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[1] Retired Nov. 30, 1952.
[2] Became Presiding Justice Dec. 19, 1952.
[3] Appointed, took office Dec. 19, 1952.

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[1] Term expired Dec. 31, 1952.
[2] Appointed, took office Jan. 1, 1953.

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Effective January 5, 1953.

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CALIFORNIA REPORTER

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SECOND SERIES

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39 Cal.2d 420

NORRIS et al. v. PACIFIC INDEMNITY CO. et al.

L. A. 22066.

Supreme Court of California, in Bank.

Aug. 5, 1952.

Rehearing Denied Sept. 4, 1952.

Action by David Morgan Norris and his minor son against the Pacific Indemnity Company for declaratory relief to determine the parties' rights and duties under an automobile liability insurance policy issued by defendant to the owner of an automobile being driven by minor plaintiff when involved in an accident resulting in personal injuries to others. Defendant filed a cross-complaint against plaintiffs and the Zurich General Accident and Liability Insurance Company, as the insurer of adult plaintiff, who signed minor plaintiff's application for an automobile operator's license. From a judgment of the Superior Court, Los Angeles County, Joseph W. Vickers, J., for defendant on the complaint and cross-complaint, plaintiffs and cross-defendants appealed. The Supreme Court, Shenk, J., held that minor plaintiff was not an additional insured within a clause of the policy defining the word "insured" therein as including any person using the automobile with named insured's permission.

Judgment affirmed.

Carter, J., dissented.

Prior opinion, Cal.App., 237 P.2d 666.

1. Insurance 🔑435.10

The word "permission" in clause of automobile liability insurance policy defining word "insured" as including any person using automobile with named insured's permission may be assumed to mean either express or implied permission. Vehicle Code, § 415(a) (2).

See publication Words and Phrases, for other judicial constructions and definitions of "Insured".

2. Insurance 🔑146(5)

The principle that words in insurance contract expressing parties' intention should be given meaning settled by judicial decision applies to judicial construction of insurance policies.

3. Insurance 🔑435.9

Generally, use of automobile described in liability insurance policy by another than named insured is not protected by clause in policy defining word "insured" as including person using automobile with named insured's permission, where named insured expressly forbade such use.

4. Insurance 🔑435.11

Generally, delegation of automobile owner's permission to use automobile by permittee to another without owner's express or implied permission is not within omnibus coverage of owner's liability insurance policy defining word "insured" as including any person using automobile with named insured's permission, unless operation of automobile by person to whom such permission is delegated serves some purpose of original permittee.

5. Insurance 🔑435.12

Where one granted permission by owner of automobile to use it uses it contrary to instructions or gives operation thereof over to another for permittee's benefit against owner's instructions, permittee is person responsible for operation of vehicle with owner's permission and hence an insured under owner's liability insurance policy defining word "insured" as including any person using automobile with named insured's permission.

6. Insurance 🔑435.11

Where course of conduct indicates insured's assent to use of automobile described in liability policy by others than one granted permission by insured to use it, third person using it with such permittee's permission is deemed responsible person with permission to use automobile and an additional insured within policy provision defining word "insured" as including any person using automobile with named insured's permission.

7. Insurance ⚷435.11

One to whom use of automobile is delegated, without its owner's express or implied permission, by one granted permission by owner to use it, is not responsible person with permission to use automobile and hence not protected by omnibus clause of owner's liability policy defining word "insured" as including any person using automobile with named insured's permission.

8. Insurance ⚷435.11

The Supreme Court's affirmance of superior court's judgment for defendant in action for declaratory relief to determine parties' rights and duties under automobile liability insurance policy, issued by defendant to owner of automobile driven by minor plaintiff when involved in accident resulting in personal injuries to others, on ground that minor plaintiff was not additional insured within policy because he did not have insured's express or implied permission to use automobile, which he was driving by permission of insured's son, whom insured granted permission to use it was not precluded as creating inconsistency in construction of statutory provisions and insurance policy, as automobile owner's imputed liability under statute for such injuries was not involved. Vehicle Code, § 402.

9. Insurance ⚷435.11

A minor, granted permission to use automobile, without its owner's express or implied permission, by his son, whom owner granted such permission, was not an additional insured within omnibus clause of owner's liability policy defining word "insured" as including any person using automobile with named insured's permission.

Parker, Stanbury, Reese & McGee and Raymond G. Stanbury, Los Angeles, for appellants.

Jennings & Belcher, Stevens Fargo and Louis E. Kearney, Los Angeles, for respondent.

SHENK, Justice.

David Morgan Norris and Irvin Victor Norris are father and minor son. They are or are about to be defendants in an action to recover damages for personal injuries and property damages sustained by Mr. and Mrs. Leo Phillipson in an automobile accident. At the time of the accident the plaintiff Irvin was driving a Plymouth automobile owned by E. A. Parkford. This action is for declaratory relief to determine the respective rights and duties of the plaintiffs and the defendant Pacific Indemnity Co., herein called Pacific, under the insurance policy issued by it to the owner Parkford. Pacific cross-complained against the plaintiffs and against Zurich General Accident and Liability Insurance Company, insurer of the senior Norris who signed Irvin's application for an operator's license (Veh. Code § 352).

The facts as found by the court are based on evidence which is without substantial conflict. Parkford had given his son, Geoffrey, permission to use the Plymouth but expressly prohibited him from lending it to or permitting its use by any other person except a member of the family or the chauffeur. On April 3, 1950, Geoffrey and Irvin went to Newport Beach in the Plymouth. While they were at a friend's home Irvin wanted to borrow a car to drive to the nearby town for a haircut. Geoffrey had not previously loaned the Plymouth to anyone, but upon request he gave Irvin the keys saying, "Irv, I am not supposed to loan the car. For God's sake, be careful." When Irvin left the barber shop in the Plymouth to meet the other boys, he collided with an automobile in which the Phillipsons were riding.

The question before the trial court was whether Irvin was an additional assured under the policy of Pacific which was introduced in evidence; and therefore whether Pacific was obligated to answer for a judgment as against him and to defend the personal injury action on his behalf. The trial court found that Irvin did not have the permission of the owner express or implied and concluded that he was not an additional assured. Judgment followed for Pacific on the complaint and the cross-complaint accordingly. The plaintiffs and cross-defendants appealed.

The appeal presents the question of the correctness of the trial court's declaration that Irvin was not an additional assured under Pacific's policy. For the purpose of determining that issue the correctness of the finding that Geoffrey had no authority to loan the automobile, in fact was expressly prohibited from doing so, and therefore that Irvin had no actual permission of the owner, is unquestioned.

The so-called omnibus clause of the policy issued to the owner by Pacific provides that "the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission."

[1] No difficulty arises as to the meaning of the word "permission" in the policy. It may be assumed that it means permission, express or implied. (See § 415(a) (2), Vehicle Code.) The problem involves the application of the policy provision. The plaintiffs contend that the omnibus clause attaches to fix liability on the insurer in this case, as the statutory provisions attached to fix the owner's imputed liability under section 402 of the Vehicle Code in Souza v. Corti, 1943, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861.

Section 402 of the Vehicle Code provides that every owner of a motor vehicle is liable for death or injury to person or property resulting from negligence in the operation of the vehicle by any person using or operating it with the owner's permission express or implied, and that the negligence of such person shall be imputed to the owner for all purposes of civil damages. The section places a limitation of $5,000/10,000 public liability and $1,000 property damage in one accident.

In Souza v. Corti, Arthur Gigli had permission to use his father's Dodge automobile. In violation of instructions prohibiting the use or operation of the car by another, he delegated operation thereof to the defendant Corti. In a personal injury action against Corti and the Giglis, father and son, judgment was rendered against Corti alone and in favor of the other defendants. The appeal of the plaintiffs involved the correctness of the implied finding that there was no imputed liability of the owner pursuant to section 402 of the Vehicle Code. In reversing the judgment as to the Giglis this court used the following language, 22 Cal.2d at pages 460–461, 139 P.2d at page 648: "In the present case the use which was being made of the borrowed car at the time of the accident was the use which was contemplated by the owner. Any secret restrictions imposed by him on the manner of its use do not negative the controlling fact that it was being used with the owner's permission at the time of the accident. Violations of such restrictions may not be said to cause a revocation of the permission. Liability of the defendant owner in this case pursuant to section 402 of the Vehicle Code is therefore established. * * *

"As to the liability of the defendant Arthur Gigli, the record shows that defendant Corti took possession of the Dodge car for the use, benefit and accommodation and under the direction of Arthur and for the purpose of taking it to Rocca's for Arthur. Under these circumstances Arthur was the principal and Corti was his agent. The negligence of the latter was therefore imputable to Arthur. Maberto v. Wolfe, 106 Cal.App. 202, 289 P. 218."

Thus in the Souza case the owner's permittee, Arthur Gigli, was held to have been the user of the car with the owner's permission at the time of the injury to the plaintiff.

Section 402 is not involved in the present case. The plaintiffs are not concerned with fastening imputed liability on the owner. They are not the beneficiaries of any statutory created liability. The plaintiffs seek to apply the policy language as a source of financial discharge of Irvin's liability to the persons injured through his own negligence. But Irvin's financial protection of his ability to discharge his liability for his negligent acts is his own concern unless his use or operation of the automobile was with the express or implied permission of the owner. Unquestionably as found by the court Irvin did not have the permission of the owner, either express or implied, for the use or operation of the car. Protection under an owner's insurance policy to the user or operator of the owner's automobile depends on his having obtained the express or implied permission of the owner.

[2] The contract language is plain. The plaintiffs would nevertheless apply the determination in Souza v. Corti as it may affect an owner's imputed liability, to obtain coverage under the owner's policy for one who was not his permittee. As support for this position they invoke the principle that in construing insurance contracts the words expressing the intention of the parties should be given a meaning settled by judicial decision. The invoked principle applies to judicial construction of insurance policies. Appleman, Insurance Law & Practice, Vol. 13, § 7404, page 104 et seq.; Fidelity & Casualty Co. v. Fireman's Fund Indemnity Co., 38 Cal.App.2d 1, 7, 100 P.2d 364. The invoked rule, insofar as it is applicable, produces an interpretation of the word "permission" to include permission, express or implied. But it does not make one a permittee who had neither the express nor implied permission of the owner for the use or operation of the automobile.

There is no decision in this state which construes or applies similar language in insurance policies in accordance with the plaintiff's contentions. Nor do decisions in other jurisdictions relied on justify a conclusion that Irvin is an additional assured under the owner's policy.

[3–7] It is held generally that the use by a third person is not protected by an omnibus clause in an insurance policy where the owner has expressly forbidden it. Samuels v. American Auto. Ins. Co., 10 Cir., 150 F.2d 221, 160 A.L.R. 1191, and annotation page 1195 at 1209, et seq., and cases cited; note, 5 A.L.R.2d 657 and cases cited. The weight of authority is said to follow the rule that a permittee's delegation of permission for the use of the car without the express or implied permission of the assured is not within the omnibus coverage unless the third party's operation of the car serves some purpose of the original permittee. 5 Am.Jur., Automobiles § 535.1 Cum.Supp. p. 155, and references; see also Card v. Commercial Casualty Ins. Co., 20 Tenn.App. 132, 95 S.W.2d 1281; American Auto Ins. Co. v. Jones, 163 Tenn. 605, 45 S.W.2d 52; Holthe v. Iskowitz, 31 Wash.2d 533, 197 P.2d 999. Where the permittee in his operation used the vehicle contrary to instructions or where against instructions he gave the operation over to another for the permittee's benefit, the courts have held the permittee to be the person responsible for the operation of the vehicle with permission and therefore an assured under the policy. O'Roak v. Lloyds Casualty Co., 285 Mass. 532, 189 N.E. 571; Guzenfield v. Liberty Mut. Ins. Co., 286 Mass. 133, 190 N.E. 23; Boudreau v. Maryland Casualty Co., 287 Mass. 423, 192 N.E. 38; Blair v. Travelers' Ins. Co., 288 Mass. 285, 192 N.E. 467; State Farm Mut. Auto. Ins. Co. v. Cook, 186 Va. 658, 43 S.E.2d 863, 5 A.L.R.2d 594; cf. Dickinson v. Great Am. Ind. Co., 296 Mass. 368, 6 N.E.2d 439. Likewise where there was a course of conduct indicating assent by the assured to use by others than the permittee, the user is deemed to be the responsible person with permission and an additional assured. Odden v. Union Indemnity Co., 156 Wash. 10, 286 P. 59, 72 A.L.R. 1363; cf. Trotter v. Union Indemnity Co., D.C., 33 F.2d 363, affirmed 9 Cir., 35 F.2d 104, arising out of the same accident; Boyer v. Massachusetts Bonding & Ins. Co., 277 Mass. 359, 178 N.E. 523; Hinton v. Indemnity Ins. Co., 175 Va. 205, 8 S.E.2d 279. But where the facts as here showed neither express nor implied permission for the permittee's delegation of the use of the car to another, the third person has been held not to be the responsible person with permission and therefore not protected by the omnibus clause. Johnson v. O'Lalor, 1932, 279 Mass. 10, 180 N.E. 525; Moschella v. Kilderry, 1935, 290 Mass. 62, 194 N.E. 728; Novo v. Employers' Liability Assur. Corp., 1936, 295 Mass. 232, 3 N.E.2d 737; Woznicki v. Travelers Ins. Co., 1938, 299 Mass. 244, 12 N.E.2d 876; Kneeland v. Bernardi, 1945, 317 Mass. 517, 58 N.E.2d 823; Locke **v.**

General Accident Fire & Life Assur. Corp., 1938, 227 Wis. 489, 279 N.W. 55, and cases cited at page 58.

[8, 9] The plaintiffs urge that an affirmance of the judgment would create inconsistency in the construction of language under the statutory provisions and under the insurance policy. As the foregoing indicates, there is no merit in this contention. The matter of the owner's imputed liability is not involved here; and the question of the operator's coverage under the owner's policy was not involved in the Souza case. Since there is neither express nor implied permission for Irvin's use of the automobile, he is not protected by the omnibus clause in the policy of the owner.

It follows that the trial court correctly concluded that the plaintiff, Irvin Victor Norris, was not an additional assured under the omnibus clause of Pacific's policy to Parkford, and that this conclusion supports the judgment.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The facts are clear. Parkford owned a Plymouth automobile. His public liability insurance carrier is Pacific Indemnity Company, called Pacific. The policy issued by Pacific insured, as required by law (Veh.Code, § 415 (a) (2) in addition to Parkford "any *other person* using or responsible for the use of [the car] * * * with the *express or implied permission* of [Parkford]." Parkford permitted his son, Geoffrey, to use the car but instructed him not to permit anyone else to use it. Geoffrey permitted Irvin Norris to use it, and in the course thereof, an injury was caused to the Phillipsons, allegedly through Irvin's negligence. Irvin would be liable as the driver of the car and the question is whether he was operating it with the implied consent or permission of Parkford and hence was covered by the insurance policy extending coverage to persons using the car with Parkford's consent. That he was covered should be clear. In order to give meaning and effect to this court's decision in Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861, that result is imperative. We there considered section 402 of the Vehicle Code, which imposes liability upon the owner of a vehicle for an injury caused by the negligence of one operating it with the owner's "express or implied" permission. We there held, as the majority opinion here concedes, that the owner was liable for an injury caused by a person driving with the permission of the owner's permittee even though the owner had expressly forbidden his permittee to let another operate the car. As stated in the majority opinion, we held that the liability pursuant to section 402 must be imputed to the owner whenever it appeared that there was an initial permission for its use although restrictions on delegation of that use were violated. To the same effect are Burgess v. Cahill, 26 Cal.2d 320, 158 P.2d 393, 159 A. L.R. 1304; Herbert v. Cassinelli, 73 Cal.App.2d 277, 166 P.2d 377, and Haggard v. Frick, 6 Cal.App.2d 392, 44 P.2d 447.

I have heretofore stated the terms of the clause of the policy here involved. It will be noted that the language is identical with that in section 402 considered in the Souza and other cases supra. It should therefore be given the same meaning, and if there is liability on the owner under section 402, there should likewise be liability under the policy. The policy was written to meet certain conditions of liability and should be interpreted in the light of those conditions. The purpose of the policy was to protect another who was operating the car where he was made responsible by law. Persons who could make the owner liable because they operated the car with implied permission under section 402, must necessarily be other persons who, under the policy, are driving with the implied permission of the owner. If the operator is said to have implied permission in one case he also has it in the other. The law stated in the Souza and other cases, supra, construing section 402 is read into and becomes a part of the policy—the contract for "* * * all applicable laws in existence when an agreement is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms. Section 1656 of the Civil Code states that 'All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.' Section 1646 of the Civil Code reads as follows: 'A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance according to the law and usage of the place where it is made.' Hence, the courts must read as a part of a contract the laws of the state existing at the time it was made. It is to be construed according to the lex loci rei sitae as to the sufficiency of its formal execution and as to the interpretation of its parts. It would be idle for the parties to say, expressly, that they incorporate into their agreement the law then existing. The parties are presumed to have had the law in view, although sometimes the terms of the contract will rebut this presumption. This rule, of course, applies as well to constitutional provisions as to statutes." (6 Cal.Jur. 310.)

It should further be noted that the clause of the policy involved is one required by statute to present. It commands that the policy must "insure the person named therein *and any other person* using or responsible for the use of said motor vehicle or motor vehicles with the *express or implied permission of said assured.*" (Veh.Code, § 415 [a] [2].) That section and section 402 are all part of Division VII of the Vehicle Code, the first chapter of which declares the civil liability including that of the owner (§ 402), the second, financial responsibility, and the third, security following the accident. All of those provisions should be read together and harmonized. Thus, when the first chapter imposes liability on the owner for the negligent operation of a car by the one to whom he has given implied permission to use it, and this court interprets that to extend to the operation by a permittee of the permittee, although the latter permission is forbidden by the owner, the second chapter which requires an insurance policy to cover persons who operate the car with the owner's implied consent, should be similarly interpreted. Otherwise the policy requirement does not give the coverage demanded by the second chapter (§ 415).

It is my opinion that this case was correctly decided by the opinion prepared by Mr. Presiding Justice Moore and concurred in by Mr. Justice McComb when this case was before the District Court of Appeal, Second Appellate District, Division Two, 237 P.2d 666, and would, therefore, reverse the judgment.

Rehearing denied; CARTER, J., dissenting.

39 Cal.2d 358

SWIFT et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 18593.

Supreme Court of California, in Bank.

July 29, 1952.

Petition by Jean Swift and others against the Superior Court of the State of California in and for City and County of San Francisco, Honorable Timothy I. Fitzpatrick, as Judge thereof to prohibit said court, sitting without a jury, from taking any further proceedings with regard to issues raised by petition for probate of a lost or destroyed will, and answers filed thereto. The Supreme Court, Spence, J., held that when a will is contested before probate and either party demands a jury trial of any issue as to which right to jury trial exists, trial court cannot proceed with any phase of the hearing in absence of jury but must impanel jury at outset, and thereupon, proponents of will must make a prima facie showing that will was executed in all particulars as required by Probate Code.

Issuance of peremptory writ ordered.

Prior opinion 241 P.2d 217.

1. Jury ⚿19(7½)

Statute guaranteeing a jury trial of specified issues on demand of either party to a will contest, guarantees such jury trial as much in cases involving contest of lost or destroyed will as in those involving contest of produced will. Probate Code, §§ 350–352, 371.

2. Wills ⚿277

Answer to a petition for probate of an allegedly destroyed will would be deemed written grounds of opposition thus constituting a "contest" of the will within contemplation of statute. Probate Code, § 370.

See publication Words and Phrases, for other judicial constructions and definitions of "Contest".

3. Wills ⚿277

A petition for probate is a proceeding in rem, and in a sense ex parte, in which an answer is not contemplated. Probate Code, § 301 et seq.

4. Jury ⚿19(7½)
Wills ⚿277

In proceeding for probate of allegedly fraudulently destroyed will, where opponents filed answers denying averments of petition, such averments and the answers thereto constituted a contest of the will, and petitioners were entitled to jury trial of issues so framed without the filing of answer or demurrer to the contest. Probate Code, §§ 370, 371.

5. Wills ⚿302(8), 309

The procedure in a contest involving an allegedly fraudulently destroyed will must be substantially the same as that followed in cases involving produced will, the only difference being as to the nature and quantity of the evidence required to prove it. Probate Code, §§ 350–352, 370, 371.

6. Wills ⚿312

When a will is contested before probate and either party demands jury trial of any issue as to which the right to a jury trial exists, trial court cannot proceed with any phase of hearing in absence of jury but must impanel jury at outset, and thereupon the proponents of will must make a prima facie showing that will was executed in all particulars as required by Probate Code. Probate Code, § 371.

7. Wills ⚿302(8)

Prima facie showing that an allegedly fraudulently destroyed will was executed must include evidence that there was a will, with proof of its contents by at least two credible witnesses, which was fraudulently destroyed prior to testator's death and without his knowledge. Probate Code, § 350.

8. Wills ⚿312

In proceeding involving both a contest and a petition for probate of a will, trial court is not at liberty, upon preliminary and formal showing of due execution, to determine upon its merits any of the issues raised by the contest, but may determine only whether prima facie case of validity has been established sufficient for submission to jury, and only if such a case has not been established can court properly deny petition for probate and dismiss contest. Probate Code, §§ 370, 371.

9. Jury ⚿25(6)

Where petition for probate of allegedly fraudulently destroyed will was on court calender and set for hearing, and answers thereto filed by opponents raised issues entitling petitioners to jury trial on demand, rule of Superior Court, regulating procedure for obtaining jury trial was inapplicable, and memorandum required by rule for Superior Court to set cases for trial was unnecessary and petitioners made sufficient demand for jury trial by making oral and written demand on first day of hearing for probate. Rules of Superior Court, rules 6, 18; Probate Code, §§ 327, 328, 370, 371.

◆

Anthony S. Devoto, San Francisco, for petitioners.

Charles R. Collins, Morrison, Hohfeld, Foerster, Shuman & Clark and George F. Clinton, San Francisco, for respondents and real parties in interest.

SPENCE, Justice.

Petitioners seek a writ of prohibition to restrain the Superior Court of the City and County of San Francisco, sitting without a jury, from taking any further proceedings with regard to the issues raised by their petition for probate of a "lost or destroyed will" and the answers filed thereto. They contend that the record presents a contest of the alleged will, entitling them to a jury trial of the issues so framed. We conclude from an analysis of the applicable law that their position is sustained.

On March 21, 1951, petitioners filed a petition for the probate of an alleged fraudulently destroyed will of Thomas R. Creely, deceased. A copy of the document alleged to be the last will and testament of the deceased was annexed to the petition. Prob. Code, §§ 350, 351. They claimed that prior to the deceased's death, and without his knowledge or consent, a niece had stolen the will from him and fraudulently destroyed it. The hearing was set for April 12, 1951. Certain heirs at law or next of kin of the deceased filed answers denying many allegations of the petition, including soundness of mind, lack of duress, fraud or undue influence, due execution and existence of the instrument, its fraudulent destruction, and the contents thereof, and praying that the purported will be denied probate. On the day first set for the hearing, petitioners made an oral request and also filed a written demand for a jury trial of the issues of fact raised by this opposition to the will's probate. On April 26, 1951, the day to which the hearing had been continued, the probate judge refused petitioners' demand and announced his intention to proceed with the hearing without a jury. Thereafter this petition was filed to prohibit him from so doing.

[1] While the code sections dealing with the probate of a lost or destroyed will, Prob. Code, §§ 350–352, make no mention either directly or indirectly of a jury trial, section 371 of the Probate Code guarantees either party to a will contest a jury trial of issues involving competency of the testator, freedom from duress, menace, fraud or undue influence, due execution and attestation of the will, or "any other question substantially affecting the validity of the will". Section 371 contains no language confining this guarantee of a jury trial to contests of produced wills. It must follow, therefore, that a jury trial of the issues provided for in section 371, if demanded, is also guaranteed in those cases involving contests of lost or destroyed wills.

[2, 3] It is contended that the "answers" to the petition for probate do not constitute a "contest" of the will. This contention cannot be sustained. Section 370 of the Probate Code provides that: "Any person interested may contest the will by filing written grounds of opposition to the probate thereof at any time before the hearing of the petition for probate, * * *." In order to give any effect to these "answers," they must be deemed "written grounds of opposition". The probate of wills is purely a matter of statutory regulation, Prob. Code, §§ 301, et seq., and there is no provision in the code for an answer to a petition for probate of a will. To the contrary, the petition for probate is a proceeding in rem, and in a sense ex parte, in which an answer is not contemplated. In re Estate of Latour, 140 Cal. 414, 437, 73 P. 1070, 74 P. 441; In re Estate of Relph, 192 Cal. 451, 458–459, 221 P. 361.

The real parties in interest here rely upon language in the cases pointing out the normal procedure for contesting a will, In re Estate of Latour, supra, 140 Cal. 414, 437, 73 P. 1070, 74 P. 441; In re Estate of Gharky, 57 Cal. 274, 279; and Estate of Renton, 3 Coff.Prob.Dec. 519, 522, and also upon the language of section 370 of the Probate Code providing for pleadings to the contest. It may be conceded that the "answers" herein are not the ordinary form of pleading filed in a "contest" under said section 370. However, a similar pleading was held to be a contest in In re Estate of Doyle, 73 Cal. 564, 15 P. 125, and we conclude that this must be the result here where the real parties in interest, who filed the "answers" and now oppose the petition herein, treat their pleading as proper and sufficient for some purpose.

In arriving at this conclusion, we are called upon to determine a matter which the court in Estate of Doyle, supra, found unnecessary to decide. There the written opposition consisted in an averment, 73 Cal. at page 565, 15 P. at page 126, that "'the deceased did not make, sign, publish, or declare as his last will' the instrument propounded." There, as here, "No demurrer was interposed to the written opposition, nor was any written answer thereto filed or served." The court tried the "contest," and determined that the offered instrument was the last will and testament of the deceased and that it was valid in all respects. On appeal, the court held, 73 Cal. 567, 15 P. 126, that: "* * * a direct issue was made by the averment in the petition that the will was executed and published as prescribed by law, and the averment in the opposition that it was not so executed or published." In dealing with the failure of the proponent to file an answer to the written opposition, the court stated, also 73 Cal. at page 567, 15 P. at page 126: "It may be doubted whether section 1312 [Now Prob.Code, § 370], which provides that an answer 'may' be made to the written opposition, requires such answer when the opposition merely denies an averment implied in every sufficient petition for the probate of a will." The presence of another ground for the decision in the Doyle case made it unnecessary for the court to resolve this doubt.

[4] Section 370 of the Probate Code continues to use the permissive words "may demur" and "may answer" which were found in former section 1312 of the Code of Civil Procedure. We conclude that an answer or a demurrer to the contest is not required in such a situation as is presented in the instant case. The averments of the petition and the "answers" thereto denying the allegations of the petition constitute a contest of the will, and petitioners are entitled to a jury trial of the issues so framed. Prob.Code, § 371.

It is then contended that, even assuming the "answers" constitute a contest, the trial court should not be prohibited from proceeding without a jury to hear the preliminary proof in support of the petition for probate.

[5] In regard to this matter of procedure, it should be pointed out here that although the instant case involves an alleged fraudulently destroyed will, the procedure must be substantially the same as that followed in cases involving produced wills. As was aptly stated in McCormick v. Jernigan, 110 N.C. 406, 14 S.E. 971: "The only difference between the probate of a will which can be produced and one which has been lost is as to the nature and quantity of the evidence required to prove it."

There is some confusion in the cases concerning the procedure to be followed when there is a petition for probate of a will and a contest thereof. This is the result of our statutory provisions which have been referred to as "somewhat peculiar," In re Estate of Latour, supra, 140 Cal. 414, 421, 73 P. 1070, 74 P. 441, and as "very peculiar", In re Estate of Doyle, supra, 73 Cal. 564, 572, 15 P. 125. As is pointed out by Mr. Justice Shaw in the opinion rendered on the application for rehearing in the Latour case, supra, 140 Cal. at page 437, 74 P. at page 442: "The hearing of these two proceedings [petition for probate and the contest] must come at the same time, and it is this circumstance which causes the confusion about the proper method of procedure." The frequently stated rule that the matter of the order of proof in such a case rests in the sound discretion of the trial court. In re Estate of Relph, supra, 192 Cal. 451, 459–460, 221 P. 361; see discussion in In re Estate of Black, 199 Cal. 257, 261, 248 P. 1015 and the concept of two separate proceedings, (1) the petition for the probate of the will and (2) the contest of the will, have not been helpful in eliminating such confusion. In In re Estate of Black, supra, 199 Cal. 257, 248 P. 1015, the cases were analyzed and the law concerning the separate proceedings concept was clarified. It was pointed out therein, 199 Cal. 260, 248 P. 1016, that: "* * * the cases * * * do not proceed upon the theory that the two proceedings are independent trials of the issues involved. Rather, they proceed upon the theory that the hearing of the petition for the probate of the will is *supplementary to,* and *in aid of,* the hearing upon the contest." (Emphasis added.)

If the trial court, in its discretion, is allowed to proceed with the hearing of the preliminary proof in support of the petition for probate in the absence of a jury, two separate proceedings will necessarily result. It will then frequently happen that evidence introduced by the proponents upon the hearing of the preliminary proof before the court alone will have to be repeated before the jury, as such evidence is often material in the consideration of the issues raised by the contest.

On the other hand, nothing is to be gained in leaving to the trial court's discretion the determination that the contest be tried before the hearing of the preliminary proof. If this procedure is followed, the situation may arise where the jury will find for the proponents on the issues raised by the contest, while the trial court might thereafter conclude that a material matter, not placed in issue by the contest, is not established on the hearing of evidence supporting the petition for probate. These considerations clearly indicate that the interrelated proceedings must be heard at the same time.

[6] In the interest of establishing a definite rule of procedure to be followed under such circumstances, we believe that it is appropriate for this court to declare that when a will is contested before probate and either party demands a jury trial of any issue as to which the right to a jury trial exists, Prob. Code, § 371, the trial court cannot proceed with any phase of the hearing in the absence of a jury but must impanel a jury at the outset. Thereupon, the proponents of the will must make a prima facie showing that the will was executed in all particulars as required by the Probate Code.

There is language in some of the cases such as In re Estate of Relph, supra, 192 Cal. 451, 459–460, 221 P. 361; In re Estate of Smith, 176 Cal. 729, 730, 171 P. 289; In re Estate of Cartery, 56 Cal. 470, 473; and in the opinions filed in In re Estate of Latour, supra, 140 Cal. 414, 420–421, 435, 437, 438–439, 73 P. 1070, 74 P. 441, which, in dealing with matters of procedure, is inconsistent with the views expressed herein; and to the extent that this and similar language found in other cases is inconsistent, it is disapproved. Such disapproval is in line with the views expressed in In re Estate of Black, supra, 199 Cal. 257, 248 P. 1015. Furthermore, it seems appropriate to mention the fact that we are not here called upon to deal with the question of the ultimate burden of proof on the issues raised by the negative averments of a contestant, which was the main question before the court and upon which the court was divided in In re Estate of Latour.

[7, 8] In the instant case, the prima facie showing must include evidence that there was a will (with proof of its contents by at least two credible witnesses) which was fraudulently destroyed prior to the testator's death and without his knowledge. Prob.Code, § 350. If the proponents fail to make such prima facie showing, the court can properly deny the petition for probate and dismiss the contest, but the court must bear in mind the holding of In re Estate of Black, supra, 199 Cal. 257, at page 262, 248 P. 1015, 1017, wherein it is stated: "We are satisfied that, upon proceedings for the probate of a will involving both a contest of the will and a petition for probate, the court is not at liberty, upon the preliminary and formal showing of due execution, to finally determine upon its merits any of the issues raised by the contest, but is limited to a determination of whether or not a *prima facie* case has been established in favor of the validity of the will, sufficient to warrant the submission of the case to a jury."

Here, as we have seen, although the pleadings are inartfully drawn, direct issues are raised by the petition and the "answers" as to the existence of the alleged will and its due execution, its contents, its fraudulent destruction in decedent's lifetime without his knowledge, the soundness of decedent's mind, and the presence or absence of fraud, duress, or undue influence. Since all of these issues are either mentioned specifically in section 371 of the Probate Code, or are "questions substantially affecting the validity" of this alleged fraudulently destroyed will as provided therein, petitioners are entitled to have all of them submitted to the jury unless upon the preliminary proof of the will there is "such a dearth of evidence that the granting of a motion for a nonsuit would be proper." In re Estate of Black, supra, 199 Cal. 257, 262, 248 P. 1017.

[9] A question is also raised as to the propriety of the petitioners' demand for a jury trial because of an asserted failure to comply with the Rules for Superior Courts. 33 Cal.2d 1. Reference is made to Rule 6, providing for a memorandum to set civil cases, and Rule 18, regulating the procedure to be followed by a party desiring a jury trial "where the right thereto is not guaranteed by law". Since section 371 of the Probate Code guarantees a jury trial of the issues raised by the contest, Rule 18 is obviously inapplicable here. Nor can petitioners' failure to follow the procedure outlined in Rule 6 be relied upon to maintain the claim that they had waived a jury trial. It is sufficient to point out that the memorandum to set civil cases for trial pertains to the placing of the ordinary cause of the court calendar. In the present case, however, the petition for probate was already on the court calendar, having been set for hearing under the applicable statutory provisions. Prob.Code, §§ 327 and 328. Written opposition thereto could have been filed "at any time before the hearing of the petition for probate," Prob.Code, § 370, and such written opposition was so filed. It is not disputed that on the day first set for hearing, petitioners made an oral and a written demand for a "trial by jury of the issues of fact raised by the written opposition herein to the probate of said alleged destroyed will." This was a sufficient demand for a trial by jury, and, under the circumstances here, petitioners were not required to go further and perform the idle act of filing a memorandum to set in order to insure their right to a jury trial.

It is ordered that a peremptory writ issue, prohibiting the probate court from proceeding with the hearing in the absence of a jury, but without prejudice to the court's power to determine in the first instance the sufficiency of petitioners' prima facie showing in support of the will as hereinabove indicated.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

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39 Cal.2d 407

DECTER et al. v. STEVENSON PROPERTIES, Inc. et al.

L. A. 21965.

Supreme Court of California, in Bank.

Aug. 5, 1952.

Proceeding by William B. Decter, and another, individually, and doing business as Decter Mannikin Company, against Stevenson Properties, Inc., and others, for declaratory relief to determine rights of parties under ambiguous lease, which provided that determination, by duly constituted authority, that operation of business specified in purpose clause was contra to municipal zoning ordinance would terminate lease. The Superior Court, Los Angeles County, Edward R. Brand, J., found that lease had been terminated by its own terms and entered judgment declaring lease terminated and granting plaintiffs' judgment for rent due to date of termination, and defendants appealed. The Supreme Court, Edmonds, J., held that evidence sustained findings and judgment.

Judgment affirmed.

Prior opinion, 241 P.2d 279.

1. Evidence ⚷450(4)

Lease provision that lease would be terminated if operation of business of type specified in purpose clause was "determined" "by duly constituted authority" to be contrary to municipal zoning ordinance was ambiguous on its face, and, under the parol evidence rule, evidence of negotiations of the parties and of surrounding circumstances was admissible to determine meaning of provision. Code Civ.Proc. §§ 1856, 1860; Civ.Code, § 1647.

2. Landlord and Tenant ⚷112½

In proceeding for declaratory relief to determine rights of parties under ambiguous lease, which provided for its termination upon determination, by duly constituted authority, that operation of business specified in purpose clause was contrary to municipal zoning ordinance, evidence upon question whether lease was terminated by revocation of zoning variance granted lessees was admissible to prove that event contemplated by parties had occurred. Code Civ.Proc. §§ 1856, 1860; Civ.Code, § 1647.

3. Declaratory Judgment 🔑347

In proceeding for declaratory relief to determine rights of parties under ambiguous lease, evidence sustained trial court's findings that landlord knew nature and extent of tenants' operations, that tenants did not invite the revocation of zoning variance granted them but took reasonable action to comply with terms thereof, and that lease was terminated by its own terms upon determination by duly constituted authority that business operations specified in purpose clause of lease were contrary to zoning ordinance.

4. Appeal and Error 🔑1008(3)

Where construction given lease by the trial court appears to be consistent with true intent of the parties, as shown by the evidence, court's interpretation will not be overturned upon appeal.

5. Contracts 🔑155

Where reasonable inferences drawn from evidence remove any uncertainty concerning intention of the parties, rule that uncertainty must be resolved against party who causes it is not applicable. Civ.Code, §§ 1647, 1654.

6. Declaratory Judgment 🔑318

Complaint which alleged circumstances surrounding execution and amendment of lease, the events resulting in a termination of business operations upon the premises, and the existence of an actual controversy between the parties concerning their rights under the terms of the lease, as amended, stated cause of action for declaratory relief, and failure to plead a mutual mistake of fact for reformation of the instrument did not prevent the trial court from construing it. Code Civ.Proc. § 1060.

7. Declaratory Judgment 🔑369, 393

In proceeding for declaratory relief to determine rights of parties under ambiguous lease, trial court's finding that revocation prevented lessees from conducting the business contemplated by the parties was not outside issues raised by the pleadings but was material to question whether event which would terminate the lease, by its terms, had occurred, and, even if such findings of evidentiary facts were unnecessary, they did not constitute prejudicial error.

8. Appeal and Error 🔑1011(1)

Finding which is based upon conflicting evidence which trial court has duty to resolve will not be disturbed upon appeal.

9. Pleading 🔑381(3)

In proceeding for declaratory relief to determine rights of parties under ambiguous lease, which provided that determination by duly constituted authority that operation of business specified in purpose clause was contrary to municipal zoning ordinance would terminate lease, evidence of statements of lessees' counsel at hearings where zoning variance granted lessees was revoked was not admissible because it bore upon an allegation of the landlords' answers. Code Civ.Proc. § 1868.

10. Pleadings 🔑22

Irrelevant matter, though pleaded, is still irrelevant. Code Civ.Proc. § 1868.

11. Trial 🔑43

The materiality of evidence is a question of law, and a wide discretion is left to the trial judge in determining its admissibility. Code Civ.Proc. § 1868.

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Ben Gould, Los Angeles, for appellants.

Averill C. Pasarow, Los Angeles, for respondents.

EDMONDS, Justice.

By this proceeding for declaratory relief, William and Gerald A. Decter seek an adjudication of the rights of the parties under a written lease. The appeal of C. H. and M. L. Stevenson, husband and wife, challenges the judgment in favor of the lessees upon the ground that it is based upon evidence inadmissible to vary the terms of the written instrument.

Stevenson Properties, Inc., leased certain real property to William B. Decter, doing business as Decter Mannikin Company, for a term of five years, commencing September 1, 1946. One week thereafter, the parties executed a supplemental agreement.

The lease, as amended, provided in paragraph 1 that the premises were "to be used for the purpose of conducting and carrying on the business of manufacturing, *selling* and repairing *window display forms, figures, fixtures and* mannikins, *display backgrounds,* and for ~~no other purpose~~ *related purposes.*" (Additions by amendment italicized, deletions crossed through). As amended, paragraph 8 provided: "Lessee further agrees to so conduct said business on said premises that the same shall not become a nuisance, and in accordance with all applicable regulations of city, municipal or other public authority; and shall maintain said premises at all times in reasonably good, clean and neat condition. *Provided, however, that if the operation of the type of business specified in Clause 1 hereof is determined, by duly constituted authority, to be contrary to Ordinance No. 90,500 of the City of Los Angeles, or any provision of the Los Angeles Municipal Code relating to zoning, the lease shall be terminated and the lessee excused and released from his obligations thereunder.*" (Additions by amendment italicized.)

The Decters alleged that the Zoning Administrator had notified them on August 19, 1946, that their operations were in violation of section 12.14A of the Los Angeles Municipal Code. The notice stated that they would be required to discontinue the manufacture of manikins within fifteen days from its date. After receipt of this notice, the complaint stated, the Decters applied for a zone variance to permit a continuance of their business. In May, 1948, a variance limited to four years was granted.

Other charges of the complaint were that the zone variance was revoked as of June 30, 1949. The Decters notified Stevenson Properties Inc., in writing, of the revocation, stating that they considered the lease to be terminated in accordance with its terms. They also informed the lessor of their intention to appeal from the order of revocation. The Board of Zoning Appeals affirmed the action of the Administrator.

In conclusion, the Decters pleaded that an actual controversy exists between the parties as to whether the order of the Zoning Administrator terminated the lease. They requested the court to declare the lease terminated.

From various documents made a part of the complaint, it appears that the zone variance was granted "only insofar as such variance is necessary to permit the continued use of the existing building for the manufacture, wholesaling, distribution, and repair of window display mannequins, forms, and figures". Among the conditions placed upon the variance was a requirement: "That in no event shall any operations, activities, or fixtures, be conducted or maintained on the property involved which result in the emission of dust, smoke, soot, or fumes on the outside of the building in question or onto adjacent properties. Further, that such activities or operations which involve the creation of dust and fumes, etc., be conducted and controlled in such a manner through the use of adequate dust collection and filtering equipment that dust, fumes, and the like will not prove annoying to the occupants of adjacent properties."

The complaint also includes the findings of fact made by the Zoning Administrator as grounds for the revocation of the variance. He found: "Some operations involved in the manufacture and repair of mannequins and similar forms and figures result in the emission of fuzz, lint, dust, and fumes." Other findings were that diligent efforts made by the Decters have not successfully controlled such emission, with resulting annoyance to adjacent property owners. Additional corrective measures, he determined, would be ineffective or beyond the ability of the Decters to finance. Therefore, "since applicable conditions of the said variance which were necessarily drawn for the protection of the adjacent properties have not been complied with," the variance was revoked.

By their answer, the Stevensons pleaded the dissolution of the corporation and the conveyance to them of the demised property. The granting of a zone variance was admitted, but the lessees' allegations concerning its revocation were denied on the ground of lack of information or belief.

More specifically, the Stevensons asserted that the lease has not been terminated; the

Decters can conduct all, or a portion, of their business on the premises in accordance with the terms of the lease. According to the Stevensons, there has been no determination "by duly constituted authority" that the operation of the type of business permitted by the lease is contrary to any zoning regulations. They charged that the Decters deliberately and repeatedly violated the conditions of the zone variance with the intent of inviting its cancellation. They also accused the Decters of presenting their case at the hearing as to revocation in a manner to achieve that purpose. As a result of their conduct, it was said, the variance was revoked.

By cross-complaint, the Stevensons claimed rent for the month of June, 1949, in the amount of $400. By stipulation of the parties, the Stevensons later were permitted to file a supplemental cross-complaint asking for additional damages for rental accrued during the remainder of the lease.

The Decters, by answer to the cross-complaint, alleged the deposit with the lessor of $225 which, they said, should be applied to the June rental, and deposited $175 with the court. By stipulation, the allegations of the supplemental cross-complaint were deemed denied.

Upon trial, the following facts were stipulated: The lease and the amendments thereto were duly executed by the parties, the amendments having been prepared in the office of counsel for the Decters. The Mannikin company had been in possession of the premises prior to execution of the lease and continued in possession by virtue of it. At all times between August, 1946, and 1949 there were more than five factory employees working on the premises.

William Decter testified over objection that, prior to the execution of the lease, C. H. Stevenson frequently visited the premises and observed the manufacturing process employed.

While the terms of the lease were being considered by the parties, the Mannikin company received a notice from the Zoning Administrator that the use of the premises for "clay model making" was in violation of the Municipal Code. The notice stated that: "Any such use must be discontinued within 15 days from the date of this notice." Upon receipt of this notice, Decter said, he notified C. H. Stevenson of the difficulty and referred the notice to his attorney.

As a witness for the Decters, Karl Ourston, civil zoning investigator for the city planning department, related the conversation between him and their counsel. He quoted the attorney as saying that the business conducted on the premises was not "clay model making" but the manufacture of papier mache manikins, 95 per cent of the business being retail.

Other testimony of Ourston was that the operation was contrary to zoning ordinances because of the number of employees. Within certain limits as to production methods and number of employees, he stated, it was permissible to engage in the manufacture and sale of manikins.

The evidence tends to show that, following the receipt of the notice of violation, the Decters altered their manufacturing operations in an effort to conform to the conditions of the variance. They changed from "dry sanding" to "wet sanding", considerably reducing the amount of dust generated.

Following application for, but prior to issuance of, the variance, they installed at considerable expense, a paint spray booth with ventilating system designed to prevent the emission of dust. Following issuance of the variance, the Decters attempted to improve the ventilating system by installing a burlap trap and periodically filling it and the ventilator baffles with water. There is some conflict in the evidence as to whether the ventilator was operated for a prolonged period of time with the top removed.

The record further shows that in December, 1948, upon the complaint of an adjoining property owner, the Zoning Administrator conducted a hearing to determine whether the variance should be revoked. Thereafter, written notice of revocation was delivered to the Decters, to become effective June 30, 1949. The Decters notified the Stevensons of the revocation and of their intention to appeal from the determination. They invited the Stevensons to participate in the appeal. C. H. Stevenson and his attorney were present at the hearing before the Board of Zoning Appeals which resulted in affirmance of the order of revocation. On the effective date of the order, the Decters vacated the leased premises.

The Stevensons attempted to introduce into evidence statements made by the attorney for the Decters at the hearing before the Zoning Administrator and on the appeal from his order. Objections to questions concerning such statements, and to the introduction of the transcripts of the hearings, were sustained. The objections were made upon the ground that the evidence offered was hearsay, incompetent and irrelevant. The excluded statements were to the effect that the Decters had done everything physically and financially possible to remedy the situation and that they sympathized with the complaining neighbors. At one point, the attorney said: "We do have a lease on the premises and if in our legal power to do so, we would try to get out and move somewhere else where we will not annoy these people."

The trial court found, among other facts, that more than five employees were engaged in the manufacturing process at all times since August 1, 1946, and that the Stevensons knew the nature and extent of the Decters' operations. It further found that the Decters were notified of a zoning violation on August 19, 1946, that they applied for and received a zone variance, and that the variance was thereafter revoked. The court specifically found that the Decters did not invite the revocation and that they had taken reasonable action to comply with the terms of the zone variance by altering their methods of operation.

Finding No. X reads in part as follows: "The Court finds that the operation of the type of business specified in paragraph 1 of the lease, as amended, on the demised premises, has been determined by duly constituted authority to be contrary to Ordinance No. 90,500 of the City of Los Angeles, and more specifically said operation has been so determined to be contrary to Section 12.14 of the Municipal Code of the City of Los Angeles.

> "* * * The Court further finds that in view of such revocation of said zone variance, plaintiffs are not able to conduct on the premises the business contemplated by the parties in their lease."

According to the findings, the Decters quit the premises "pursuant to said revocation." Therefore, the court said, the Stevensons are entitled to rent only up to and including June, 1949.

The Court concluded that the Decters were entitled to a judgment declaring the lease, as amended, terminated and their obligations thereunder released. The Stevensons, it held, were entitled to judgment for $175 as the balance due on June rental. Judgment was entered accordingly.

The principal contention of the Stevensons is that evidence of the revocation of the zone variance and of their knowledge of the extent of the Decters' operations was improperly admitted. They further contend that revocation of the variance was not a determination which would terminate the lease. The finding to the contrary, they say, is not supported by the evidence. In addition, they argue that the complaint did not state facts sufficient to constitute a cause of action and that the Decters, having failed to plead ambiguity as the basis for reformation of the contract, are bound by the language of the lease. Objected to as being outside the issues raised by the pleadings are the findings that the Stevensons knew the nature and extent of the Decters' operations, the revocation prevented the Decters from conducting the business contemplated by the parties, and the business employed more than five workers in manufacturing. The Stevensons also contend that, because the Decters invited revocation of the variance, the revocation is not a ground for termination of the lease. The Court erroneously excluded evidence of statements at the revocation hearings, they say, because the offer of evidence was within the issues raised by the answer.

The Decters reply that the revocation effected a termination of the lease in accordance with its terms, as amended. There was, they say, no error in the admission or exclusion of evidence.

[1] The Stevensons contend that the parol evidence rule, Code Civ.Proc. § 1856, was violated by admission of evidence that they knew the nature and extent of the Decters' operations. According to them, the lease is unambiguous and no evidence may be admitted to vary its terms.

Contrary to their contention, however, the lease, as amended, is clearly ambiguous upon its face. It is impossible to determine from its provisions to what officials or tribunal the phrase "by duly constituted authority" refers. In like manner, it cannot be ascertained by reference to the lease alone what action or finding would constitute a determination that the operation of the business is contrary to zoning ordinances or code provisions. A further ambiguity is pointed up by the argument of the Stevensons that the Decters could have conducted some of their operations, such as retail sales, upon the premises, despite revocation of the variance. The lease, however, refers in the singular to "the operation of the type of business specified in Clause 1." The purpose clause appears to call for the carrying on of a single, integrated business comprising "manufacturing, selling and repairing" of specified products.

"Once something has to be read into a contract to make it clear, it can hardly be said to be susceptible of only one interpretation. It would have been error for the trial court to read something into the contract by straining 'to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists.'" Union Oil Co. v. Union Sugar Co., 31 Cal.2d 300, 306, 188 P.2d 470, 473. It is apparent that the lease, as amended, is not clear on its face, and, under the theory of the parol evidence rule that has been accepted by the majority of this court, evidence of the negotiations of the parties and of surrounding circumstances was admissible for the purpose of determining the meaning of its provisions. Mayers v. Loew's Inc., 35 Cal.2d 822, 829, 221 P.2d 26; Union Oil Co. v. Union Sugar Co., supra; Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665; Code Civ.Proc., §§ 1856, 1860; Civ.Code, § 1647.

[2] The Stevensons also object to the admission of evidence in regard to the revocation of the variance as constituting a violation of the parol evidence rule. However, that was an issue presented by the pleadings. As stated by the Stevensons, "The primary question on this Appeal is whether or not the Lease by its terms is terminated by revocation of the Zoning Variance." Evidence upon this basic question is obviously admissible, not to vary the terms of the lease, but to prove that the event contemplated by the parties when they executed the instrument had, in fact, occurred.

[3] According to the Stevensons, the revocation of the variance was not a determination which would terminate the lease. The trial court's finding to the contrary, they claim, is not supported by the evidence. They argue that, if uncertainty exists, the provision for termination must be resolved against the Decters, who drafted the amendments in question. It is not the function of the Zoning Administrator, they say, to determine whether any type of business legally may be conducted in any particular location. The Decters, they argue, could secure such determination only from the courts. Furthermore, they assert that the variance was simply permissive and granted only insofar as necessary to continue use of the building for purposes more limited than permitted by the lease. Neither the granting nor revocation of the variance, they conclude, constituted a determination that the operation of the business was contrary to zoning regulations.

Essentially, this argument appears to be based upon the premise that the evidence is insufficient to support the findings and judgment. In effect, the Stevensons contend that, as a matter of law, the evidence will not support an inference that the lease has been terminated by an event within the contemplation of the parties when they executed it. This contention has no support in the record.

The evidence tends to show that the parties were cognizant of an existing violation of zoning regulations by the operations as they were being conducted at the time the lease was executed. Immediately after the lease was executed, it was amended. It reasonably may be inferred that the amendment was intended by the parties to provide for a foreseeable risk which might result in frustration of the purpose of the lease. Such provision was essential if the Decters were to protect themselves against the existing risk of being forced to abandon their operations. Cf. Lloyd v. Murphy, 25 Cal.2d 48, 54, 153 P.2d 47.

[4] The circumstances disclosed by the record also support the inference that the "operation" to be protected by the amendment was the existing method of conducting business. At the time the lease and amendments were executed, this operation was in jeopardy by virtue of the previous notice to discontinue business. It remained uncertain whether operations could continue until the zone variance was secured. The revocation of the variance thus reinstated the situation as it existed at the time the parties executed the lease and its amendments. Thereafter, the Decters could not continue with the integrated business purpose described in the lease without subjecting themselves to possible criminal prosecution. Under such circumstances, there was a reasonable basis for the trial court's conclusion that the revocation was the determination "by duly constituted authority" which the parties had contemplated when they executed the amendments. Where the construction given the contract by the trial court appears to be consistent with the true intent of the parties, as shown by the evidence, its interpretation will not be overturned upon appeal. Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 772, 128 P.2d 665; Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 370, 210 P.2d 757; Crillo v. Curtola, 91 Cal.App.2d 263, 272, 204 P.2d 941.

[5] In view of the inferences which reasonably may be drawn from the evidence as to the intention of the parties, the Stevensons cannot secure the benefit of the rule that uncertainty must be resolved against the party who caused it. As stated in section 1654 of the Civil Code, the rule is applicable only "[i]n cases of uncertainty not removed by the preceding rules," among which is one that a "contract may be explained by reference to the circumstances under which it was made". Civ.Code, § 1647. Here no uncertainty remains to be resolved.

[6] There is no merit to the contention that the complaint did not state facts sufficient to constitute a cause of action. The complaint alleged the circumstances surrounding the execution and amendment of the lease, the events resulting in a termination of business operations upon the premises, and the existence of an actual controversy between the parties as to their rights under the terms of the lease, as amended. The allegations were sufficient to state a cause of action for declaratory relief. Code Civ.Proc. § 1060. Likewise without merit is the related contention that failure to plead a mutual mistake of fact for reformation of the instrument prevents the court from construing it. An action for declaratory relief properly may include "a determination of any question of construction" arising under the instrument. Code Civ.Proc. § 1060.

[7] The contention that certain findings are outside the issues raised by the pleadings is but a variation of other arguments by the Stevensons. Whether the lessor knew the nature and extent of the Decters' operations at the time the lease and its amendments were executed, and whether those operations were in violation of zoning regulations, were preliminary questions to be decided in determining what the parties meant by what they said. They were a part of the circumstances surrounding the making of the lease. The finding that the revocation prevented the Decters from con-

ducting the business contemplated by the parties was material to the question of whether the event which would terminate the lease had occurred. Even if such findings of evidentiary facts were unnecessary, they were not prejudicially erroneous. Forman v. Hancock, 3 Cal.App.2d 291, 296, 39 P.2d 249.

[8] The trial court found that the Decters did not "violate the conditions of the variance obtained by plaintiff with the intention of inviting a cancellation of said variance." This finding was based upon conflicting evidence, which it was the duty of the trial court to resolve. Its determination thereon will not be disturbed on appeal. Pfingsten v. Westenhaver, 39 Cal.2d 12, 244 P.2d 395; Columbia Laboratories, Inc., v. California Beauty Supply Co., 24 Cal.2d 114, 120, 148 P.2d 15.

[9-11] Finally, the Stevensons contend that the trial court erroneously excluded evidence of statements by counsel for the Decters at the revocation hearings and transcripts of those hearings. They argue that the evidence was admissible to prove the defense raised by the answer that the Decters had invited a cancellation of the variance by their conduct at these hearings.

However, the Stevensons do not now explain, nor did their offer of proof to the trial court show, the relevancy of such evidence to the issues in dispute. It is not alleged, nor does it appear from the record, that the Decters were required by the lease to seek a variance or to operate thereunder. On the contrary, the findings of the trial court, based upon the evidence, are to the effect that the parties contemplated a termination of the lease if the Decters could not continue their operations as they were being conducted at the time the lease and its amendments were executed.

There are no facts here shown which allow application of the equitable doctrine of "clean hands." The variance considerably restricted the operations contemplated by the parties and the Decters, if they had chosen, might have refused to comply with any of its provisions. Instead, according to the evidence, they attempted to meet its conditions. No fraud or unfair dealing would have been shown even if they finally had abandoned efforts to retain the variance in force. There is no evidence, or offer of proof, that the parties intended the Decters to obtain and perpetuate a variance under which their operations would be restricted.

The evidence offered was not admissible simply because it bore upon an allegation of the answer. To be admissible, "[e]vidence must correspond with the substance of the material allegations, and be relevant to the question in dispute." Code Civ.Proc. § 1868. "Irrelevant matter, though pleaded, is still irrelevant." Crowell v. City of Riverside, 26 Cal.App.2d 566, 583, 80 P.2d 120, 128. The materiality of evidence is a question of law and a wide discretion is left to the trial judge in determining its admissibility. Spolter v. Four-Wheel Brake Service Co., 99 Cal.App.2d 690, 699, 222 P.2d 307; Moody v. Peirano, 4 Cal.App. 411, 418, 88 P. 380. His ruling thereon, in the absence of an abuse of discretion, will not be disturbed upon appeal. Estate of Ades, 81 Cal.App.2d 334, 342, 184 P.2d 1.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER and SCHAUER, JJ., concur in the judgment.

39 Cal.2d 458

HILL et al. v. WESTBROOK'S ESTATE et al.

L. A. 22227.

Supreme Court of California, in Bank.

Aug. 12, 1952.

Action by Minnie Hill, also known as Minnie Westbrook, against the estate of Charles Westbrook, deceased, and Edward J. Westbrook, administrator thereof, to enforce claim against decedent's estate. The Superior Court of Los Angeles County, Robert H. Scott, J., entered judgment for defendant administrator, and plaintiff appealed. The Supreme Court, Schauer, J., held that the evidence supported finding that any contribution of services or moneys by plaintiff for benefit of decedent was gratuitous and in contemplation of their reciprocal relationship.

Judgment affirmed.

Prior opinion 237 P.2d 541.

1. Executors and Administrators ⚿221(5)

In action against estate for services rendered decedent by woman who had lived in meretricious relationship with decedent, evidence supported finding that any contribution of services or moneys by plaintiff for benefit of decedent was gratuitous and in contemplation of their reciprocal relationship.

2. Work and Labor ⚿7(7)

When a man and woman knowingly live together in a meretricious relationship, in absence of an express agreement, oral or written, that she be compensated for services performed, there is no implied obligation on part of man to compensate her for household services rendered by her.

3. Contracts ⚿112, 142

Where parties live together in illicit relationship during time services are performed, an express contract to compensate for services performed as a housekeeper is valid, unless made in contemplation of such illicit relationship, and whether contract is dependent upon illicit relationship is a question of fact.

4. Appeal and Error ⚿882(10)

Where plaintiff's testimony as to contributions to decedent's estate was admitted without objection on first trial of action to enforce claim therefor, but was excluded on second trial under statute prohibiting party to action against administrator upon claim against a deceased person from testifying as to any matter or fact occurring before death, plaintiff, having expressly agreed with trial court's ruling excluding testimony, could not claim on appeal that waiver of objection in first trial continued in second. Code Civ.Proc. § 1880, subd. 3.

5. Appeal and Error ⚿1011(1)

Factual determination of trial court on conflicting evidence was conclusive on appeal.

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Emmett E. Patten and Glen A. Duke, Monrovia, for appellant.

Hugh E. Macbeth and Hugh E. Macbeth, Jr., Los Angeles, for respondent.

SCHAUER, Justice.

[1] This is an appeal from a judgment for defendant administrator in an action on a rejected claim against an estate. Plaintiff and decedent, who were not formally married, lived together as man and wife from 1930 until decedent's death in 1946. Two children were born to them. The creditor's claim was for the lump sum of $10,000 "For services rendered decedent from about August 15, 1930, to date of death [July 31, 1946], * * * consisting of keeping house for him * * *, living with him as man and wife * * *, bearing decedent two children, * * * performing the usual duties of a housewife * * *, and earning a salary from time to time during said period, all of which was turned over to said decedent." The judgment for defendant administrator rests upon findings, supported by the evidence, that any contribution of services or moneys by plaintiff for the benefit of decedent was gratuitous and in contemplation of their reciprocal relationship. We have concluded that under the law governing appellate review (see In re Estate of Bristol (1943), 23 Cal.2d 221, 223, 143 P.2d 689; Richter v. Walker (1951), 36 Cal.2d 634, 640, 226 P.2d 593) such judgment must be affirmed.

[2, 3] On the first trial of this action plaintiff had judgment for $3,000. The

judgment was reversed because it allowed recovery, in a lump sum, not only for services for which plaintiff might have recovered but also for living with decedent and bearing the children. (Hill v. Estate of Westbrook (1950), 95 Cal.App.2d 599, 602, 603, 213 P.2d 727.) On the first appeal the District Court of Appeal correctly said, "When a man and woman knowingly live together in a meretricious relationship—in the absence of an express agreement, oral or written, that she be compensated for services performed—there is no implied obligation on the part of the man to compensate the woman for household services rendered by her. * * * Although the parties live together in illicit relationship during the time the services are performed, an express contract to compensate for services performed as a housekeeper has been held valid and enforceable unless made in contemplation of such illicit relationship * * * Whether the contract was dependent upon the illicit relationship is a question of fact."

At the second trial plaintiff introduced evidence that when she went to live with decedent in 1930 he operated a liquor store, a small restaurant, and a rooming house, and that she rendered services for him by clerking in the store, working in the restaurant, and acting as maid and housekeeper in the rooming house. This evidence was contradicted by testimony of a witness for defendant that plaintiff did not render such services; that plaintiff was unable to work because she was ill; and that the roomers did their own cleaning. Plaintiff introduced evidence that in 1943, she, decedent and their children moved to a house in Monrovia which, decedent often stated, he had bought or was buying for plaintiff and the children; and that plaintff worked in a shirt factory in Monrovia and contributed her earnings to the support of the family. Plaintiff's counsel announced during the second trial that she was "seeking to recover for her work in the rooming-house, in the hamburger stand, the liquor store, and her contribution that she paid over to him from her salary in the shirt factory."

Plaintiff introduced evidence that various witnesses had, during decedent's lifetime, seen a document in decedent's handwriting which purported to be a will of decedent and which left his property to plaintiff and the children, and evidence of declarations of decedent that he had made such a will. (What became of this will does not appear.) Also in evidence are declarations of decedent that he was grateful for plaintiff's services and that "she would be well fixed" on his death. This evidence was introduced, plaintiff's counsel said, to "show that he had promised—our whole theory is that she expected reward and he expected to pay her" for her services.

[4] Plaintiff took the stand in an attempt to prove the amount of her "earnings and her contributions towards this estate." On the first trial some of these amounts had been before the court by stipulation, and plaintiff had been allowed to testify to a few facts which occurred before the death of decedent. On the second trial no stipulation appears to have been reached and objection to plaintiff's testimony was sustained because of the provision of paragraph 3 of section 1880 of the Code of Civil Procedure that a party to an action against an administrator upon a claim against a deceased person cannot be a witness "as to any matter or fact occurring before the death of such deceased person." Plaintiff's counsel, apparently feeling bound to accept the proscription of the statute, agreed that "We can't get it in," but on this appeal contend that her testimony should have been received because defendant at the first trial waived his objection to her competency as a witness and such waiver should be held to have carried over to the subsequent trial.

Plaintiff relies upon the holding of Deacon v. Bryans (1931), 212 Cal. 87, 93, 298 P. 30, that a waiver of objection to incompetence of a witness on the first trial of a case continues upon retrial. But it was not incumbent on the trial court, of its own motion, to raise and determine the question whether the holding of the Deacon case applied. Plaintiff (and her counsel presumptively acted in accord with their duty as they saw it at the time), having expressly agreed with the ruling of the trial court which excluded her testimony, cannot now complain of that ruling. (See Crane v. Smith (1943), 23 Cal.2d 288, 302, 144 P.2d 356; Davenport v. Stratton (1944), 24 Cal.2d 232, 242, 149 P.2d 4; Parker v. Shell Oil Co. (1946), 29 Cal.2d 503, 514, 175 P.2d 838; McClure, on Behalf of Caruthers v. Donovan, (1949), 33 Cal.2d 717, 730, 205 P.2d 17.) Furthermore, the want of evidence as to the precise amount of plaintiff's earnings had no bearing on the outcome of the case. The trial court, it appears, found against plaintiff because it believed that her contributions to decedent were made "gratuitously and voluntarily in contemplation of, as a part of, in consideration of and as acts dependant upon the meretricious relationship between plaintiff and said Charles Westbrook," and not because there was no evidence of the amount of such contributions.

[5] We cannot sustain the contention that the evidence shows as a matter of law that "plaintiff rendered services to the decedent during his lifetime in reliance on the promise of the decedent, actual or implied, to provide for and reward her for the services on his death." It was for the trial court to resolve the conflict in the evidence of plaintiff's witnesses and defendant's witness on the question whether plaintiff rendered services in decedent's restaurant, store and rooming house, and to determine whether plaintiff sustained her burden of proving that decedent promised to compensate her and that she rendered her services because of expectation of monetary reward and not because of her regard for decedent. As indicated by the reference to the cited cases in the first paragraph of this opinion the factual determinations of the trial court are conclusive here.

For the reasons above stated the judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, CARTER, and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.

COSTA v. REGENTS OF UNIVERSITY OF CALIFORNIA et al.*

Civ. 14776.

District Court of Appeal, First District, Division 2, California.
July 28, 1952.

Rehearing Granted Aug. 27, 1952.

Malpractice action against a hospital and certain doctors for alleged improper diagnosis and treatment of cancer which resulted in necrosis and osteomyelitis. The Superior Court, City and County of San Francisco, Franklin A. Griffin, J., after the jury failed to arrive at a verdict, on defendants' motion, entered judgment in their favor, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held, inter alia, that the evidence failed to present a case for the jury.

Affirmed.

1. Limitation of Actions 🔑31

An action by a patient against a physician and surgeon for injuries sustained by reason of negligent or unskilled treatment of the physician and surgeon is an action sounding in tort and not upon contract, and therefore such action is barred one year after date of injury. Code Civ.Proc. § 340, subd. 3.

2. Limitation of Actions 🔑95(1)

In malpractice cases, the statute of limitations does not start to run until the date of discovery, or the date when, by exercise of reasonable care, plaintiff should have discovered the wrongful injury. Code Civ. Proc. § 340, subd. 3.

3. Limitation of Actions 🔑199(1)

In malpractice cases, the issues of when the plaintiff discovered his injury and its actionable origin, or should have done so by exercise of reasonable care, so as to commence running of statute of limitations, are questions for trier of facts. Code Civ.Proc. § 340, subd. 3.

4. Limitation of Actions 🔑199(1)

In malpractice action brought more than one year after injury, evidence as to delay in discovery of injury and its actionable origin presented questions for jury. Code Civ.Proc. § 340, subd. 3.

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* Subsequent opinion 254 P.2d 85.

5. Physicians and Surgeons ⚷18(8)

Ordinarily, a doctor's failure to possess or exercise the requisite learning or skill can be established only by expert testimony, but where negligence on part of doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required.

6. Negligence ⚷121(2)

The root of res ipsa loquitur doctrine is the inference based on common knowledge, and therefore its application in field of malpractice is restricted to cases where layman is able to say as a matter of common knowledge and observation that consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.

7. Evidence 20(1)

It is a matter of common knowledge that in the course of an operation and of certain other treatments, like X-ray treatments, injury to or removal of healthy tissue near diseased part is often necessary or unavoidable and not an indication of negligence, and therefore only on ground that injury was distinct and separate from operation and not within area covered by operation could layman, on basis of common knowledge, presume negligence on part of doctor.

8. Physicians and Surgeons ⚷18(6, 8)

In malpractice action, whether undifferentiated epidermoid carcinoma is the most dangerous and most wildly spreading kind of carcinoma, whether there were no means to determine with certainty how far the carcinoma had spread or whether the mandible was involved, and whether, to get full required dosage of X-ray to original lesion for purpose of destroying it, irradiation of the mandible was unavoidable, though it was known that thereafter in a certain percentage of cases necrosis of the jaw might occur, were purely medical issues, and no part of them was so obvious that common layman's knowledge could evaluate it without enlightenment by expert testimony and res ipsa loquitur dictrine was not applicable.

9. Physicians and Surgeons ⚷18(6)

Where X-ray burning was purpose of treatment of carcinoma and issue in malpractice action was whether such burning had not extended further than permissible in good practice, res ipsa loquitur doctrine was not applicable.

10. Physicians and Surgeons ⚷18(9)

In malpractice action against doctor based upon alleged facts that X-ray treatment of carcinoma was too drastic and extensive, and that there had been insufficient use of perfected devices and precautions, and faulty methods of application and failure to use available diagnostic procedures to determine whether extension of lesion necessitated such drastic treatment, evidence was insufficient to establish that such treatment or the procedures followed may have caused or contributed to development of osteomyelitis and osteo necrosis to present question for jury.

11. Physicians and Surgeons ⚷18(9)

In malpractice action for alleged improper diagnosis and treatment of radio necrosis and osteomyelitis, evidence was insufficient to present question for jury.

12. Hospitals ⚷7

A university hospital has no duty, contractual or otherwise, to hospitalize persons with whom they have only contracted for out-patient services, and no duty to have beds available for them whenever they may need them, and therefore failure of university hospital to hospitalize out-patient when his condition required it, such failure being due to fact that no bed was available, was not negligence.

13. Hospitals ⚷7

Where alleged negligent handling of hospital's records, which allegedly made records unreliable, was not a proximate cause of the injury for which action was brought, recovery for such injury could not be based upon such handling.

14. Physicians and Surgeons ⚷18(9)

Where there was no evidence in malpractice action of negligence as to any one of 15 particulars, there was no evidence to go to jury with respect to the combination of such particulars.

15. Physicians and Surgeons ⚷18(6)

Alleged fact that condition of necrosis and secondary osteomyelitis would not ordinarily follow treatment for cancer, would not make doctrine of res ipsa loquitur applicable in action for malpractice in treatment of cancer so as to cause such condition.

16. Physicians and Surgeons ⚷18(7)

In malpractice action for alleged improper treatment of cancer so as to cause condition of necrosis and secondary osteomyelitis, exclusion of expert testimony as to whether such condition would ordinarily follow treatment for cancer was proper where offered to give rise to res ipsa loquitur doctrine.

17. Trial ⚷59(2)

The order of proof is in the sound discretion of the court. Code Civ.Proc. § 2042.

18. Appeal and Error ⚷232(2)

Even if question would have been material on ground other than that urged in trial court, point would not be reviewed on appeal, in view of fact that such ground was not stated in trial court. Code Civ. Proc. §§ 2042, 2055.

19. Appeal and Error ⚷1048(6)

Record disclosed that cross-examination of doctor in malpractice action as to why certain neck operation had not been performed was immaterial and that plaintiff was in no way prejudiced by such restriction of his cross-examination. Code Civ Proc. § 2055.

20. Appeal and Error ⚷1048(6)

Where no objection was sustained to court's interruption of cross-examination and definition of word "apparently" used in hospital record, and no proof of meaning of such word was made, and examination of doctor continued as to standard procedure if it were suspected that something was involved other than that which was apparent, and thereafter doctor testified that he meant by such word that there was no evidence of bony involvement, cross-examination was not limited and plaintiff in malpractice action was not prejudiced.

21. Appeal and Error ⚷1048(6)

In malpractice action, in questioning of doctor concerning distance of lesion, the subject of treatment, from the gum line, which was burned by X-ray, as shown in small sketch made in hospital record, question whether there were statements in the record which gave such distances was not proper on ground that jury needed expert explanation of medical language of record, in view of fact that plaintiff rebutted his own argument by statement that he wished to bring out that there were no such statements in the record, and sustaining of objection to such question was without importance or prejudice.

22. Appeal and Error ⚷1046(5)

Plaintiff in malpractice action was not prejudiced by fact that court, when plaintiff began to point out portion of hospital record and to comment on it, after objection invited plaintiff to state question based on the record which witness had in front of him.

23. Appeal and Error ⚷1048(6)

In malpractice action, refusal to permit cross-examination of defendant doctor as to whether certain course of treatment would have been followed if certain conditions which later occurred had been present was not prejudicial in view of fact that the witness had earlier testified to the matter which plaintiff wished to bring out by such cross-examination.

24. Physicians and Surgeons ⚷18(7)
Witnesses ⚷211(1)

In malpractice action against physician for condition caused by X-ray treatment of cancer, objection to question put to physician to name another of his patients who had similar results was correctly sustained on ground that name was immaterial and would violate confidence between physician and patient. Code Civ.Proc. § 2055.

25. Appeal and Error ⚷1048(6)

In malpractice action, court's objection to question on cross-examination concerning doctor's definition of "ambulatory" was not prejudicial, in absence of showing of materiality. Code Civ.Proc. § 2055.

26. Witnesses ⚷275(6)

Where it was not explained to trial court in malpractice action that question, asked defendant doctor whether text-books were used in teaching doctors at certain hospital in subjects being mentioned in cross-examination of the doctor, was intended to lay foundation for quotation of statements which counsel knew were in text-books used by doctor, sustaining of objection of immateriality to such question was not error. Code Civ.Proc. § 2055.

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Ernest I. Spiegl, San Francisco, Belli, Ashe & Pinney, San Francisco, for appellant.

Dana, Bledsoe & Smith, San Francisco, for respondents.

NOURSE, Presiding Justice.

Appellant brought a malpractice suit against the Regents of the University of California in whose University of California Hospital in San Francisco, herein further called U. C. Hospital, he received treatment and also against five individual defendants. His action against three of the individual defendants was nonsuited; they are not parties to this appeal. The case against the Regents and against Bertram V. A. Low-Beer and Nathan Spishakoff, two of the physicians who treated him, was tried to a jury which failed to arrive at a verdict and was discharged. On the motion of said defendants, whose motion for a directed verdict had been denied, judgment was entered in their favor under sec. 630, C.C.P. and plaintiff appeals. The court held that said appeal was timely filed, Costa v. Regents of University of Cal., 103 Cal.App. 2d 491, 495, 229 P.2d 867.

Plaintiff, a seasonal cannery worker living at Monterey, California, permanently partially disabled by a spinal injury received in the army, on July 16, 1945 consulted a local physician, Dr. Gorham, about a sore on his tongue which he said he had had for three or four months. On July 27 a biopsy was taken and on August 1, 1945 the report received that it was an epidermoid carcinoma. Dr. Gorham arranged for him to go to the outpatient department of the U. C. Hospital for treatment. Plaintiff was first seen at the hospital on August 22, 1945 and it was found that, over and above the primary lesion under the tongue, nodes or a nodular mass under the chin were involved either by metastasis or direct extension. X-ray treatment was decided upon to be followed by operation on the neck after the primary lesion would be controlled. Plaintiff received the X-ray treatment as an outpatient in the Department of Radiology of which defendant Dr. Low-Beer was the head and defendant Dr. Spishakoff was an assistant. After, on the request of said department, six lower front teeth of plaintiff had been extracted in the Department of Dental Surgery the intra oral X-ray treatment started on August 27, 1945. From that date until September 21, 1945 plaintiff received 8 intra oral treatments followed by 12 submental treatments (treatments from the outside under the chin). The treatments caused burning of the skin of the neck and inflammation of the mucous membrane of the mouth, which healed during October 1945. At the end of the X-ray treatment plaintiff, who had during the treatment taken temporary living quarters in San Francisco, returned to Monterey and came up from there to the U .C. Hospital from time to time in accordance with appointments made. On November 23, 1945 plaintiff was put on the waiting list for neck surgery but the transfer record in relation to it was misplaced for six months and plaintiff not notified that the operation could take place until May 1946 at which time plaintiff declined in accordance with the advice of defendant Low-Beer that the operation was no longer necessary. In the meantime the lesion, which had been regularly followed in the Radiology Department, had healed satisfactorily without signs of recurrence or metastasis. However in the middle of January 1946 there had developed pain in plaintiff's teeth and a sinus in his gum which, after the taking of X-ray pictures which did not show appreciable bony involvement, was diagnosed as probably an early radiation necrosis, which had to be watched. For the moment only penicillin lozenges were prescribed. When plaintiff was seen on

March 8, 1946 the necrotic area in the gum had increased. After consultation with a doctor of the Dental Department and the president of the Visible Tumor Clinic an attitude of further watching and waiting, with mouth hygiene to be given by the dental clinic, was decided upon. During April, May and June 1946 plaintiff was well enough to resume his work as a cannery worker. In May he wrote a letter to defendant Dr. Spishakoff that he felt O. K. except for some sore teeth. He quit work again in June 1946 and testified that he did so because of the deteriorating condition in his mouth. On June 16, 1946 plaintiff when seen by defendant Low-Beer believed that the area of necrosis on the lower alveolar ridge had become somewhat larger but on June 25 a slight improvement was found and on July 9 and August 26, 1946 little or no change in the necrotic areas was noted. In a letter to whom it may concern given by Dr. Hill, an assistant in the Department of Radiology to plaintiff on the last mentioned date, the statement was made that plaintiff at that time had areas of osteo-radio necrosis of the lower jaw. An appointment was made for plaintiff to return in 4 weeks for the taking of films of the jaw, but plaintiff returned on December 10, 1946 at which time the exposed areas of the mandible were found to have considerably extended. X-rays of the mandible were taken the same day to determine the extent of the involvement and an appointment made for plaintiff to come back in a month. The roentgenologist's report could not decide whether the lesion shown was caused by osteo-radio necrosis or infiltration of carcinoma and advised further study. However in the beginning of January 1947 painful swelling under the chin and pain in the lower jaw developed which new development was reported to Dr. Low-Beer by plaintiff's landlady, later his wife, in a letter dated January 3, 1947. When defendant Low-Beer saw plaintiff on January 8, 1947 he thought it looked like osteomyelitis. Further X-ray films were ordered and the patient presented in the Visible Tumor conference. It was decided that plaintiff, as treatment for acute osteomyelitis, required hospitalization, systemic penicillin treatment and mouth hygiene but no surgical intervention at that time. However plaintiff was told that no bed was available for him at the U. C. Hospital but that steps could be taken for his hospitalization in the City and County Hospital. Plaintiff preferred under those circumstances to be hospitalized nearer to his home and he stated his desire to be treated in the Peninsula Community Hospital at Carmel by Dr. Swengel. Accordingly defendant Low-Beer wrote under date of January 10, 1947 a letter to Dr. Swengel describing in detail diagnosis and treatment of the cancer in 1945, the appearance and treatment of breakdown of alveolar mucosa and laying free of the bone in the alveolar region in 1946 and the recent appearance of acute osteomyelitis with as advised treatment: "Hospitalization of patient, systemic penicillin, and mouth hygiene, and no surgical intervention at the present time." The letter was given to plaintiff sealed (his landlady had requested that plaintiff should be kept unaware of the malignant character of his illness, which attitude was expressly approved by plaintiff in these proceedings) and was handed over by him to Dr. Swengel without having been read by plaintiff. It was stipulated when the letter was received in evidence that the letter could not prove knowledge of its content by plaintiff. Before plaintiff left for Monterey an appointment was made for him to come back after the hospital treatment. He was hospitalized the same day (January 10, 1947) in the Peninsula Community Hospital at Carmel, treated by Dr. Swengel with systemic penicillin, mouth hygiene and anodyns and discharged on January 22, 1947 as improved. He left the hospital on foot. His temperature was normal after having been somewhat too high the first two days of the hospitalization. Plaintiff did not return as a patient to the U. C. Hospital and defendants thereafter. He remained in Monterey under treatment of Dr. Swengel who discontinued the systemic penicillin treatment and also consulted once a Dr. Cleves, a general practitioner, who advised him to spray his mouth with penicillin. During the year 1947 plaintiff's condition deteriorated greatly. When on December

22 of that year he was admitted as a veteran to the U. S. Naval Hospital at Oak Knoll he had developed large collar-like submandular masses with fistulas draining to the outside, a large exposed area of the mandible was necrotic, the mouth in a foul condition, his general condition emaciated from poor nutrition due to inability to eat because of the infection of the mandible. He was treated for radiation necrosis, osteomyelitis and the general condition described with systemic penicillin, sulfadiazine, opening of the draining areas under the mandible, mouth hygiene, vitamines intramuscular, calcium tablets and special diet. A splint in the mouth to cover the denuded bone was tried but plaintiff could not continue to wear it because of the tenderness of the gums. Plaintiff's general condition improved and in January 1948 he was able again to be out of bed, but the osteomyelitis extended backward toward the throat, and the necrotic mandible fractured, for which reasons on January 29, 1948 the diseased portion of the mandible was excised from the molar region on the left to the area between the first and second molars on the right. Further surgery was necessary because of recurrence of osteomyelitis. Although plaintiff was sent home sometimes for periods to gather strength he had to return for further treatment and closing of the fistulas until he was discharged on July 20, 1948.

This action was instituted on November 5, 1948. The complaint is in two counts. The first count alleges in substance that defendants, who treated plaintiff as a paying outpatient, had been so negligent in the diagnosis and treatment of the growth on his tongue as to cause destruction of fleshy and bony tissue of the mandible, not involved in the illness to be cured; that defendants assured plaintiff that such symptoms were a normal result of the treatment given and would clear up within a reasonable time; that when the symptoms grew worse on January 10, 1947 they refused to admit plaintiff as a paying bed patient and reiterated said assurances and told plaintiff that he should not permit surgical treatment of the mandible by other physicians. That until December 1947 he received conservative treatment by other physicians who also assured plaintiff that the affected tissue would eventually heal without any permanent injury; that however his condition deteriorated until in December 1947 he was accepted as a patient in the U. S. Naval Hospital, Oakland, where in January 1948 he heard for the first time that during the treatment by defendants plaintiff's mandible had been severely burned, and that because of its vulnerable and denuded condition osteomyelitis in the mandible had set in; that over and above the negligence in the original treatment defendants were negligent in not earlier (in the middle of 1946) diagnosing and treating the osteomyelitis so as to prevent the serious consequences which now existed. The second count of the complaint adds to the above allegations the contention that defendants to conceal the true facts concerning their negligence knowingly and fraudulently misinformed plaintiff concerning the character and prospects of his later affliction and refused to plaintiff's later physicians and surgeons information concerning medical history and treatment of plaintiff's case. Defendants denied the material allegations of the complaint and as affirmative defenses pleaded contributory negligence of plaintiff and the bar of the statute of limitations. There is no contention that plaintiff's alleged contributory negligence would as a matter of law justify taking the case from the jury; however defendants urge that the bar of the statute had that effect and that moreover no substantial evidence of negligence had been adduced. They point out that written information given by defendants and other assistants at U. C. Hospital concerning plaintiff's case history and treatment, to-wit the stated letters of January 10, 1947 to Dr. Swengel and of August 26, 1947 to whom it may concern negative any intent of fraudulent concealment, that there is no evidence whatever that defendants' representations to plaintiff, if any, were made fraudulently contrary to their better knowledge, for the purpose of concealment, that the statute started running according to the normal rule on January 10, 1947, the last day on which plaintiff presented himself for treatment by defendants and the action was therefore barred on January 10, 1948.

Even if it be conceded that the relation of physician and patient between plaintiff and defendants ended when in January 1947 notwithstanding an appointment made plaintiff did not present himself anymore for treatment after he had left the hospital at Carmel improved and ambulant, and that there was no substantial evidence of fraudulent concealment sufficient to go to a jury, since defendants before showing reluctance to give information to Lt. Commander Madden of Oak Knoll Hospital had given full information in writing concerning plaintiff's treatment and case history in the letters mentioned, nevertheless plaintiff's action was not barred as a matter of law.

[1–3] "It is the settled law in this state that an action by a patient against a physician and surgeon for injuries sustained by the former, by reason of the negligent or unskilled treatment of the latter, is an action sounding in tort and not upon a contract. Such an action is therefore barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure one year after the date of the injury." Although this general statement was made in Huysman v. Kirsch, 6 Cal.2d 302, 306, 57 P.2d 908, this same leading case modified and liberalized this rule among other means by applying to the malpractice case the principle of workmen's compensation law "that the statute of limitations should not run against an injured employee's right to compensation during the time said person was in ignorance of the cause of his disability and could not with reasonable care and diligence ascertain such cause." 6 Cal. 2d at pages 312–313, 57 P.2d at page 913. Since that decision the rule is settled in this state that in malpractice cases the statute cited does not start to run until the date of discovery, or the date when, by the exercise of reasonable care plaintiff should have discovered the wrongful injury. Greninger v. Fischer, 81 Cal.App.2d 549, 553, 184 P.2d 694. Although Huysman v. Kirsch and some of the cases following it related to foreign substances negligently left by the defendant in the body of the patient, the rule is not restricted to such cases. See Greninger v. Fischer, supra, relating to negligence in diagnosis and treatment of an injury and Agnew v. Larson, 82 Cal.App. 2d 176, 185 P.2d 851, applying the rule to negligence in prescribing dangerous medicine. In Airola v. Gorham, 56 Cal.App. 2d 42, 46, 133 P.2d 78, this court quoted the rule of Huysman v. Kirsch even as an example of a broader principle applicable also outside the field of malpractice. As in compensation cases, Pacific Indemnity Co. v. Industrial Accident Comm., 34 Cal. 2d 726, 729, 214 P.2d 530, the issues when the plaintiff discovered his injury and its actionable origin, or should have discovered them by the exercise of reasonable care are questions for the trier of facts.

[4] In this case the testimony of plaintiff, that he relied on statements of defendants and of Dr. Swengel and a dentist Hart that his symptoms were a normal result of the treatments, that they would clear up in course of time and that he should not permit surgical treatment of his jaw, that he did not know the exact meaning of the technical terms used by defendants concerning his illness and that only after the operation in Oak Knoll Hospital he learned the true character and cause of the injury to his chin, part of which testimony was corroborated by plaintiff's wife, was sufficiently substantial evidence as to the delay in discovery to make these issues questions for the jury.

[5–9] However these issues relating to the statute of limitations need not go to the jury if there was no substantial evidence of negligence. Appellant argues not only that there was such evidence but even that the doctrine of res ipsa loquitur was applicable to the case because, like Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, there was here not only negligence in treatment but a distinct injury to a healthy part of the body (the jaw) not the subject of treatment and not within the area to be covered by it. It is not contended that the existence of such a situation was proved without conflict but that there was sufficiently substantial evidence of the existence of such a situation that said issue should have gone to the jury. The contention is without merit. "Ordinarily, a doctor's failure to possess or exercise the requisite learning or skill can be established only by the testimony of experts. (Citations.) Where, however, negligence on the part of a doctor is demonstrated by facts *which can be evaluated by resort to common knowledge*, expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact. (Citation.)" (Emphasis ours.) Lawless v. Calaway, 24 Cal.2d 81, 86, 147 P.2d 604, 606. At the root of the res ipsa loquitur doctrine is the inference based on common knowledge. Moore v. Belt, 34 Cal.2d 525, 531, 212 P.2d 509. Therefore its application in the field of malpractice is restricted to cases "*where a layman is able to say as a matter of common knowledge and observation* that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised." (Emphasis ours.) Engelking v. Carlson, 13 Cal.2d 216, 221, 88 P.2d 695, 698. Ybarra v. Spangard, supra, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, cited by appellant, is a good example of such an exceptional case: the patient, regaining consciousness after anesthesia for an appendectomy felt a sharp pain between neck and shoulder, where he had never had pain prior to the operation, and developed paralysis of the muscles around the shoulder. The court held that there was no problem of negligence in treatment, "but of *distinct* injury to a healthy part of the body not the subject of treatment, *nor within the area covered by the operation*" and that those circumstances raised an inference of negligence, 25 Cal.2d at page 491, 154 P.2d at page 690. Although appellant correctly quotes from this decision, he neglects in his further argument to consider the decisive element that the injury was distinct and separate from the operation and not within the area covered by it. Only on that ground could a layman on the basis of common knowledge presume negligence, for it is also common knowledge that in the course of an operation and of certain other treatments like X-ray treatment here involved, injury to or removal of healthy tissue near to the diseased parts is often necessary or unavoidable and not an indication of any negligence. In this case the carcinoma, even if it were true that it had apparently not reached the jaw, was in an area near to it; teeth had been extracted from said jaw with plaintiff's knowledge, in preparation of the treatment. It is the position of defendants that the cancer found, an undifferentiated epidermoid carcinoma, is the most dangerous and most wildly spreading kind, that there were no means to obtain certainty exactly how far it had spread or whether the mandible was involved or not; that at any rate to get the full required dosage to the original lesion for the purpose of destroying it irradiation of the mandible was unavoidable, although it was known that thereafter in a certain percentage of cases necrosis of the jaw might occur. There can be no doubt that the issues thus presented are purely medical and that no part of them is so obvious that common layman's knowledge could evaluate it without enlightenment by expert testimony. In Ybarra v. Spangard, supra, 25 Cal.2d at pages 489–490, 154 P.2d 687, 162 A.L.R. 1258, it is pointed out that the res ipsa doctrine should remain a simple rule of circumstantial evidence based on common sense and human experience and not be transformed into a rigid legal formula arbitrarily precluding its application in cases where it is important that it should be applied. Conversely the same rigidity may not lead to application in cases where common sense and human experience show that it has no place. Appellant's theory would lead to the absurd result that in every surgical operation, amputation or X-ray treatment, where always healthy tissue is injured or destroyed, there would be a prima facie case of negligence and the physician or surgeon would always have the burden of showing that none of this destruction or injury should have been avoided. Moreover the uncontradicted evidence that in a certain percentage of cases of X-ray treatment of carcinoma of the mouth injury to the mandible is unavoidable makes the res ipsa loquitur doctrine entirely inapplicable. Engelking v. Carlson, supra, 13 Cal.2d 216, 221–222, 88 P.2d 695. Appellant cites McCullough v. Langer, 23 Cal. App.2d 510, 73 P.2d 649; Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107; Moore v. Steen, 102 Cal.App. 723, 283 P. 833, and Dodds v. Stellar, 77 Cal.App.2d 411, 175 P.2d 607, as showing that the doctrine has consistently been held applicable to X-ray or radiation burns. However all these cases are distinguishable on the ground that there the irradiation was intended for diagnosis, or applying of heat, so that no burning whatever should take place, whereas here burning was the purpose of the treatment and the issue was whether said burning had not extended further than permissible in good practice. To the latter point the res ipsa doctrine is not applicable.

[10] Appellant next argues at great length that also without application of the res ipsa loquitur doctrine there was evidence of negligence that should have gone to the jury. He divides his contentions in this respect into fifteen specifications. It will not be necessary to treat each specification separately. They form three distinct groups: the first six specifications relate to the X-ray treatment itself, its allegedly too drastic and extensive character, insufficient use of protective devices and precautions, faulty methods of application and failure to use available diagnostic procedures to obtain certainty whether the extension of the lesion necessitated such drastic treatment. We do not find any substantial expert evidence supporting any of this group of specifications. To the contrary there is much expert testimony that the treatment as given was in accordance with good standard procedure, and that decisions complained of were matters of choice and stayed within the limits of sound medical judgment. Appellant mainly relies on the testimony of Dr. Bell of the Department of Surgery of U. C. Hospital and Lt. Commander Madden, dentist and oral surgeon, who treated appellant at Oak Knoll Hospital. Dr. Bell, who saw the patient only after the X-ray treatment had been terminated, advised an operation to remove the lymph nodes of the neck, which were enlarged apparently in relation with the cancer. He testified that it was the ordinary procedure to treat the original lesion by radiation and to treat enlarged nodes surgically. Appellant seeks to conclude from this evidence that X-ray treatment of the submental nodes was unnecessary and that therefore the external X-ray treatment could have been avoided. Neither Dr. Bell nor any other expert so testified. To the contrary the testimony of defendant Dr. Low-Beer, supported by testimony of other experts not parties to the action, was that for the killing *of the original lesion* "sandwich" treatment intra orally and externally from different directions was the best procedure. Dr. Bell did not express any opinion as to the desirability of the X-ray treatment given, but, as a surgeon, testified to the desirability of certain surgical treatment over and above the X-ray treatment. His testimony would have been important if the basis of the action had been recurrence of the cancer because of failure to remove the nodes surgically. However, fortunately, there was no recurrence. As support of appellant's contention that the X-ray treatment was too extensive Dr. Bell's testimony is without value.

Dr. Madden testified that it was the general practice to use a lead shield or mask to protect the mandibular area as much as possible during X-ray treatment of a cancer of the tongue, and that a mask could be built in an hypothetical situation taken from this case. However he also testified that he was not an expert on X-ray treatment and that he only made the masks which the X-ray operator desired. Several experts on X-ray treatment testified that in the case before us it was not advisable to mask the mandible because it would impede the irradiation of the parts where irradiation was necessary. The testimony of Dr. Madden does not cause a substantial conflict with said evidence because he evidently only intended to express an opinion about the desirability of the use of shields and masks in general and the technical possibility of making them in cases like the one here involved, but not on the question whether in this special case the use of such devices would have had an injurious effect on the treatment, a subject as to which he expressly denied expert knowledge. Neither his nor any other expert testimony in the case could be a basis for a jury to find negligence because of failure to shield or mask.

There is much discussion of the evidence with respect to the exact location and extent of the cancer, because appellant argues that if the evidence pointing to the least dangerous location and the smallest size is believed a less drastic and extensive treatment would have sufficed. Although there may be some conflict in the evidence as to this point we need not go into detail. The expert evidence showed clearly that the exact extent of the cancer under the surface and the absence of hidden involvements cannot in a case like appellant's be decided with such certainty that it can be safely relied on for the purpose of restricting the treatment within narrow limits. There was no expert evidence whatever that on the data available to defendants they ought in good practice to have restricted the X-ray treatment to a less drastic procedure or that the diagnostic methods now indicated by appellant if used would have yielded certainty and should have led to restriction to less dangerous treatment. Several experts testified that said methods (X-ray pictures and biopsy) could not be relied on for the purpose. In fighting so dangerous a condition as here involved, physicians may take serious risks and in doing so must rely on their judgment in deciding how far to go. See Callahan v. Hahnemann Hospital, 1 Cal.2d 447, 35 P.2d 536. To hold them responsble in the cases where the bad chance unfortunately materializes would be evidently unjust and most dangerous if physicians were deterred from going to the extent which gives their patient the best chance of survival.

We need not detail the further specifications of this group as there is with respect to them neither evidence that they constituted bad practice nor that the procedures specified may have caused or contributed to the development of osteo necrosis and osteomyelitis.

[11] The second group of seven specifications relates to the treatment of the radio necrosis and osteomyelitis which developed during 1946–1947. Appellant assigns as negligence among other things that defendants did not use dentures and tube feeding to protect the necrotic areas and prevent osteomyelitis infection, that when osteomyelitis developed it was not timely diagnosed, that no diagnostic methods were used to find osteomyelitis although appellant's deteriorating condition and the presence of osteo necrosis required them and that the osteomyelitis was treated insufficiently and too late.

With respect to this second group of specifications appellant favorably compares the treatment given in Oak Knoll Hospital with the treatment given by defendants. The comparison is without any value. In the first place "the fact that another physician or surgeon might have elected to treat the case differently or use methods other than those employed by defendant does not of itself establish negligence", Lawless v. Calaway, 24 Cal.2d 81, 87, 147 P.2d 604, 607. But moreover in this case there was no resemblance whatever between the conditions during the period when defendants treated appellant's radio necrosis and when he was a patient at Oak Knoll Hospital. The treatment of defendants ended in the first part of January 1947 just at the time when they themselves made the diagnosis of acute osteomyelitis and declared a more intensive treatment including systemic penicillin necessary. Said treatment given immediately in the Monterey Hospital proved effective for the moment. For the treatment after that time until appellant reached Oak Knoll Hospital in the unfortunate condition previously described, a treatment which covered nearly the whole year 1947, defendants are in no way responsible, as during that time appellant chose to be treated by others (general practitioners).

This second group of specifications relates therefore only to the period from the middle of 1946, when according to the complaint defendants should have diagnosed the osteomyelitis, and the beginning of January 1947. Although there were earlier symptoms of soft tissue necrosis the first mention of osteo radio necrosis which may be a danger sign for osteomyelitis is in the letter of Dr. Hill of August 26, 1946. There is no evidence of any knowledge of defendants prior to January 1947 of complaints of a more generalized nature or of outside redness or swelling comparable to those existing at the end of 1947. No mention of such is made in the records of the U. C. Hospital and appellant who testified at length in his own behalf did not testify that he complained of such conditions to defendants. All his complaints relate locally to his mouth. His wife testified to his illness and keeping his bed in the fall of 1946 but not to reporting of these circumstances to defendants before her letter of January 3, 1947; that letter mentions swelling under the chin. There is no record or evidence of any visit of plaintiff to the U. C. Hospital between August 26, 1946 and December 10, 1946 or of any report sent to defendants during that period concerning plaintiff's condition. It is then evidently useless to compare appellant's treatment in the second half of 1946 when he was treated by defendants as an irregularly reporting ambulant outpatient with a beginning osteo radio necrosis and his treatment at the end of 1947 when he was received in Oak Knoll Hospital as a bed patient with a far progressed acute osteomyelitis and a general condition exhausted by malnutrition and illness.

Appellant relies on the testimony of Dr. Newell, called as an expert by defendants, to the effect that from the first appearance of radio necrosis of the mandible osteomyelitis should always be suspected. However said expert also testified that in common practice systemic penicillin is used when the patient develops a fever and increased white cells in his blood and becomes ill with a bad feeling indicating absorption of poison in the system and that it is good practice to take temperature and blood count when he begins feeling badly. Other expert witnesses also testified that it is only common practice to give systemic penicillin injections for osteomyelitis when the patient is febrile and toxic from a generalized infection or when at least there was redness and swelling in the area indicating infection; whether there are indications of an infection is mostly a matter of judgment for the physician who is treating the patient at the time. Lt. Commander Madden testified that in the condition in which appellant came to Oak Knoll accepted practice was to give penicillin and/or sulfa drugs and that also in a hypothetical case combining plaintiff's symptoms on December 10, 1946 and January 8, 1947 systemic use of penicillin or other antibiotic was standard practice, but he also testified that the treatment was a matter of judgment for the attending doctors. This evidence cannot prove any negligence of defendants. There is no evidence of any circumstances brought to their knowledge before January 1947 which indicated a general toxic condition or other infection which required according to common practice treatment not given or the need of taking temperature or blood count. The testimony of Dr. Madden has no relevancy for this early period. On January 10, 1947 defendants gave the same advice as held good practice by him and at that time their function ended. There is no expert evidence either that common practice required the taking of more X-ray pictures than were taken or that the taking of more pictures would have led to earlier diagnosis or other treatment. X-ray pictures would have been taken earlier if appellant had kept the appointment made for that purpose on August 26, 1946. The pictures taken on December 10, 1946 proved inconclusive according to a report made on them after plaintiff had again left for Monterey. There is no expert evidence that circumstances then existing showed that this further study could not wait until the new appointment made for a month later. When the letter of January 3, 1947 showed an exasperation of the condition a new appointment was immediately given and more pictures made.

The same applies to the complaints of insufficient protection against infection.

Although Dr. Madden testified that in Oak Knoll Hospital he gave appellant a necrellic splint to cover the denuded bone and to keep food from going into the exposed area (the hospital record shows that appellant could not continue to wear it) there is no evidence that such was standard practice in the earlier stages of necrosis or at all or that it was negligence not to give it. The same applies to the tube feeding which Dr. Madden only prescribed for the initial stage in Oak Knoll Hospital (1947–48) when the inflammation made it hard for appellant to swallow. There is no evidence that in 1946 when defendants were treating him his condition was such that tube feeding was a procedure necessarily required by good practice.

The other specifications in this group are wholly without merit. From the failure to hospitalize appellant between November 1945 and May 1946, when the hospitalization was planned for neck surgery, no detrimental results have appeared and there is no connection whatever with the treatment of the osteo necrosis. There is no evidence that it is common practice to have osteomyelitis of the jaw treated by orthopedists. Dr. Madden testified that such cases were sent to an oral surgeon; at U. C. Hospital the Dental Department was consulted and gave plaintiff mouth hygiene. Neither is there evidence that in 1946 appellant needed the same diet as when he was hospitalized in Oak Knoll Hospital and that for his condition in 1946 the prescription of milk by defendants was not sufficient according to common practice.

[12, 13] In the last place appellant predicates negligence on two unrelated specifications equally without merit. The refusal to hospitalize appellant in January 1947 because no bed was available although defendants declared that hospitalization was necessary cannot constitute negligence because there is no duty, contractual or otherwise for a University Hospital to hospitalize persons with whom they have only contracted for outpatient's services, and certainly no duty to have beds available for them whenever they may need them. The allegedly negligent handling of defendants' hospital records which according to appellant made them unreliable concededly had not been a proximate cause of the injury for which the action was brought.

[14] Appellant contends that if each separate specification were insufficient as basis of a negligence verdict the combination of all fifteen would at any rate suffice. That is not so. When there is here no evidence of negligence as to any of the fifteen points, there is no evidence to go to the jury with respect to their combination either.

Appellant's further designations of error relate to rulings of the court on the admission of evidence.

[15, 16] In the first place it is contended that the court erroneously sustained objections to questions of appellant directed to expert witnesses whether the condition of necrosis and secondary osteomyelitis which plaintiff suffered did not ordinarily follow treatment for cancer as here involved. An offer of proof to the effect that it does not was made and the relevancy argued on the ground that if this were established the doctrine of res ipsa loquitur would apply. The court correctly held that such, even if proved, would not make that doctrine applicable. The result of the same treatment is not always the same in all cases and on all patients. When the result of a treatment is less favorable or more prejudicial than in the great majority of cases such need not indicate that the treatment was negligently performed but may as well be the result of individual differences in reaction or the less favorable circumstances of the case. Whether a result less favorable than usually found is caused by negligence or by such circumstances can as a rule not be evaluated by resort to common knowledge on which as hereinbefore shown the theory of res ipsa loquitur is based. No special circumstances are shown in this case which can take the question involved out of the field of technical expert knowledge into the field of common knowledge.

[17–19] Next appellant contends that the court erred in limiting the examination of the defendant Dr. Bell in a manner held reversible error in Lawless v. Calaway, supra, 24 Cal.2d 81, 147 P.2d 604. In that case it was held, 24 Cal.2d at page 90 et seq., 147 P.2d 604, that the right to elicit testimony from an adversary under section 2055 should be liberally construed and that any relevant matter in issue in a case is within its scope. It also comprises the standard of skill and care ordinarily exercised under like circumstances and the question whether defendant's conduct conformed thereto, even though such examination calls for expert testimony. It is true that the court in discussing the manner of examination of Dr. Bell used expressions which might indicate that he was not fully aware of the above rule. However a careful examination of the parts of the transcript indicated by appellant shows that the court's interference did not actually cause an undue or prejudicial restriction. The first example given by appellant related to the question asked Dr. Bell whether he knew why the neck operation was not performed. An objection was sustained on the ground that the reason was immaterial. Appellant's attorney pointed out as only ground of materiality that he was going to an issue brought out by defense counsel in his opening statement. The court then ruled in substance that it was not the proper time for rebuttal of intended evidence, but that appellant could meet the evidence when it was put in. The order of proof is in the sound discretion of the court. Sec. 2042, C.C.P.; 24 Cal.Jur. 764 and cases there cited. If the question would have been material on another ground, as is argued now, but which was not stated in the court below, the point cannot be reviewed on appeal. Valentin v. Valentin, 93 Cal.App.2d 588, 593, 209 P.2d 654; Estate of Parkinson, 190 Cal. 475, 477, 213 P. 259. Moreover in the light of all the evidence now received the question was immaterial and appellant in no way prejudiced.

[20] Appellant next complains that he was restricted in eliciting from Dr. Bell an unequivocal definition of the medical significance of the word "apparently" in the following phrase contained in the hospital record of the plaintiff's first examination in the surgical department: "It (the lesion) does not apparently involve the gum margin." The court stated: "I don't think 'apparently' is a medical term. 'Apparently' means from appearance; is that what you construe it, Doctor? A. That's right." No objection was sustained or offer of proof made, and the examination of Dr. Bell continued as to the standard procedure if it were suspected that something was involved other than that which was apparent. Moreover immediately thereafter the answer was elicited that the writer meant that there was no evidence of bony involvement. In fact no restriction and therefore no prejudice appears.

[21] The third example stated relates to questioning of Dr. Bell concerning the distance of the lesion from the gum line as shown in a small sketch made in the record. The witness gave answers indicating that he did not know it for this special case and could not say it with certainty. To the question whether there were other statements in the record which gave more certainty an objection was sustained informally on the ground that the record was the best evidence. Appellant's argument that the jury needed expert explanation of the medical language of the record is rebutted by his own statement that he wished to bring out that there were no such statements in the record. The matter seems without importance or prejudice.

[22] At the next point cited appellant stated his intention to ask questions relating to parts of the record and began to point out a portion and to comment on it, to which commenting defendants objected. The court then invited appellant to state the question based on the record which the witness had in front of him. The questions which appellant then asked were not based on the record at all but only asked for definitions of osteomyelitis and osteo-radionecrosis which were given. The questions proved to be introductory to an inquiry whether when symptoms of necrosis followed by osteomyelitis were present the patient should properly be referred to an orthopedic surgeon. The answer elicited was that it depended on the location and that if it was in the mandible it should probably not be done. There is no indication whatever of any prejudice by any possible restriction of reference to the record.

[23] When cross-examining the defendant Spishakoff who had testified for the defense after plaintiff had rested and had

stated that he had not seen the plaintiff after March 8, 1946 and that up to that time he saw no occasion for taking temperature or making other routine checks appellant asked whether in his judgment, if there would have been moreover a red and swollen area outside, a symptom which occurred later, there would have been occasion to make such a check. Objection was sustained on the ground that it was not cross-examination. Although under the rule of Lawless v. Calaway, supra, the question would probably have been admissible under section 2055, C.C.P., as part of plaintiff's case or on rebuttal there may be doubt whether it ought to be injected into the cross-examination on defendants' case. However we need not decide the point. Just prior to the objection stated the witness had already answered without objection that clinical signs of infection like redness in the area or swelling would be the occasion for such check. The answer was what plaintiff wished to bring out and he cannot be prejudiced by the prevention of repetition.

[24] An objection to the question put to defendant Low-Beer to name another of his patients that had a similar result was correctly sustained on the ground that the name was immaterial and would violate the confidence between the physician and said patient.

[25] An assignment of error not relating to examination of a defendant follows. After the expert Dr. Shimkin had testified that calcium, vitamins and so forth would do no particular good so long as the patient was ambulatory, was taking nourishment by mouth, and has maintained his weight, plaintiff inquired into the meaning of "ambulatory". The witness testified that it was determined by his ability to stay on his feet and to come to the clinic at intervals on his feet. To the question whether that would also be the case when he came with the help of somebody else, in an automobile, although needing to be in bed, the court objected on his own motion without stating a reason and took the noon recess. The court evidently objected to undue prolongation of the very extensive cross-examination by unimportant details. Appellant did not make any showing of materiality. Although we do not think that the question was actually objectionable no sufficiently substantial prejudice by the exclusion is shown or appears to us to justify reversal.

[26] Next appellant assigns as error the sustaining of an objection of immateriality to the question asked defendant Dr. Bell, whether text books are used in teaching the doctors at U. C. Hospital in the subjects being mentioned in the examination of the witness. Appellant explains on appeal that the question was intended to lay the foundation for quotation of statements which counsel knew were in text books used by the defendants. The question which evidently is prima facie immaterial was not explained at the trial in this or any other manner. Thus the sustaining of the objection was no error. The point argued by appellant whether it would be objectionable to ask an expert witness who is a teacher which books he uses in teaching the subject involved in his testimony is not before us.

Finally appellant assigns as prejudicial error miscellaneous rulings and remarks of the court too numerous to allow statement of each separately. We have checked all and concluded that each was either not erroneous or not prejudicial.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.

In re CARAVAS' ESTATE.*

BRANDENBURGER v. STATE.

Civ. 7985.

District Court of Appeal, Third District, California.

Aug. 6, 1952.

Hearing Granted Sept. 25, 1952.

Proceeding in the matter of the estate of Gerasimos Caravas, deceased, wherein Sheldon Brandenburger, as administrator of the estate of Foteini G. Caravas, deceased, filed a petition claiming property of first named decedent distributed to the State of California in the absence of known heirs. The Superior Court, Sacramento County, John Quincy Brown, J., entered judgment denying the claim, and petitioner appealed. The District Court of Appeal, Schottky, J. pro tem, held that the five year period within which nonresident alien heir was required by statute to appear and demand the property was not extended by statute excluding from the period limited for commencement of an action the time of continuance of a disability to commence an action by reason of a state of war.

Judgment affirmed.

Peek, J., dissented.

1. Aliens 🔑9

At common law, aliens were denied the right to take realty by succession.

2. Aliens 🔑12(4)

A conditional estate vested in nonresident alien heir upon death of a resident of California, but such estate was subject to divestiture unless heir appeared and demanded the property within five years as required by statute. Probate Code, § 1026.

3. Aliens 🔑12(4)

Statute requiring a nonresident alien entitled to property by succession to "appear and demand" the property within five years is a law of succession and not a statute of limitations and quoted words do not contemplate or require the commencement of any "action" within meaning of statute excluding from the period limited for commencement of an action the time during which a person is under a disability to commence an action by reason of existence of a state of war. Probate Code, § 1026; Code Civ.Proc. § 354; Trading with the Enemy Act, §§ 2, 3(c), 50 U.S.C.A.Appendix, §§ 2, 3(c).

See publication Words and Phrases, for other judicial constructions and definitions of "Action".

4. Aliens 🔑12(4)

The principle of international law that existence of a state of war suspends the running of statutes of limitation against alien enemies resident in enemy territory was not applicable to extend the five-year period within which a nonresident alien was required by statute to appear and demand the property to which he was entitled by succession. Probate Code, § 1026; Code Civ.Proc. § 354.

5. Descent and Distribution 🔑1
Wills 🔑1

The right of inheritance, including designation of heirs and the proportions which they shall receive, as well as the right of testamentary disposition, are entirely matters of statutory enactment within the control of the Legislature.

6. Aliens 🔑12(4)

Statute excluding from the period limited for commencement of an action the time of continuance of disability to commence an action by reason of existence of a state of war did not extend the five-year period within which nonresident alien heir of a deceased resident of California or administrator of estate of such heir was required by statute to appear and demand decedent's property, though sole heir of decedent at time of his death and thereafter until death of heir was a nonresident enemy alien prohibited by statute from bringing actions in courts in the United States. Probate Code, § 1026; Code Civ.Proc. § 354; Trading with the Enemy Act, §§ 2, 3(c), 50 U.S.C.A.Appendix, §§ 2, 3(c).

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Brandenburger & White, Sacramento, for appellant.

William J. Power, Dep. Atty. Gen., for respondent.

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* For subsequent opinion see 250 P.2d 593.

SCHOTTKY, Justice pro tem.

Gerasimos Caravas died intestate in San Francisco on September 30, 1941. His estate was probated there, and in the absence of known heirs was distributed to the State of California, the decree of distribution being dated September 15, 1942.

On August 25, 1947, Sheldon Brandenburger was appointed administrator of the estate of Foteini G. Caravas by the Superior Court in Sacramento County. Immediately thereafter said administrator filed a petition in the superior court, which petition alleged the fact of the death of Gerasimos Caravas and the probate proceedings in San Francisco as hereinbefore set forth, and alleged further that there was distributed to the State of California the sum of $1,936.18 constituting the residue of said estate; That Foteini G. Caravas, the mother and sole heir of the estate of Gerasimos Caravas, did not appear in the probate proceedings nor offer proof of her right of succession; that Foteini G. Caravas died in Greece on or about January 1, 1944, being at that time a resident of Greece, and that she was survived by five children, all of whom were residents and citizens of Greece.

The answer to the petition denied the allegation of relationship, and raised two separate defenses, the first being that the petitioner was barred by the provisions of section 1027 of the Probate Code in that Foteini G. Caravas did not appear and demand the property within five years from the time of succession; and secondly, that petitioner was barred under the provisions of section 259 of the Probate Code in that no reciprocal rights existed between the United States and Greece.

The court found the relationship existed as alleged in the petition, and that the surviving children of Foteini G. Caravas were residents of Greece except Odysseus Caravas who was a resident of New York at the time of the death of Gerasimos Caravas. It was found that at all times pertinent here Americans had the right to inherit property located in the country of Greece upon the same terms and conditions as citizens of the country of Greece. The court also found "That the country of Greece was occupied by the German military forces from April 7, 1941, until November 30, 1944, and continuously from the date of death of said decedent until November 30, 1944, said mother of said decedent and said heirs of said mother and said petitioner herein were by reason of the existence of a state of war under a disability to commence an action for the recovery of the estate of said Gerasimos Caravas, and were under a disability to make claim for the recovery thereof." It was also found that there had been no demand for the property within five years from the death of Gerasimos Caravas.

As conclusions of law, it was adjudged that the petitioner was barred by section 1026 of the Probate Code, and that the five year period within which the alien heirs of a decedent, or the administrator of the estate of an alien heir of the decedent must appear and claim the property of the decedent, is not extended by the provisions of section 354 of the Code of Civil Procedure. Judgment was entered accordingly. The petitioner has appealed.

Appellant contends that the five year period under section 1026 of the Probate Code within which a nonresident alien must appear and claim the property was suspended while the foreign claimants were disabled by reason of a state of war from asserting rights in this country. The brief of appellant points out that under section 2 of the Trading with the Enemy Act, U.S.C.A., Title 50, Appendix, § 2, Foteini G. Caravas was an "enemy alien" at the time of her son's death and up to the time of her death on January 1, 1944; and that enemy aliens were prohibited from bringing actions in courts in this country. The amicus curiae brief of the Attorney General of the United States points out that under that act Greeks were prohibited from communicating with anyone in this country "except in the regular course of the mail," and that during the period Greece was occupied by German forces the United States mail service to Greece was suspended.

It is argued by appellant that section 354 of the Code of Civil Procedure operated to suspend the five year period during time of war. That section provides: "When a person is, by reason of the existence of a state of war, under a disability to commence an action, the time of the continuance of such disability is not part of the period limited for the commencement of the action whether such cause of action shall have accrued prior to or during the period of such disability."

Respondent argues that said section has no application since it is concerned with the commencement of legal actions, and under section 1026 of the Probate Code it is not necessary for a nonresident alien to bring an action to perfect title to property. Section 1026 provides: "A nonresident alien who becomes entitled to property by succession *must appear and demand the property* within five years from the time of succession; otherwise, his rights are bared and the property shall be disposed of as escheated property." (Italics added.)

In answer to respondent's argument that section 1026 of the Probate Code does not require or contemplate any legal proceedings, appellant argues that it was necessary to assert the claim in a court of law, and cites section 1027 of the Probate Code which prescribes the procedure to be followed by a resident heir to recover property held by the State Treasurer. Said section provides in part:

> "[*Time to file claim.*] The property so distributed shall be held by the State Treasurer for a period of five years from the date of the decree making such distribution, within which time any person may appear in the Superior Court for the County of Sacramento and claim the estate or any part thereof. Rights of nonresident aliens shall be governed by the provisions of Section 1026 of this code. Such court shall have full and exclusive jurisdiction to determine the title to said property and all claims thereto.
>
> "Any person who does not appear and claim, as herein required, shall be forever barred, and such property, or so much thereof as is not claimed shall vest absolutely in the State."

But respondent in reply points out that said section 1027 refers to the time after distribution to the state within which a petition must be filed in the superior court by resident citizens, and that said section 1027 specifically says that the rights of nonresident aliens are governed by section 1026.

[1] At common law and under the law of California as it existed from 1849 to 1856, aliens, at least as to real property, were denied the right of taking by succession. In 1856 the legislature made provision for succession by nonresident aliens. Stats.1856, p. 137. The right of aliens to take by succession was governed by the statute of 1856 until 1873 when, with the enactment of the Civil Code, sections 672 and 1404 thereof became effective. These sections provided:

> *Sec. 672:* "If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in Title VIII, Part III, Code of Civil Procedure."
>
> *Sec. 1404:* "Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

Said sections 672 and 1404 were replaced by Probate Code section 1026 in 1933.

In Estate of Laurence, 84 Cal.App.2d 500, at pages 504–508, 191 P.2d 109, 112, this court, in discussing the various sections hereinbefore quoted, said:

> "One entitled to succession takes, not by virtue of the decree of distribution, but by the law of succession. * * *
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> * * * * * *
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> "However, while title of a non-resident alien heir vests upon the death of

decedent, it does so on the condition subsequent that he appear and demand the property within the prescribed period of five years. This has been held in numerous cases. In Lyons v. State, 67 Cal. 380, 7 P. 763, a decedent resident of California died leaving as his only heirs at law certain alien residents of Ireland, who appeared and claimed the estate. The state of California contended that under section 4, Art. IX, of our state constitution, decedent's estate had vested eo instante in the state; but the court said, at page 384 of 67 Cal. at page 765 of 7 P.: 'The fault in the argument is that Guilford did not die without heirs. The petitioners were his heirs, and the property of his estate vested in them, subject to be divested if they did not appear and claim it within the time and in the manner provided by statute.' To a like effect is the holding in Carrasco v. State, 67 Cal. 385, 7 P. 766. There a California resident died, leaving surviving him a widow and minor child residing in Chile. The minor child died, and the widow assigned her interest in the estate to Carrasco, who, after the estate had been administered and the residue paid into the state treasury, appeared and claimed same—presumably within five years from the death of decedent. The court held that since, under sections 671 and 672 of the Civil Code, an alien may take, hold or dispose of property, real or personal, within the state if claimed within the given time, such person took by succession and could dispose of her interest; and that the buyer or assignee could then claim same.

"In State v. Smith, 70 Cal. 153, 12 P. 121, it was contended also that a nonresident alien could not take by succession. The court said, page 156 of 70 Cal., page 123 of 12 P.:

" 'All aliens take by *succession.* Civ. Code, § 671. The failure of a nonresident alien to "appear and claim" within five years after descent cast operates a bar of his right to assert any title in the property as against the state. And this, not on the idea that the property has escheated to the state, as of the date of the death of the ancestor, but because by the law the "nonresident" takes subject to the loss of his right by a failure to make claim within the five years. The clause of section 672 is a limitation, applicable, however, not alone to the commencement of an action in the courts, but to any appearance within the state, and the assertion of a claim, whether by such action or otherwise. The claim may be *in pais,* as by taking possession of the property, or conveying or contracting with respect to it. If he fails to appear and claim it, the property is escheat at the expiration of the five years.'

"Also see People v. Roach, 76 Cal. 294, 296, 18 P. 407; Estate of Pendergast, 143 Cal. 135, 140, 76 P. 962; Estate of Romaris, 191 Cal. 740, 744, 218 P. 421; State v. Miller, 149 Cal. 208, 210, 85 P. 609; 1 Cal.Jur. 925.

* * * * * *

"Under the authorities hereinabove cited, the heir in this case, being a nonresident, succeeded to the title to the property of the estate subject to divestiture if she did not claim *the property,* not before a decree of distribution had been made, but within five years from the death of the decedent. And in order to prevent such divestiture it was necessary to show that she had appeared and claimed the property within five years."

In Estate of Pendergast, 143 Cal. 135, at page 140, 76 P. 962, at page 964, the court said:

"* * * The respondent claims that, if one of the persons who would otherwise take by succession is barred from so doing by reason of being a nonresident alien, the effect is, that his share goes back to the estate, and is inherited by the other heirs. This claim, we think, is not justified by the terms of the statute. They clearly imply that upon the death of the deceased the estate vests as a conditional estate in the nonresident alien heir, sub-

> ject only to the contingency that, if he fails to appear and claim the same within five years, his right ceases, and the property then vests in the state, not strictly by escheat for want of heirs, but by virtue of the effect of the statute. Lyons v. State, 67 Cal. [380] 384, 7 P. 763; State v. Smith, 70 Cal. [153], 156, 12 P. 121; People v. Roach, 76 Cal. [294], 296, 18 P. 407."

[2, 3] We believe that under the foregoing authorities and code section it must be held that a conditional estate vested in Foteini G. Caravas upon the death of Gerasimos Caravas, which estate was subject to divestiture under section 1026 of the Probate Code unless she appeared and demanded the property within five years. We are convinced also that said section 1026 is a law of succession and not a statute of limitations and that the words "must appear and demand the property" do not contemplate or require the commencement of any legal action.

Appellant cites Ebert v. State of California, 33 Cal.2d 502, 202 P.2d 1022, which is concerned with section 1027. The only question involved in that case was whether the five year period within which a resident heir must appear and claim his inheritance by filing a petition began at the time of the entry of the decree of distribution or at the time of delivery to the State Treasurer. The question of whether the period prescribed by section 1027 was a statute of limitations was not in any way involved, and we do not believe that the court, by referring to the five year period as a "period of limitation" intended to hold that it was a statute of limitations. But even if the five year period in section 1027 could be considered a statute of limitations on the basis that it requires a petition to be filed in the superior court, we are satisfied that the five year period in which a nonresident alien "must appear and demand the property" under said section 1026 is not a statute of limitations, because the filing of no petition or action is required, and because, as hereinbefore stated, we are satisfied that said section 1026 is a law of succession and not a statute of limitations.

Appellant also cites Estate of Knauft, 59 Cal.App. 536, 211 P. 29, in which proceedings to contest a will were instituted in 1921 by German aliens after the statutory period for filing such contest had expired. The court there referred to the provisions of section 354 of the Code of Civil Procedure and the Trading With the Enemy Act, and concluded that such German enemy aliens were entitled to maintain their contest because of the disability which prevented them from asserting their rights when they arose. But, as respondent correctly points out, in order to maintain their contest it was necessary for the German heirs to commence a legal proceeding, which clearly entitled them to the benefit of the provisions of said section 354, whereas there is no such requirement under section 1026 of the Probate Code which is a law of succession and not a statute of limitation.

Appellant makes the further contention that under the principles of international law, the time period contained in section 1026 of the Probate Code was tolled during the period of disability, and that it is immaterial whether the time limitation relates merely to the remedy or is an essential requisite to the right. Appellant cites 34 Am.Jur., p. 201, and Supp. p. 28, on which latter page it is said: "This principle of international law the courts have attached to, or read into, statutes of limitation, though it is not expressed in them; and it is applicable irrespective of whether the limitation in the particular statute of limitations is considered to be a limitation of the right or liability, or of the remedy, although there is apparently some contrary authority."

Appellant cites Frabutt v. N. Y. C. & St. L. R. Co., D.C., 84 F.Supp. 460, an action brought under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., which specified a three year period of limitation. Action was brought by the wife of the deceased workman after the limitation had run. In deciding that the limitation period was suspended during the period of disability, the court stated, at page 464 of 84 F.Supp.: "It appears by a firmly established principle of international law that the existence of a state of war between two countries or powers is effective to suspend the running of statutes of limitations as between the citizens of such countries or powers at war, or, as it has been otherwise stated, war suspends the statute of limitations against alien enemies resident in enemy territory. On the restoration of peace all rights suspended during hostilities, or which remain dormant, are revived, and the statute of limitations again becomes operative. The rule suspending the running of limitations during war is one of international law which the courts attach to, or read into, statutes of limitations, though it is not expressed in them; and it is applicable irrespective of whether the limitation in the particular statute of limitations is considered to be a limitation of the right or liability, or of the remedy."

Respondent does not dispute the principles of international law quoted by appellant but argues that in all the cases cited by appellant the thing that was required and which was absolutely necessary was the commencement of an action, and the Probate Code section 1026 makes no such requirement.

[4, 5] We have already reached the conclusion, as hereinbefore stated, that said section 1026 is a law of succession and not a statute of limitations, that the words "must appear and demand the property" do not contemplate or require the commencement of any legal action, and upon the death of Gerasimos Caravas a conditional estate vested in Foteini G. Caravas, which estate was subject to divestiture unless she appeared and demanded the property within five years. If we are correct in this conclusion, then the principles of international law relied upon by appellant will not aid his case, because, as stated in In re Wilmerding, 117 Cal. 281, at page 284, 49 P. 181, at page 182: "The right of inheritance, including the designation of heirs and the proportions which the several heirs shall receive, as well as the right of testamentary disposition, are entirely matters of statutory enactment, and within the control of the legislature."

[6] Notwithstanding the earnest and able arguments contained in the briefs of appellant and in the amicus curiae brief of the Attorney General of the United States, we are convinced that the trial court correctly concluded that the five year period within which the alien heirs of a decedent, or the administrator of an alien heir of the decedent, must appear and claim the property of the decedent is not extended by the provisions of section 354 of the Code of Civil Procedure, and that the judgment should be and the same is hereby affirmed.

ADAMS, P. J., concurs.

PEEK, Justice.

I dissent. I cannot agree with that portion of the majority opinion which holds that Section 1026 of the Probate Code is the only statute here involved; that the provision that a nonresident alien "appear and demand the property within five years from the time of succession" neither contemplates nor requires a proceeding of any kind to perfect his title, and that therefore section 354 of the Code of Civil Procedure does not apply.

It cannot be denied that sections 1026 and 1027 of the Probate Code are related statutes and as such must be, under well-established rules, "construed together and harmonized if possible." Ebert v. State, 33 Cal.2d 502, 509, 202 P.2d 1022, 1026. Thus, in accordance with such rule, it has been held that "when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law and particularly of the same section thereof." Ransome-Crummey Co. v. Woodhams, 29 Cal.App. 356, 360, 156 P. 62, 64.

The pertinent provisions of section 1027 are that when an "estate or any portion thereof" has been distributed to the State of California the property so distributed shall be held for a period of five years "from the date of the decree making such distribution" within which time any person may appear in the Superior Court of the County of Sacramento and "claim the estate" or any part thereof, that said court shall have "full and exclusive jurisdiction to determine the title to said property and all claims thereto" and that if one does not so "appear and claim" the property within five years he "shall be forever barred". However, section 1027 provides further that if the claimant be a nonresident alien his rights "shall be governed by the provisions of Section 1026 of this code", which section provides that a nonresident alien "who becomes entitled to property by succession", must "appear and demand" the property within five years from the "time of succession"; otherwise his "rights are barred".

It is to be noted that the predecessor of section 1026, Civil Code section 672, used the same wording as section 1027. That is, the nonresident alien must "appear and claim" the property. When that section was transferred to the probate code the words "appear and demand" rather than "appear and claim" were used. According to Black's Law Dictionary, Third Edition, "appear" means "To be properly before a court." "Demand", by that same authority, is defined as being "A claim; the assertion of a legal right; a legal obligation asserted in the courts." Thus "appear and demand", as used in 1026, must mean to come regularly before a court for the purpose of asserting therein a legal claim to something. Therefore, it can not be said that because of the change of wording from "appear and claim" to "appear and demand" the Legislature thereby intended to change the requirement of coming regularly before a court. But in any event, both wordings contemplate an "appearance". See California etc. Co. v. Superior Court, 13 Cal. App. 65, 108 P. 882.

Since both sections relate to the same general subject matter they come within the rule of construction previously mentioned and therefore must be read in conjunction with each other in order to harmonize and give full effect to all of the provisions contained therein. From the analysis of the history and definitions of the terms used in the two sections previously set forth, it would appear that the only apparent difference between the two sections relates solely to the time within which the two different classes of heirs must "appear and claim" or "appear and demand" the property, that is, from the date of succession, under 1026, or the date of distribution, under 1027. When so construed, it would also appear that 1027 is the procedural section which sets forth the procedure to be followed by both classes of heirs in order to perfect their title.

When Gerasimos Caravas died on September 30, 1941 his mother was living in Greece. Italy had attacked Greece in the fall of 1940 and in April of 1941 German armies had invaded her country. After the German conquest of Greece it was in turn blockaded by the British Navy and with this country's declaration of war upon Germany in December, 1941, it became enemy territory. Thus Greece was cut off from the outside world from the fall of 1941 until her liberation in the latter part of 1944. During this time all residents of Greece became technical enemies of this country under the Trading with the Enemy Act (Section 2). Under the provisions thereof residents of the United States were prohibited from sending communications to residents of Greece and under Section 3(c) thereof the Greeks in turn were prohibited from cummunicating with anyone in this country "except in the regular course of the mail". Since no regular course of mail existed during that period by virtue of the order of the United States Post Office Department, which suspended all service to Greece as of November 26, 1941 (Postal Bulletin No. 18334) until the order resuming partial service of November 20, 1944 (Postal Bulletin No. 18773), it would have been impossible for her to have communicated with anyone in this country.

The case of State v. Smith, 70 Cal. 153, 12 P. 121, upon which the majority relies for the proposition that no legal action of any kind is required to perfect title under section 1026, is not inconsistent with this conclusion. In that case John Smith died in Sacramento, his only heirs being natives and residents of England. One of them, John Smith, Jr., came to California and obtained letters of administration upon the estate after having declared his intention to become a citizen of the United States. The property was distributed to those heirs and the administration closed. Suit was subsequently commenced by the Attorney

General to declare the estate escheated because, as alleged, the nephews and nieces could not inherit in California. Judgment was given for defendants, thereby deciding only that a nonresident alien is entitled to inherit under California law. The theory of the action was that a nonresident alien was not eligible to take property by succession under California law and the facts show the estate was distributed to said nonresident aliens after probate proceedings. Hence the statement of the court to the effect that a nonresident alien could "appear and *claim*" the property in compliance with Civil Code section 672 (the predecessor of Probate Code section 1026) by a claim "in pais, as by taking possession of the property, or conveying or contracting with respect to it" must be considered as dicta.

Furthermore, I find nothing in the Estate of Laurence, 84 Cal.App.2d 500, 191 P.2d 109, or in the Estate of Pendergast, 143 Cal. 135, 76 P. 962, which is to the contrary. In the Laurence case the question related to the sufficiency of the showing of the appearance by a nonresident heir. In the Pendergast case the question related to the rights of other heirs to succeed to the interests of nonresident heirs whose rights were barred by their failure to appear and claim their share of the estate within the statutory period. The determination in both cases (if it be so considered rather than dicta) that section 1026 attaches a condition subsequent to the right of succession of a nonresident alien is not inconsistent with my conclusion that section 354 applies in a proper case.

If, then, Foteini, to perfect her right to the property to which she had succeeded in this State, was compelled to "appear and demand" in the Superior Court of this county, was the running of the five-year period tolled by her disability to do so by reason of her being a nonresident alien under the facts above summarized.

As I read the majority opinion, it is conceded that if an appearance and commencement of any legal action were necessary section 354 would apply. But, says the majority, because the requirement of appearance and demand in section 1026 does "not contemplate or require the commencement of any legal action" the provisions of such section do not apply.

Respondent adds a further argument in this regard, which is that, even if section 1026 does contemplate a "proceeding" it is not an "action" within the meaning of section 354. This argument fails to consider the provisions of section 363 of the same code, wherein it is specifically stated that the "word 'action' as used in this title is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature." Furthermore, in the Estate of Knauft, 59 Cal.App. 536, 538, 211 P. 29, 30, it was held that "While this section [354] is a part of the chapter devoted to provisions respecting the time of the commencement of actions, in its nature it deals with the general subject of disability within the particular classes defined, and is, for that reason, in its nature applicable to proceedings in probate."

In discussing the Knauft case the majority opinion refers with approval to the argument of respondent wherein it is stated that the case has no applicability here since the court was there confronted with the question of the right of German aliens who had instituted a contest of a will after the period for filing the same had expired and that they were entitled to maintain their contest because a disability prevented assertion of their rights when they arose. In other words, the majority would distinguish between the situation where one must first take some action to establish a right (will contest) from where one must take some action to preserve a vested right already established (succession to property). As the Attorney General of the United States succinctly asks in his amicus curiae brief: "What possible reason can there be for suggesting that, when the bringing of an action is a condition precedent to the acquisition of a right, the alien who is disabled by war from prosecuting the action will be safeguarded, but that, when the alien already has a vested interest, the law will suffer it to be destroyed when the law prevents him from filing papers or taking some similar step to preserve it?"

Certainly if the same facts would not have barred Foteini from bringing a will contest in this State to establish her right to a portion of the estate because of her admitted disability such condition should likewise toll the running of the statute against her right to assert what the State of California had already conferred upon her. State of Maryland, to Use of Burkhardt, v. U. S., 4 Cir., 165 F.2d 869, 1 A.L.R. 2d 213. In Scarborough v. Atlantic Coast Line R. Co., 4 Cir., 178 F.2d 253, 259, 15 A.L.R.2d 491, the court, in commenting on a similar contention, said:

> "* * * the distinction between a remedial statute of limitations and a substantive statute of limitations is by no means so rock-ribbed or so hard and fast as many writers and judges would have us believe. Each type of statute, after all, still falls into the category of a statute of limitations. And this is none the less true even though we call a remedial statute a pure statute of limitations and then designate the substantive type as a condition of the very right of recovery. There is no inherent magic in these words. * * *
>
> "Here the proper approach is not technical and conceptualistic. Rather, we think it should be realistic and humane. The spirit, not the letter, should control." See State of Maryland, to Use of Burkhardt, v. U. S., supra.

But, even assuming the majority opinion to be correct in its holding that no proceeding is required under our statutes to perfect the vested inheritance of a nonresident alien, or that if a proceeding is required it is not such a one that section 354 is applicable thereto, it does not necessarily follow that the time within which such alien must appear and demand is not extended by the disability of war. Limitation statutes are not enacted in contemplation of war. They are enacted in contemplation of continuing peace. War is but one of the exceptions which tolls the running of the statute. It seems obvious to me the consent to maintain an action or to appear and demand must of necessity contemplate that the consent so given means the right so to do in a court which is open for such proceedings. This conclusion is compelled both by principles of equity and by a realistic appraisal of the reasons underlying the precept that war suspends limitation statutes of all types. Additionally, such conclusion also is substantiated by the common law on the subject, which would be controlling if we had no applicable statute. Civil Code, section 4.

In Frabutt v. New York, Chicago & St. Louis R. Co., D.C., 84 F.Supp. 460, 464, the court said:

> "* * * The rule suspending the running of limitations during war is one of international law which the courts attach to, or read into, statutes of limitations, though it is not expressed in them; and it is applicable irrespective of whether the limitation in the particular statute of limitations is considered to be a limitation of the right or liability, or of the remedy."

It was further held in Osbourne v. U. S., 2 Cir., 164 F.2d 767, 769, where a comparable issue was raised:

> "Neither do we think that distinction should be made because of the type of statute of limitations involved. All statutes of limitation are based on the assumption that one with a good cause of action will not delay bringing it for an unreasonable period of time; but, when a plaintiff has been denied access to the courts, the basis of the assumption has been destroyed. Whatever the reasons for describing this type of statute of limitations as substantive rather than procedural—and we suspect the chief reason was to make the period of limitation named in the statute, rather than that of the forum, control in cases brought in state courts—we think we do the distinction no violence by holding that either type of statute will toll for one who is a prisoner in the hands of the enemy in time of war."

For the foregoing reasons I would reverse the judgment.

112 Cal.App.2d 602

PEOPLE v. KROSS.

Cr. 4771.

District Court of Appeal, Second District,
Division 2, California.
Aug. 8, 1952.

Rehearing Denied Aug. 21, 1952.
Hearing Denied Sept. 4, 1952.

An accused was convicted in the Superior Court of Los Angeles County, Philip H. Richards, J., of grand thefts and burglaries and he appealed from the judgment and from order denying motion for new trial. The District Court of Appeal, Fox, J., held that evidence established corpus delicti.

Affirmed.

1. Burglary 🔑41(2)
Larceny 🔑56

In prosecution for grand thefts and burglaries, evidence that proprietors of fur establishments had determined that certain furs were in stock just prior to defendant's arrival at their places of business, that shortly after defendant's departure described furs were missing, and that such furs had not been sold and that proprietors had given no one permission to take such furs from storage vaults, established corpus delicti.

2. Burglary 🔑45
Larceny 🔑68(1)

In prosecution for grand thefts and burglaries brought against a defendant who allegedly went to establishments of specified fur dealers who discovered furs to be missing after defendant left, guilt of defendant was for jury under evidence, as against contention that defendant's connection with charged crime was not sufficiently shown.

3. Criminal Law 🔑1159(2)

An appellate court will not review evidence in criminal prosecution beyond point of scrutinizing record to determine whether there is substantial evidence that supports inference of guilt, and conviction will not be reversed unless it can be said that it is not supported on any reasonable hypothesis.

4. Burglary 🔑41(1)
Larceny 🔑65

Direct proof of burglary and theft was not necessary in prosecution for grand thefts and burglaries, and burglaries and thefts could be proved by circumstantial evidence.

5. Criminal Law 🔑1159(2)

On appeal from conviction for grand thefts and burglaries, District Court of Appeal would not review evidence beyond point of scrutinizing record to determine whether there was substantial evidence that supported inference of guilt.

6. Criminal Law 🔑316

Where a defendant charged with grand thefts and burglaries of furs from fur establishments failed to give testimony explaining how hairs from fur-bearing animals came to be on inside of his oversized pants and in his socks, and defendant failed to deny presence of such hairs, such failures supplied support for inferences unfavorable to defendant as to source of such hairs.

7. Criminal Law 🔑928

A new trial of criminal prosecution ordinarily will not be granted because of remarks about case, made during trial, to jurors, or in their hearing, by strangers to litigation, where neither successful party nor jurors were at fault, unless such remarks probably influenced verdict.

8. Criminal Law 🔑1155

In prosecution for grand thefts and burglaries, rulings of trial court that no prejudice to defendant was shown as result of actions of photographers in presence of some jurors in courtroom in attempting unsuccessfully to persuade defendant to permit them to take picture of defendant's face and oversized pair of pants allegedly used in secreting stolen furs, during course of which attempts defendant was told jury would think him guilty, was not a clear abuse of discretion, so that such rulings were determinative on appeal.

9. Constitutional Law 🔑257
Criminal Law 🔑627½

Federal Rules of Criminal Procedure authorizing court at any time after filing of information or indictment to order attorney for Government to permit defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to defendant or obtained from others by seizure or by process, has no application to practices in state courts and cannot be incorporated into Fourteenth Amendment to the federal Constitution as a limitation on state action. Fed.Rules Crim.Proc. rule 16, 18 U.S.C.A.; U.S.C.A.Const. Amend. 14.

10. Criminal Law ⟹478(1)

In prosecution for grand thefts and burglaries brought against a defendant who allegedly went to establishments of fur dealers who discovered mink furs to be missing after defendant left, police chemist who was an expert in comparing objects under microscope and who, through use of microscope, had compared hairs found in defendant's sock and oversized pants with known fur samples, was properly permitted to testify as to his findings relative to their similarity, notwithstanding police chemist was not an expert on furs.

11. Criminal Law ⟹404(1)

In prosecution for grand thefts and burglaries brought against a defendant who allegedly went to establishments of specified fur dealers who discovered mink furs to be missing after defendant left, fur samples were properly admitted in evidence for purposes of comparison with hairs found in defendant's socks and oversized pants where stolen furs were established to have been of mink family of different types and samples were from mink family.

12. Criminal Law ⟹561(1)

Each fact in chain of circumstances that will establish guilt of an accused need not be proved beyond a reasonable doubt, and reasonable doubt that would warrant acquittal is one that results or arises from consideration of all evidence in case.

13. Burglary ⟹46(1)
Larceny ⟹70(1)

In prosecution for grand thefts and burglaries of mink furs, wherein identified fur samples were introduced into evidence for comparison with hairs found in defendant's clothing, trial court properly refused series of instructions that to consider such hairs jury must find beyond reasonable doubt that they came from stolen furs, otherwise not guilty verdict would be necessary, since such instructions would have precluded conviction based upon other facts and since no inference could be considered unless established beyond a reasonable doubt.

14. Criminal Law ⟹814(5)

In prosecution for grand thefts and burglaries brought against a defendant who allegedly went to establishments of fur dealers who discovered furs to be missing after defendant left, wherein identified fur samples were introduced into evidence for comparison with hairs found in defendant's socks and oversized pants, evidence did not justify instruction that not guilty verdict was required if defendant possessed hairs by accident or other innocent manner.

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Morris Lavine, Los Angeles, and Edward R. Brand, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was charged with two counts of grand theft and two counts of burglary. The jury found him guilty as charged, finding that the burglaries were of the second degree. Defendant's motion for a new trial was denied; his application for probation was also denied, and he was sentenced to the state penitentiary. He appeals from the judgment of conviction and the order denying a new trial.

This case involves defendant's entry of two fur stores with the alleged intent to steal expensive furs and his alleged success in perpetrating the thefts. On the morning of February 15, 1951, at about 11:30 a. m., defendant entered the office of Robert Walsh, a wholesale fur dealer, located in the Bankers Building at 629 South Hill Street, Los Angeles. Although the weather was warm, defendant was wearing an overcoat. Mr. Walsh was in the showroom displaying furs to some customers. Mr. Walsh's brother was also there. A telephone call was received for Mr. Walsh and as he finished the telephonic conversation he walked to the entrance of his secretary's office and observed the defendant, whom he had never seen before, walk out of the shipping and receiving room. Defendant looked at Walsh and continued walking to the office of the secretary who was at her desk. The secretary looked up and observed defendant counting bills. He identified himself by the name of Feinberg, stating he was waiting for his wife. An invitation to be seated was declined with the statement that he preferred to stand. The secretary, however, insisted, escorting him to a chair in her office where he sat for a few moments. Soon, defendant stated that he desired to have a cup of coffee; that he was expecting his wife between 11:45 and 12:00; that if she appeared while he was gone, to have her wait for him. The secretary did not actually see him depart from the premises, but she never saw him again.

Walsh's fur vault was centrally located in relation to the showroom and the shipping and receiving room, with entrances equipped with steel doors leading into both rooms. These doors were kept open during business hours. Furs were shown to customers only in the showroom, and Walsh never allowed a customer to enter the vault in which all his furs were kept. There were only two ways in which the vault could be entered, either through the showroom or from the hallway through the shipping and receiving room.

It took Walsh about 25 minutes to serve his customers, after which he went into the vault and noticed several items missing. Walsh, his brother, and his secretary immediately took inventory, which was just a few minutes after defendant's departure. Two Breath of Spring Mink cape stoles and a set of Stone Martens, consisting of four pelts, were found missing. The color of these furs was described as a blue somewhat lighter than slate. Walsh had last seen these furs when he arranged his stock that morning at about 10:00 a. m. Reference to his records disclosed that these furs had not been sold, and that they were still listed in the inventory, which his secretary had compiled the previous day. No woman identifying herself as Mrs. Feinberg ever appeared.

At about 12:50 in the afternoon of the same day, defendant entered the office of the Giba-Friedman Fur Company, located in the Spreckels Building, one block south of the Bankers Building on the same street. At that time a salesman and the bookkeeper were the only persons on duty. Defendant asked for Mr. Bertz, the salesman, who, however, had never seen defendant before. Defendant inquired whether his wife, "Mrs. Lawine," had arrived. The salesman replied that she had not and suggested defendant have a seat and wait for her. He also suggested defendant remove his top coat because the latter was perspiring very profusely. Defendant declined, stating, as he mopped his brow, that he did not feel well and that his wife was due about 1:15. During the next few moments Bertz noticed that defendant sat on a couch, arising occasionally to pace the floor and look down the firm's hallway. He also noticed that the top coat worn by defendant seemed too large.

Mrs. Buckhout, a customer, was seated in the waiting room at a point from which she could see the 8-foot drapes which hung over the doorway of the firm's storage room. She observed defendant pacing the room several times and on one occasion looking behind the drapes, where he suddenly disappeared. He came out again after about five to eight minutes. Mrs. Buckhout expressed a desire for some lunch and defendant offered to get some tea for her. Bertz told him that would not be necessary, as one of the other salesmen could get it for her. Defendant then stated that if his wife showed up she could purchase anything she wanted and he would send the money. He thereupon took his departure still wearing his top coat. No woman named Lawine or of any similar name ever made an appearance at the fur salon.

The company kept its furs in the storage room. The next morning at 9:15 a check of the inventory was made and it was found that a Silver Blue Mink stole and a Ranch Mink stole were missing, both of which were in the vault on the previous day. Neither of these furs had been sold.

After defendant left the premises of the Giba-Friedman Fur Company he went to the offices of Bachelis Furs, located in the Cutts Building at 706 South Hill Street, Los Angeles. He arrived there about 3:00 p. m. An employee named Weinstein, who had never seen defendant before, noticed that he was wearing a brown top coat in spite of its being a "hot and humid day." Defendant asked for a black Russian Broadtail jacket. He was advised they did not have any on hand but if he would return the next day they would have them. Without, apparently, knowing the name of the salesman, defendant gave his own name as "Weinstein."

On the next morning Walsh[1] had occasion to go to the Cutts Building, which was located about half a block from the Bankers Building. He took the elevator to the seventh floor. After a few minutes he returned to the elevator, and, as he pushed the button, the elevator door opened and out stepped defendant. Walsh followed defendant into the Bachelis Fur establishment where the latter again contacted the salesman Weinstein regarding the Broadtail jacket, and was advised that they had not yet been brought in. Weinstein observed defendant wore the same garb as on the day before although it was also a warm day. Finally, defendant stated he would be back later, and made his exit. As he left, he looked in Walsh's direction. Walsh followed him to the hallway but failing to see him, took the elevator to the lobby of the building. Weinstein also followed defendant. Walsh waited for a short time and finally defendant appeared, coming down the stairway into the main lobby. Walsh approached defendant and told him that he had been in his office the day before and asked him his name. Defendant gave the name of "Levine." At this point Walsh and salesman Weinstein left to contact a traffic officer. Bertz, the salesman of the Giba-Friedman Company, happened by the Cutts Building about that time and recognized defendant, who had started south on Hill Street. Bertz engaged him in brief conversation regarding his contemplated return with his wife to purchase a fur. Defendant then continued on his way at a rapid pace.

Walsh and Weinstein returned with the uniformed officer. The officer called to defendant several times but the latter gave no heed and kept on walking rapidly. The officer and the three furriers chased defendant down the street, the officer half trotting to try to catch up with him. Defendant crossed the street in the middle of the block. The officer whistled at him a number of times to halt. Defendant did not stop but kept on, half running and half walking, and entered the Jewelers Building. Arriving there the officer not seeing defendant in the lobby walked to the elevator but could not find him. He then looked around a partition separating the elevators and the stairway, and discovered defendant standing at the first landing of the stairs looking down at him. He called to defendant to come down telling him he wanted to talk to him, but instead defendant proceeded on up the stairway. When the officer apprehended him on the second floor, he said his name was "Kay." He then sought to secure his release by twice offering money to his captor.

On the way to the police station one of the transportation officers asked defendant his name, to which he replied, "Samuel Koenig." When asked for his address defendant stated he had just arrived from New York and Chicago and gave his local address as Flower Street, but when the officer started to take defendant to that address he admitted he did not live there. He then gave an address in Chicago as his residence. He claimed to have arrived in Los Angeles on a plane which left Chicago at 6:30 a. m. on February 15th and arrived in Los Angeles at 1:15 p. m.

Defendant's trousers were removed. Suspenders were attached to the pants but no belt. On the inside of the trousers the officer noticed an inset with several hairs clinging to it. His socks were also taken for examination.

Defendant's waistline was found to be 50 inches. The waistband of his trousers measured 60 inches, and the inset 14 inches at the widest point. Defendant's clothing was turned over to a police chemist who, upon examining them, extracted numerous hairs. Hair was found on the inside of both trouser legs, in the crotch, in the rear part of the trousers, in the trouser cuffs; also inside defendant's suit coat, and in his socks. These hairs were placed in glass vials marked according to the place in the clothing from which they were taken. At least 35 hairs were found on the inside of the trousers. Known fur samples were brought to the chemist by an officer who had obtained them from the fur dealers, including Ranch Mink, Stone Marten, Silver Blue Mink, Breath of Spring Mink, and Silver Fox. Specimens from both sources were mounted on slides, marked according to source. The chemist compared the hairs from defendant's clothing with the known samples by means of a microscope. Further comparisons were made of hair taken from a cat, a rabbit and a squirrel. The chemist found there was a great similarity between some of the hairs taken from defendant's clothing and the Mink hair on the known samples; some of the hairs very closely resembled the sample marked "Ranch Mink." The hairs taken from the pants could not have come from a dog, cat, squirrel or rabbit; neither could they have been from the material of defendant's pants. According to Mr. Walsh, who had been in the fur business for over 20 years, a new Mink garment will shed hairs loosened in the cutting and assembling of the garment.

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[1] Walsh is the wholesale furrier in the Bankers Building; Bertz is the salesman of Giba-Friedman in the Spreckels Building.

Defendant did not take the stand. He did, however, produce a fur expert of many years' experience, from New York, who was critical of the police chemist's mounting of the hairs on the slides, and because of this alleged faulty mounting was not able to make comparisons. He did, however, find two hairs which had been dyed. He could observe a bluish tinge or cast on two or three hairs taken from inside defendant's pants. Also, he was able to determine that several other hairs found in defendant's trousers came from fur-bearing animals, two of which were light brown in color. The Weather Bureau report disclosed the maximum temperature on February 15th was 69 degrees, and on February 16th 63 degrees.

[1] Defendant's first contention is that the evidence is insufficient to support the verdicts. He first urges that the evidence fails to prove the corpus delicti. The proprietors of the two fur establishments and their employees had determined that certain furs were in stock just prior to defendant's arrival at their respective places of business. Shortly after his departure, the described furs were missing; they had not been sold; and the proprietors had given no one permission to take them from the storage vaults. Thus the corpus delicti was amply established in each case. People v. Dodson, 77 Cal.App.2d 389, 394, 175 P.2d 59; People v. Owens, 98 Cal.App.2d 485, 486–487, 220 P.2d 575.

[2–5] It is next contended that the evidence of defendant's connection with the thefts was not sufficient; that nothing more than strong suspicion of his guilt was shown; that the evidence was as consistent with innocence as with guilt. Whether the evidence is as compatible with innocence as with guilt was a question for the jury and not for this court. People v. Allen, 104 Cal.App.2d 402, 412, 231 P.2d 896; People v. Kendall, 111 Cal.App.2d 204, 244 P.2d 418. An appellate court will not review the evidence beyond the point of scrutinizing the record to determine whether there is substantial evidence that supports the inference of guilt. The judgment will not be reversed unless it can be said that it is not supported on any reasonable hypothesis. People v. Todd, 91 Cal.App.2d 669, 670, 205 P.2d 453; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Defendant lays emphasis on the fact that no one saw him take the furs in question, and that they were not found in his possession. Direct proof of burglary and theft is not necessary; they may be proved by circumstantial evidence. People v. Goodall, 104 Cal.App.2d 242, 247, 231 P.2d 119; People v. Owens, supra; People v. Johnson, 99 Cal.App.2d 717, 724–725, 222 P.2d 335; People v. Barrow, 62 Cal.App.2d 590, 594, 145 P.2d 42.

As to defendant's connection with the alleged offenses the record discloses in detail the evidence supporting the factual statement already recited. His continual adherence to loose-fitting garments, his reappearance in a top coat in spring weather, his two attempts to bribe the arresting officer, his use of fictitious names in presenting himself to his victims, his uniform manner of gaining entrance into the storage rooms, his thrice repeated statement that he had come to meet his wife to select a fur, his flight in the face of accusations, his prevarication concerning the date of his arrival in Los Angeles, and the discovery in his pants of hairs from furs—all these furnish substantial proof of his guilt. People v. Newland, supra, 15 Cal.2d at page 681, 104 P.2d 778; People v. Cooper, 81 Cal.App.2d 110, 117, 183 P.2d 67.

[6] The weight to be given the evidence was for the jury. It justifies an inference of defendant's unlawful entries and his asportation of the furs. The persuasiveness of this inference is accentuated by defendant's failure to testify. Here were incriminating circumstances. He alone knew how these hairs from fur-bearing animals came to be on the inside of his pants and in his socks. His failure to explain or deny this incriminating evidence supplied additional support for inferences unfavorable to defendant as to the source of such hairs. People v. Adamson, 27 Cal.2d 478, 490–491, 165 P.2d 3; People v. Steccone, 36 Cal.2d 234, 239, 223 P.2d 17. It cannot, therefore, be fairly said that defendant's conviction is based upon mere suspicion or that it is lacking in substantial evidentiary support.

Defendant's second point is that the court erred in failing to grant a mistrial. This contention is based on the conduct of certain photographers in their attempt to photograph the defendant in the court room at a time when the court was not in session but four jurors were in the jury box. Defendant was seated at the counsel table with his head down and with a handkerchief over his eyes. The photographers took pictures of defendant against his will. They tried to get him to expose his face; also, to have his picture taken with his oversize pair of pants. In support of his motion for a new trial based upon this incident defendant filed an affidavit in which he charged the photographers, in substance, with making the following comments: "Come on. Let's take your face and your baggy pants together. What are you hiding your face for? * * * Lift it up and let's take a picture of you. What is the matter with you? The jury will think you are guilty. These pictures of you hiding your face won't do you any good with the jury. Let's see your face."

The trial judge was immediately notified of this occurrence and upon reconvening court admonished the jury that the guilt or innocence of defendant was to be decided only upon the evidence introduced during the trial of the case and from no other source whatsoever, and further admonished them that "whatever any of you may have seen this morning is not evidence in this case; it is not to be considered by you in any way, shape or nature in deciding the issues which will be ultimately presented to you in this case."

[7] The motion for a mistrial was thereupon denied. This incident is also used as one of the grounds on the motion for a new trial which was denied. The rule regarding such situations is stated as follows in 66 C.J.S., New Trial, § 51, page 165: "A new trial ordinarily will not be granted because of remarks about the case, made during the trial to jurors, or in their hearing, by strangers to the litigation, where neither the successful party nor the jurors were at fault, unless such remarks probably influenced the verdict."

[8] While the conduct of the photographers was an unfortunate occurrence there is no showing of prejudice which cannot be assumed where neither the trial court nor the prosecutor was involved, and where the court admonished the jury to disregard the occurrence, calling the jury's attention to their duty to consider only the evidence admitted in the case. The trial court had an opportunity to consider the likely effect of this occurrence upon the jury and the likelihood of prejudice resulting to the defendant. His rul-

ings on both occasions are to the effect that no prejudice was shown. These determinations by the trial court are determinative on appeal in the absence of a clear abuse of discretion. We find no such abuse.

In People v. Pyle, 44 Cal.App. 130, 133, 185 P. 1019, 1021, "defendant filed two affidavits wherein it was stated that one Doyle had stated to defendant's attorney, outside the courtroom, and in the presence of some of the jurors, that he (Doyle) would 'fix' defendant, that defendant beat him out of some money, and that for what defendant's attorney had done he (Doyle) would have defendant arrested." In commenting on this situation the court said, "This, if true, was reprehensible; but, in the absence of a showing that such alleged statements influenced the verdict of the jury, we think it was not an abuse of discretion to deny defendant's motion" for a new trial.

In People v. Currie, 3 Cal.App.2d 31, 33, 39 P.2d 215, 216, it appeared from the testimony taken upon the hearing of defendant's motion for a new trial that "during the pendency of the trial, on an occasion when the jurors were leaving the courtroom following an adjournment, two or more of them were accosted by a person who as a witness for the prosecution had testified that she purchased stock in the company respecting which it was alleged that defendant had made false representations. This person stated to said jurors that she hoped the jury 'would be good to them' and would 'give us a square deal,' and that she was a widow 'and had lost her money.' None of the jurors replied. There was testimony that the trial judge was advised of the incident previous to the submission of the cause to the jury, and also that counsel for the defendant did not learn of it until after the verdict had been returned and the jury discharged." The defendant then contended the court erred in not admonishing the jury to disregard these remarks, and that the making of such remarks, plus the failure to give an appropriate admonition, entitled him to a new trial. The court held that while the trial court might properly have admonished the jurors to disregard the statements, it could not say the error, if any, was prejudicial or the refusal of a new trial was an abuse of discretion. These authorities furnish clear support for the action of the trial court.

[9] In the space of one-half a typewritten page in his brief, wholly devoid of any reference to the transcript, defendant contends that the court erroneously refused to permit him, prior to trial, to examine the debris found on his clothing and refused to permit his expert witness to examine the vials of retrieved hairs, thus inhibiting his preparation for trial and denying him "a right guaranteed by the Fourteenth Amendment to the Constitution of the United States." The only citation in support of this assertion is Rule 16, Federal Rules of Criminal Procedure, 18 U.S.C.A. A reading of Rule 16 immediately discloses that its language has no application to the practices in state courts, and cannot by the most strained interpretation be incorporated into the Fourteenth Amendment to the United States Constitution as a limitation on state action. Furthermore, there is no factual support in the record for defendant's claim that he was denied reasonable opportunity to prepare for trial. The record indicates that defendant's expert witness had access to the prosecution's exhibits prior to his testimony and that he was allowed to examine the hair mounted on slides under microscope and to make notes on his findings. He was able to use these findings in an attempt to rebut the testimony given by the police expert. The fact that there was a change in the condition of the exhibits through deterioration and obscurity did not deny defendant the opportunity to provide his rebuttal evidence. Furthermore, had defendant's expert deemed it necessary he could have improved the condition of the exhibits through the application of a chemical substance. Defendant's assertion that he was denied due process of law is without reasonable support in law or in fact. People v. Shafer, 101 Cal.App.2d 54, 59–60, 224 P.2d 778. See People v. Gatti, 167 Misc. 545, 4 N.Y. S.2d 130, 132.

[10] Defendant challenges the testimony of the police chemist upon two grounds: (1) the matters testified to by

him were a subject of common knowledge and not of such a character as to justify expert testimony; and (2) he was not an expert on furs. Comparing hairs of fur-bearing animals is a technical matter justifying, if not requiring, the use of a microscope. The average layman is not adept at comparing objects under such an instrument. It was therefore proper to permit an experienced and skilled person to give the jury the benefit of his expert comparisons. See People v. Horowitz, 70 Cal.App.2d 675, 689–690, 161 P.2d 833. In this connection it is to be noted that the defendant made use of an expert in this field.

The police chemist did not claim to be an expert on furs. His qualifications were that he was an expert in comparing objects under the microscope. His testimony was that he had compared the hairs from known samples of furs, which had been furnished by the furriers, with those which were found on the inside of defendant's clothing, and that he found certain similarities. It is to be recalled that defendant's expert substantiated the testimony and conclusions of this witness in certain particulars. It was not necessary for him to be an expert on furs in order to give such comparative testimony. It was, of course, for the jury to determine the weight that should be given to such evidence. People v. Tucker, 88 Cal.App.2d 333, 340, 198 P.2d 941.

[11] Defendant also complains of the admission in evidence of the fur samples on the grounds: (1) that they were incompetent, irrelevant and immaterial, and (2) no proper foundation had been laid. There is no merit in either of these contentions. The stolen furs were established to be of the Mink family of different types, and it may be reasonably inferred that the hairs from other similar furs would have a similar appearance, so as to be of assistance in establishing the character of the hairs found in defendant's clothing. It was proper, therefore, to receive in evidence these samples for purposes of comparison. See People v. Miner, 96 Cal.App.2d 43, 51, 214 P.2d 557. The foundation for the introduction of these samples was clearly laid by the testimony of Mr. Walsh and Mr. Bertz who identified the type of fur from which the samples were taken.

[12, 13] Defendant complains of the trial court's refusal to give a series of proposed instructions to the effect that in order to consider the hairs that were found in defendant's clothing for any purpose the jury must find beyond a reasonable doubt that they came from the stolen furs, otherwise a not guilty verdict would be necessary. Such instructions were improper for two reasons: (1) They would have precluded a conviction based upon the other facts and circumstances in the case, and (2) no inference could be considered unless such inference was established beyond a reasonable doubt. "It is not the law, * * that each fact in a chain of circumstances that will establish a defendant's guilt must be proved beyond a reasonable doubt. (Citations.) The doctrine of reasonable doubt applies to proof of *guilt* and not to the establishment of each incident or event inculpating the defendant. (Citation.) A reasonable doubt that would warrant acquittal is one that results or arises from a 'consideration of all the evidence' in the case." (Citations.) People v. Klinkenberg, 90 Cal.App.2d 608, 632, 204 P.2d 47, 62, 613.

[14] There was no error in the court's refusal to instruct that if the jury believed the defendant possessed the hairs by accident or in some other innocent manner a verdict of not guilty was required. There was no evidence that would justify such an instruction.

It is unnecessary to go into further details respecting other instructions which the court rejected because an examination of the instructions which were given shows that they were fair and comprehensive, and clearly and adequately stated the rules essential for the jury's guidance in determining the issues in this case.

The judgment and order denying a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, and SCHAUER, JJ., dissenting.

112 Cal.App.2d 700

MUTASCIO v. BARTOLUCCI et al.

Civ. 15093.

District Court of Appeal, First District, Division 1, California.

Aug. 18, 1952.

Rehearing Denied Sept. 17, 1952.

Hearing Denied Oct. 16, 1952.

Action by J. Alfred Mutascio against Louis Bartolucci, the Anglo California National Bank of San Francisco, a corporation, and others to recover the reasonable value of services rendered at request of defendants. The Superior Court for the City and County of San Francisco, Theresa Meikle, J., granted a nonsuit and from that portion of order granting the nonsuit as to defendant bank, plaintiff appealed. The District Court of Appeal, Wood, J., held that proof of oral agreement to pay plaintiff a commission for his services and use of his liquor licenses was inadmissible under parol evidence rule.

Portion of order appealed from affirmed.

1. Evidence ⚷441(9)

Where terms of written contract for purchase and sale of wine by bank through use of an individual's liquor licenses were not ambiguous and provided, as contingent compensation to licensee for his services that he should receive any proceeds of sale remaining after payment of purchase price of wine and extinguishment of obligations of named winery to bank, proof of oral agreement between licensee and bank for payment of a commission to licensee for his services and use of his liquor licenses was inadmissible, under parol evidence rule, in absence of mistake, illegality or fraud. Civ. Code, § 1625; Code Civ.Proc. § 1856.

2. Appeal and Error ⚷837(11)

Evidence of an oral agreement incompetent under parol evidence rule, even if admitted in evidence, with or without objection by adverse party, may not be considered upon the review of a judgment of nonsuit. Civ.Code, § 1625; Code Civ. Proc. § 1856.

◆

Albert Picard, San Francisco, Raymond N. Baker, San Francisco, of counsel, for plaintiff.

Frederick M. Fisk, W. Burleigh Pattee, Chickering & Gregory, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff brought this action against the defendants, alleging two causes of action; one, for $1,026 as compensation for services rendered at the agreed rate of $400 a month, and the other, for $2,000 as the reasonable value of services rendered at the request of the defendants. Upon the conclusion of plaintiff's case in chief, the defendants moved for and the court granted a nonsuit as to each of the counts. Plaintiff appeals from that portion of the order granting the nonsuit as to the second count and the defendant bank. He does not appeal from the portions of the order that relate to the first count or to the individual defendants.

The sole question is whether or not it is competent for plaintiff to prove an oral agreement between him and the defendant bank for the payment to him of a 2 per cent commission for his services and the use of his liquor licenses in purchasing for the bank 100,000 gallons of sweet wine. The parties executed a written agreement which dealt with this transaction but did not therein provide for payment of a commission to plaintiff.

It appears that the defendant bank was engaged in selling certain wine pledged to the bank by the Oakville Winery to secure an indebtedness of the winery to the bank. In the course of time, the only wines remaining unsold were dry wines. Under prevailing market conditions it was not feasible to sell them except in conjunction with the sale of sweet wines. After some negotiations an arrangement was made for the acquisition of 100,000 gallons of sweet wines by the use of certain licenses which the plaintiff had and which the bank did not have. These negotiations, which took place during October, 1947, resulted in a written agreement dated October 29, 1947, executed by California Grape Products Corporation as first party, by plaintiff J. Alfred Mutascio, as second party, and defendant The Anglo California National Bank of San Francisco, as third party. The first party agreed to sell 100,000 gallons of California sweet wine at 50 cents per gallon or the total sum of $50,000, and the second party agreed to buy the same. The third party agreed to pay the first party the $50,000 as the purchase price for the wine on the condition that title and possession of the wine would remain with the first party, subject to the direction and control of the third party until the third party should notify the first party in writing that the second party had paid the third party the full purchase price or had been released from the obligation to do so by the third party. The second party agreed to execute a non-negotiable demand note payable to third party and secured by the wine. First party agreed to deliver the wine to second party or to such person as third party should designate. Third party agreed to credit second party with payment upon the note for such portion of the wine as third party should fail within six months to direct first party to deliver to second party. Second party agreed to use his best efforts to dispose of the wine delivered to him by first party upon written instructions of third party. Third party agreed from time to time to release to second party upon trust receipts such amounts of the wine as should be determined by third party; second party, upon sale thereof, to account to third party for the proceeds, "which proceeds the third party shall apply first towards the payment of interest and then principal due on the demand note. * * * After the entire principal and interest of said demand note has been paid, the remainder of said proceeds shall be applied by the third party towards the extinguishment of the obligations of the Oakville Winery to the third party, * * Upon the extinguishment of said obligations, if there be any remainder, such remainder shall be returned to the second party." This contract also gave the third party the right and option at any time to take delivery for its own account of the undelivered portion of the wine upon crediting second party with payment upon the note of an amount equal to the purchase price of the undelivered gallons of wine.

[1] For his part in this transaction (buying and selling the wine, and accounting for the proceeds of sale) plaintiff would own all of the proceeds, if any, remaining after payment of the purchase price of the wine and the extinguishment of the obligations of the Oakville Winery to the bank. That is the very subject matter of the asserted oral agreement, compensation for the purchase of the wine through the use of plaintiff's licenses. We find here no basis for an exception to the rules that the "execution of a contract in writing * * * supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument", (Civ.C., § 1625) and that "[w]hen the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties * * * no evidence of the terms of the agreement other than the contents of the writing" (Code of Civil Proc., § 1856). The terms of the writing are not ambiguous, and there is no issue of mistake, illegality, or fraud.

Plaintiff seeks to characterize the asserted oral agreement as collateral, but his cases do not support him. In Webber v. Smith, 24 Cal.App. 51, 140 P. 37, the owner of a milk route delivered a bill of sale of vehicles and other tangible property which recited payment of $2,625. That did not preclude him from proving a separate oral agreement for the sale of the goodwill of the business for an additional sum. As stated by the court "the subjects dealt with in the bill of sale were distinct and separate from that about which it was claimed an oral agreement had been made. The bill of sale specified and covered the tangible property. The intangible property was, according to plaintiff's testimony, the subject of a separate agreement which it was the intention of the parties to express in writing, but which was not reduced to that form. The mere fact that it had been the intention to make a writing covering the conditions of the sale of the milk route, and that such writing had never been made, would not affect the validity of the contract as it was represented to have been made by the plaintiff, nor entitle it to be viewed in any other light than that of a completed transaction, except as to the execution of it." 24 Cal. App. at page 53, 140 P. at page 38. Torrey v. Shea, 29 Cal.App. 313, 155 P. 820, was simply a case which involved three separate written contracts for the sale of hops grown on a certain ranch, one contract for the 1909, another for the 1910 and still another for the 1911 crop. It was competent to show that these contracts were signed at the same time and that the parties orally agreed that the three were in fact a single contract. The law recognizes that "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together" (Civ.Code, § 1642). Also, the oral agreement did not contradict or vary the terms of the writings. In Gardiner v. Burket, 3 Cal.App.2d 666, 40 P.2d 279, it appeared that a land-owner who had executed a community oil lease was allowed to show an oral agreement with the lessee to the effect that the lessee would compensate the land-owner for removing a dwelling house from the demised property. The lease was silent as to this subject and the agreement was distinct from the lease.

The facts of the instant case are more like those in Cameron v. Ayres, 175 Cal. 662, 166 P. 801. There the parties had entered into a written contract whereby the plaintiff agreed to negotiate a loan for defendant for the erection of a building and defendant agreed to erect a building and employ plaintiff to superintend its construction and pay him 10 per cent of the cost of construction. In view of that writing, it was held incompetent for plaintiff to prove an asserted oral agreement by the defendant to pay him a commission for obtaining such a loan.

[2] In the instant case the asserted oral agreement was for the payment of compensation for the purchase of the wine through the use of plaintiff's licenses. The subsequent written agreement contains a provision contingently compensating plaintiff for such services, and constitutes an integrated agreement. Proof of the asserted oral agreement is precluded by the parol evidence rule. Such proof is incompetent as a matter of law. Even if admitted in evidence, with or without objection by the adverse party, it is not available for consideration upon the review of a judgment of nonsuit. See In re Estate of Gaines, 15 Cal.2d 255, 264–265, 100 P.2d 1055, and Hanrahan-Wilcox Corp. v. Jenison Mach. Co., 23 Cal.App.2d 642, 644–645, 73 P.2d 1241.

The portion of the order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

112 Cal.App.2d 638

In re TEED'S ESTATE.

HOUGH et al. v. HOUGH et al.

Civ. 18937.

District Court of Appeal, Second District, Division 1, California.

Aug. 11, 1952.

Proceedings in the matter of the estate of Ida Teed, wherein the Superior Court, Los Angeles County, Thurmond Clarke, J., ruled in favor of the contestants, James Hough and others, and refused probate to the will, and Helen Hough and others, proponents, appealed. The District Court of Appeal, Doran, J., held that the evidence would not sustain the trial court's finding of mental incompetency.

Reversed.

1. Wills 🔑386

On appeal from judgment refusing probate because of mental incompetency of the testatrix, power of appellate court would begin and end with determination as to whether there was any substantial evidence to support conclusion that testatrix had been of unsound mind at time of executing will.

2. Appeal and Error 🔑1001(1)

To preclude reviewing court from disturbing verdict, it is essential that supporting evidence be such that reasonable men will not reasonably differ as in concluding that evidence establishes plaintiff's case, but improbable conclusions drawn in favor of party litigant through sanction of jury's verdict will not be sustained on appeal where testimony is at variance with physical facts and repugnance is material and self-evident.

3. Wills ⚿55(1)

Evidence would not sustain conclusion that testatrix had been of unsound mind at time of executing will sought to be probated.

4. Wills ⚿31

It is not every mental departure from normal which will destroy testamentary disposition, and mental derangement sufficient to invalidate will must be insanity in one of two forms: (1) insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which testator is the victim of some hallucination or delusion; and in addition evidence must establish that will itself was creature or product of such hallucination or delusion.

5. Wills ⚿55(4)

Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon, and have influenced, the testamentary acts.

6. Evidence ⚿568(2), 571(2)

Without some substantial basis therefor, a lay opinion as to testamentary capacity is without value, and likewise, the ipse dixit of the most profound expert proves nothing except it finds support upon some adequate foundation.

7. Wills ⚿52(1)

Presumption is that testatrix is competent, and substantial evidence other than guesswork and general conjecture should be required to rebut such presumption.

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Nixon A. Lange, Huntington Park, for appellants, Helen Hough and Mabel Croy.

Cosgrove, Cramer, Diether & Rindge, John N. Cramer, Jesse R. O'Malley, Los Angeles, for appellants, Childrens Hospital of Los Angeles.

M. Lewis Lehman, Dockweiler & Dockweiler, Los Angeles, for respondents.

DORAN, Justice.

The judgment herein refused probate to a will of the decedent, Ida Teed, executed on January 25, 1949, on the ground of mental incompetency. The decedent, a maiden lady aged about 93 years, died on January 31, 1949. The trial court found that there was no undue influence and no fraud. The appellant Helen Hough is a grandniece of Miss Teed; appellant Mabel Croy is a niece; appellant Childrens Hospital is a beneficiary under the will of January 25, 1949. Contestants and respondents James Hough and Edith Pazdernick, the decedent's nephew and niece, claimed as beneficiaries under a previous will dated October 15, 1948.

Appellants' contention is that the record discloses no substantial evidence "to show that Miss Teed had a mental sickness of such a degree that it incapacitated her from making a valid will". In regard to mental competency, it is urged that the trial court did not follow principles of law repeatedly laid down by the courts of this state, and that the "uncontroverted evidence affirmatively proves the competency of the testatrix on January 25, 1949". Conversely, the respondents assert that there is substantial evidence in support of the findings.

It appears from the record that Ida Teed, a Columbia graduate, was a retired school teacher and had been an art instructor in the New York and Los Angeles public school systems. In August of 1948, decedent was admitted to Good Samaritan Hospital in Los Angeles, then being acutely ill from a stomach hemorrhage. According to Dr. Urabec, decedent's physician, Miss Teed's condition improved after September, 1948. Likewise, an orthopedic specialist, Dr. Chappel, testified to decedent's improvement to such an extent that the patient was able to walk. On November 20, 1948, Miss Teed was discharged from the Good Samaritan Hospital and entered Longwood Manor Sanatarium where death occurred on January 31, 1949.

The respondents rely upon the principles enunciated in Estate of Teel, 25 Cal.2d 520, 154 P.2d 384, 387, as follows: " 'the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case. * * * It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is *any substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.' " (Respondents' italics.) It is appellants' contention that the "six items of evidence which they (respondents) contend constitute substantial evidence that Miss Teed was incompetent at the time she executed the will", do not meet the requirement of "substantial" evidence, within the meaning of the above rule.

The items relied upon by respondents as "substantial" evidence of Miss Teed's mental incompetency, comprises (1) the testimony of Jane Morgan, an acquaintance; (2) decedent's hospital chart; (3) medical testimony of Dr. J. M. Lacey; (4) testimony in response to a hypothetical question propounded to Dr. Victor Parkin, a psychiatrist; (5) previous wills executed and unexecuted by the decedent; (6) "failure of Ida Teed to know and comprehend the nature and extent of her property on January 25, 1949". A resume of this evidence is essential to an understanding of the case. Unless the sum total of these items meets the above requirement, it must be assumed that the trial court's conclusion was wrong, both in fact and in law.

Jane Morgan testified to having known the decedent for some 18 years, visiting Miss Teed periodically, the last conversation being at the sanitarium on January 20, 1949; that the witness found Miss Teed "failing rapidly"; that "she would talk very fast and her breath was very short, and I was fearful she might have a heart attack, so I asked her not to talk. * * * She seemed very excited and she was trying to tell me something but I couldn't understand her". On cross-examination it was brought out that decedent had "difficulty in enunciating", but the witness thought that "if she knew what she was saying I could have got a drift of what she was trying to tell me regardless of whether she was enunciating clearly or not". When asked as to "the soundness or unsoundness of the mind of Miss Teed", the witness replied, "Well, my opinion was her mind was affected. Q. That she was of unsound mind? A. Unsoundly, yes." The witness did not discuss decedent's property or relatives, and had "no information with respect to her property or with respect to her relatives".

Decedent's hospital chart for January 24, 25 and 26, 1949, is the second item relied on as affording substantial evidence of mental incompetency. The notations for January 24 merely disclose that Miss Teed complained of various pains, was "Up in chair while eating" at 1:30, and shortly thereafter was "Reading paper"; pulse was "regular" and "unchanged", and respiration "normal". On January 25, the date when the will in question was executed, the patient was "very nervous at 7:00 A.M."; after eating breakfast complained of tightness in chest and exhaustion, "wants to read but goes to sleep". At 4:00 P.M. the patient was "more comfortable—reading. Dr. Urabec here. Ate well—visiting nurse while eating". At 6:00 P.M., "patient appears improved this P.M.". According to the chart, "Mr. Olson & Mr. Martin" (attorneys) were there after decedent finished lunch at 1:00 P.M., at which time, according to the attorneys' testimony, the will was executed after Miss Teed had read and discussed the will, "expressed her desires", and had remarked, "This Will will certainly make my relatives mad". The chart indicates that on January 26, the patient was complaining, uncomfortable and nervous, and had "a poor day". The chart contains no notations concerning Miss Teed's mental condition.

According to respondents' brief, "The testimony of Dr. J. M. Lacey definitely shows that decedent was of unsound mind January 25, 1949". The witness, a physician of

25 years experience, specializing in "internal medicine diagnosing", with six months experience in a psychiatric hospital, first met Miss Teed two years before death; had seen decedent professionally on two occasions in September, 1948 at Good Samaritan Hospital, spending a total of approximately two or three hours with the patient. Dr. Lacey gave the patient's history as including gastro-intestinal hemorrhage prior to entering the hospital and a stroke of paralysis about September 1, 1948, with a high degree of arteriosclerosis. Dr. Lacey stated that Miss Teed "seemed to be very much of a crotchety old lady. She was 93 years old, and nothing would please her", and then expressed an opinion "that anyone with a history that she had * * * never does recover their mental equilibrium, so that their judgment is worth anything". With this basis, the physician concluded that when the will was executed, Miss Teed "was of unsound mind".

The fourth item of evidence alleged to constitute substantial proof of Miss Teed's incompetency is the testimony of Dr. Victor Parkin, a psychiatrist, who had never seen the patient. In response to a hypothetical question, the witness expressed an opinion that Miss Teed "was so far mentally enfeebled as to be of unsound mind". On cross-examination, in answer to the question, "And to make a sound psychiatric judgment of an individual some personal observation of that individual should be made * * *?" the witness replied, "It is always desirable to form your own opinion from your observations and examination".

Dr. Parkin was read a statement written by decedent on December 13, 1948, saying, "I am going to re-read Toynbee. In fact I have to read it several times to get the most out of it. Toynbee's or rather, the inferences from his book, are just what today thoughtful people are fearing. * * I just opened Churchill's book you just sent me, and there is the same idea—a warning that our present civilization is in peril. That's what I get from Toynbee. It is not a thought to raise one's spirits". In answer to the question, "Would you state the author of that statement was of unsound mind, Doctor", the witness responded, "It doesn't sound like it to me".

Former wills and proposed wills of the decedent, "in sharp contrast" to the will in question, make up the fifth proposed item. In this connection respondents refer to Estate of Mullen, 8 Cal.App.2d 684, 686, 47 P.2d 746, 747, where it is held that "A previously executed testamentary writing, conflicting with the propounded instrument, executed voluntarily and while decedent had recognized mental capacity, is an evidentiary fact from which undue influence or unsoundness of mind at the time of the later writing might be inferred, there being no explanatory facts." Appellants have commented on the fact that "The case is not in point for * * * in the case at bar there was a very great deal of evidence introduced as to why Miss Teed changed her will and made a bequest to the Childrens Hospital * * *".

Respondents' sixth and last "item of substantial evidence", claimed to support the trial court's finding of incompetence, is "the failure of Ida Teed to know and comprehend the nature and extent of her property on January 25, 1949". According to appellants' brief, "The argument appears to be this, that since Miss Teed used a layman's words 'personal property' when she meant 'personal effects' this is substantial evidence that Miss Teed was incompetent on the day she executed the will in question. Merely to state the proposition is to answer it. Proponents' argument is addressed to the construction of the will, not to the competency of the testatrix".

[1] Since, according to the well-established rule as expressed in Estate of Teel, 25 Cal.2d 520, 154 P.2d 384, 387, hereinbefore mentioned, "the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence," to support the conclusion that the testatrix was of unsound mind at the time of executing the will in question, it becomes necessary to consider the meaning of the italized word "substantial".

Webster's International Dictionary defines the word as follows: "Consisting of, pertaining to, of the nature of or being, substance, existing as a substance; material". Its meaning is further defined as "not seeming or imaginary, not illusive, real, true; important, essential, material, having good substance; strong, stout, solid, firm". The word means "considerable in amount, value or the like; firmly established, solidly based." Synonyms are "tangible, bodily, corporeal, actual, sturdy, stable".

[2] "Substantial evidence", according to 40 Words and Phrases, pages 499, 500, where many definitions are collected, is evidence "which, if true, has probative force on the issues". It is more than "a mere scintilla," and the term means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion", citing Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126. To preclude a reviewing court from disturbing a verdict, it is essential that the supporting evidence be "such as will convince reasonable men who will not reasonably differ as to whether evidence establishes plaintiff's case", quoting from Morton v. Mooney, 97 Mont. 1, 33 P.2d 262, 263. And as said in Missouri Pac. R. Co. v. Hancock, 195 Ark. 414, 113 S.W.2d 489, "improbable conclusions drawn in favor of a party litigant through the sanction of the jury's verdict will not be sustained on appeal where testimony is at variance with physical facts and repugnance is material and self-evident".

[3] The sum total of the above definitions is that, if the word "substantial" means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case. Applying the foregoing definitions, and having regard for the well-established legal standards of testamentary capacity, it cannot justly be said that the trial court's conclusion to the effect that Miss Teed was mentally incompetent, is supported either by law or by "substantial" evidence. To sanction such a conclusion herein would in effect amount to a judicial pronouncement that old age with its accompanying disabilities is an almost insurmountable obstacle to the execution of a valid will. Such is not the law either in this state or elsewhere.

[4] The rule of testamentary capacity is well stated in the recent case of Estate of Lingenfelter, 1952, 38 Cal.2d 571, 581, 241 P.2d 990, 996, where the Supreme Court says: "The most that can be drawn from all of the accounts of her conduct is that she was ill, weak, highly nervous and excitable, and prone to violent outbursts of neurotic temper. The acts which led certain witnesses to express the opinion that she was of unsound mind had no bearing upon her testamentary capacity." The court then quotes from Estate of Perkins, 195 Cal. 699, 703, 235 P. 45, 47, as follows: "'Every mental departure from the normal will not destroy a testamentary disposition, * * *. Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. * * * The evidence must establish that the will itself was the creature or product of such hallucination or delusion; that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument.'"

[5] Particularly applicable to the instant case is the following quotation from the same opinion: "Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act". At most, the alleged supporting evidence relied upon by respondents merely presents an ordinary, clinical picture of a very old lady, beset with various physical ills. This, under the rule just stated, is insufficient to disqualify a testatrix from testamentary disposal.

The witness Jane Morgan found Miss Teed "failing rapidly", and unable to enunciate clearly, and thought the patient's mind "was affected". Dr. Lacey characterized the patient as a "crotchety old lady" whom "nothing would please", and opined that "anyone with a history that she had * * * never does recover their mental equilibrium". Dr. Lacey admittedly had no personal knowledge of Miss Teed's condition since in September, 1948, several months before the will was made, at which time the doctor had seen the patient on two occasions. Dr. Parkin, who had never seen decedent, was confronted with Miss Teed's letter, written December 13, 1948, and containing an intelligent discussion of books by Toynbee and Churchill. In answer to the question, "Would you say that the author of that statement (Miss Teed) was of unsound mind?" stated, "It doesn't sound like it to me".

The hospital chart makes no mention of any mental unsoundness or of any facts from which such an inference might be drawn. On the contrary it particularly notes that although nervous and uncomfortable, on the day the will was made Miss Teed was able to read, visit with a nurse, and to confer with attorneys.

The other items of evidence relied upon as showing incompetency, namely, former wills making other dispositions of property, and Miss Teed's use of certain language in the will here in question, add nothing to the sum total so far as proving any mental disqualification. The very purpose of making a new will, in most instances, is to effect a change in disposition of testator's property. Also, the use of nonlegal terms in testamentary instruments casts no slur upon a testator's competency even though a court may later be called upon to interpret such terms.

[6] A survey of the entire record indicates that only by the use of conjecture and surmise, or by effecting a complete change in the law of testamentary capacity, can the judgment be sustained. So far as opinion evidence is concerned, it is fundamental that without some substantial basis therefor, a lay opinion is without value. Likewise, the *ipse dixit* of the most profound expert proves nothing except it finds support upon some adequate foundation.

The record is full of letters from Miss Teed bearing dates all the way from October 28, 1948 to a week before death, in which are intelligently discussed all sorts of business, financial, social and other matters with a definiteness and understanding apparently well above average. Such matters as tax returns, trust distribution, accounts and bookkeeping, receive such attention as could only come from a keen, intelligent mind. Testimony of the two attorneys who prepared the last will indicate that the testatrix read and fully understood the document, and understandingly said, "Mr. Olson, this will make my relatives mad", which the present litigation proves to have been a correct prophesy.

[7] As hereinbefore indicated, the present inquiry involves not only the matter of "substantial" evidence, but more important still, the correct law of testamentary capacity. That the courts of this state have shown no tendency towards restricting or altering the long established rule is evidenced by the recent case of Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990, hereinbefore mentioned. Neither in that case, nor in any other, can expression of law be discovered which can be legitimately construed as disqualifying the testatrix herein. The presumption is that a testatrix is competent, and substantial evidence other than guesswork and general conjecture should be required to rebut such presumption. Such evidence does not appear in the instant case.

Even though testatrix had reached the age of 93 years, was sick, feeble and failing, and even though the patient had a history of arteriosclerosis and other concomitants of old age, the same rule exists. As said in appellant Childrens Hospital's brief, "Giving respondents the benefit of every legitimate inference possible from the record, the fact stands out that they have not brought the case within the rule".

The judgment is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

112 Cal.App.2d 691

DI MARIA et al. v. MITCHELL et ux.

Civ. 15021.

District Court of Appeal, First District, Division 1, California.

Aug. 18, 1952.

Joseph F. DiMaria and Philip A. DiMaria, as copartners, doing business under the firm name and style of DiMaria and DiMaria, brought action against Tom Mitchell and wife to recover attorneys' fees. The Superior Court, County of Santa Clara, Gregory P. Maushart, J., entered judgment adverse to plaintiffs, and they appealed. The District Court of Appeals, Peters, P. J., held that certain instruction was prejudicially erroneous.

Judgment reversed.

1. Accord and Satisfaction 🔑22(1)

In action by attorneys against clients to recover attorneys' fees, trial court erred in refusing to allow attorneys to offer proof that if an accord and satisfaction had been entered into, as contended by clients and as denied by attorneys, attorneys had, in fact, rescinded the accord and satisfaction.

2. Appeal and Error 🔑205

No offer of proof is required, in order to permit review on appeal of exclusion of evidence, when an entire class of evidence is excluded, and relevancy of such class of evidence is apparent.

3. Evidence 🔑265(1)

A party against whom an admission operates may explain it if he can. Code Civ.Proc. § 2052.

4. Appeal and Error 🔑1064(1)
Attorney and Client 🔑167(3)

In action by attorneys against clients to recover attorneys' fees, wherein attorneys testified as to express contracts for rendition of certain services, instruction that if from evidence, jury found that agreement relating to fees was reached between attorneys and clients after relationship already existed between them, and that there were special relations of confidence existing in that relationship, or that attorneys failed to disclose fully to clients extent of services already performed and those to be required under agreement, then, regardless of terms of agreement, utmost limit of recovery to which attorneys were entitled was reasonable value of services actually rendered, was prejudicially erroneous.

◆

DiMaria & DiMaria, Palo Alto, in pro. per.

Crist, Stafford & Peters, Elton F. Martin, Palo Alto, for respondents.

PETERS, Presiding Justice.

Joseph and Philip DiMaria, brothers and partners in the practice of law, brought this action against Tom Mitchell and his wife to recover $6,652 attorneys' fees, it being alleged that as to certain of the services rendered there was an agreed fee, while as to the balance there was no express agreement and the reasonable value of such services is sought. The answer alleges full payment for all services rendered, and further alleges an accord and satisfaction whereby defendants paid plaintiffs, and they accepted, $1,000 in full satisfaction of all claims. The jury brought in a general verdict in favor of defendants. From the judgment entered on that verdict the plaintiffs appeal.

The DiMarias practice law in Palo Alto. Except for one item of service, Joseph DiMaria rendered the services which are the subject of this action.

The evidence shows that the DiMarias and Mitchell became acquainted in May or June, 1947, and that for a year and several months thereafter certain services were rendered by the DiMarias for Mitchell. The DiMarias claim that all such services were legal services for which they expected to be paid, while Mitchell claims that some of these services were social, for which payment was not expected, or were rendered for other parties involved in such transactions. The DiMarias divided up the work for which they claim compensation, into eight categories.

1. Mitchell owned a large building in Belmont known as the Belle Monti Country Club. The club property had been sold off

and subdivided so that the club building was surrounded by small homes. The area was zoned for residential purposes only. Mitchell was desirous of getting the club rezoned so that he could operate a night club there. Joseph DiMaria attempted to secure this result, and, when unsuccessful, sought successfully to get a rezoning so that the building could be remodeled into an apartment house, and, when that project failed to materialize, discussed with the authorities the possibility of rezoning for an educational use, and finally secured a rezoning so that the building could be sold to and used by a research foundation. Joseph testified also to services in exchanging the club property for certain property in San Jose owned by the foundation, and leased to a Safeway store. Joseph testified that he made six to eight appearances before the planning commission and city council of Belmont, that he spent many hours discussing the problems with Mitchell, and that he spent at least 300 hours in research, in connection with the problems involved. Joseph also testified that he had an express agreement with Mitchell in reference to these services, Mitchell agreeing to pay, and he to accept, $2,250 for these services. Joseph admitted that while these services were being rendered Mitchell paid him $500, which he credited on the club account. Admittedly the foundation, the other party to the exchange of the properties, paid Joseph $220 for his services to them on that deal.

Mitchell testified that he never formally hired the DiMarias; that he knew Joseph socially and saw him frequently; that DiMaria simply took it upon himself to help out as a social courtesy. The experts called by each side differed widely as to the reasonable value of these services. Plaintiffs and their expert fixed the reasonable value at $2,250 to $2,500, while defendants' experts fixed the value at $750 to $1,000.

2. The second item of service was rendered by Philip DiMaria who handles tax matters for the firm. He testified that he was hired by Mitchell to represent him in attempting to secure a reduction of a claimed income tax deficiency. He further testified that he saved Mitchell $404.70, and that his agreement with Mitchell was for a minimum fee of $25 plus one-half of any saving. Thus, he claimed an agreed fee of $202.35 for these services, which include a treasury department hearing and several conferences. Mitchell admitted hiring the firm for this service, denied the express agreement for a contingent fee, and denied ever receiving a bill for this service.

3. The plaintiffs claim $250 as the reasonable value of services rendered by them in connection with the Safeway store property received by Mitchell in exchange for the club property. Joseph claims that he helped to negotiate a loan on this property, but this was denied not only by Mitchell, but also by the president of the bank who made the loan, he testifying that DiMaria had nothing to do with the loan. Joseph also testified as to certain services in connection with the insurance on the property, and with the further renting and possible sale of the property. He estimated the total time spent on this item as twenty-five or thirty hours. Mitchell denied ever hiring plaintiffs to perform any service in connection with this property. One of the experts for defendants fixed $100 as the reasonable value of these services, while the other opined that the services were worth $250. Plaintiffs' expert testified that the services were worth from $200 to $400.

4. Plaintiffs next claim $1,000 as the reasonable value of services rendered in connection with the El Mar Bar, sold by Mitchell to Palmer and Rossi. The purchasers had defaulted and finally Joseph helped to work out a compromise whereby Mitchell surrendered $500 of his claim and was paid $5,000 in cash, after the purchasers refinanced their loan. DiMaria testified as to the negotiations had by him, the documents he prepared and the filing of two lawsuits, all of which took between fifteen and twenty hours of time. He also testified that, although there was no express contract for a fee, he treated this transaction as being on a contingent basis, and believed that since he had recovered $5,000, $1,000 would be a fair fee. After Mitchell received the $5,000 he paid Joseph $500, which Joseph credited to this account.

The experts for defendants fixed the reasonable value of the services here rendered as $120 and $250, while plaintiffs' expert fixed it at $1,250.

5. Plaintiffs next claim $750 as the reasonable value of services rendered Mitchell in connection with the Club Casino. Mitchell had sold this business to the Christianas and took back a promissory note for $28,000, payable in monthly installments at the rate of $1,000 a month, and secured by a chattel mortgage on the fixtures. The Christianas defaulted and DiMaria ultimately collected $1,000 from them before they ended up in the board of trade. Joseph testified as to the difficult legal research performed by him in this matter, and as to three trips to San Francisco required in connection with the negotiations. Plaintiffs' expert fixed the reasonable value of these services at $600, while one of defendants' experts fixed it at $100, and the other at $230.

6. The DiMarias claim $250 for services rendered in securing a default judgment against the Christianas. Admittedly they brought suit against the Christianas on two open accounts, one for $301 and one for $500, and on a promissory note for $350. A default judgment in those amounts was secured, together with an allowance of attorneys' fees in the amount of $50. Mitchell challenges the validity of the judgment on the ground that it was signed only by the court clerk, contending that a judgment including attorneys' fees must be signed by the judge. A judicial sale was held of some of the fixtures involved, and Mitchell bid in the property at such sale. The Christianas ultimately were thrown into bankruptcy. Joseph testified that he spent six to eight hours on this problem, that there was no agreement as to the amount of fee for this service, but that he treated it as a contingent matter and believed a $250 fee to be reasonable. Defendants' experts fixed the reasonable value at $250 and $100 respectively.

7. Joseph also filed suit and secured an *ex parte* restraining order against the Christianas preventing them from removing and disposing of certain fixtures. Two hearings on a motion to dissolve this order were had, whereupon all concerned stipulated that it should remain in force until the further order of the court. Joseph testified that he spent ten or eleven hours on this transaction, that there was no agreement as to the fee, and that the services were reasonably worth $200 or $250. The two experts for defendants opined that the services were worth $100 and $150 respectively.

8. The last item involved relates to a three-acre piece of unimproved property owned by Mitchell and located near an establishment referred to as Dinah's Shack. Joseph testified to securing permission from the proper officials to subdivide this property, of helping refinance it, and various incidental services. He devoted ten to fifteen hours to this problem, admitted that there was no agreement for a fee, and believed $250 to be a reasonable fee. Defendants' experts fixed the reasonable value at $100 and $50 respectively. Mitchell denied any hiring at all as to this item, claiming that Joseph was desirous of including in Mitchell's subdivision some nearby property owned by Joseph. This was denied by Joseph.

As to several of the transactions involving the prospective sales of some of the properties, Mitchell testified that Joseph was acting as attorney for the real estate broker involved, who was a client of the DiMarias, and was not acting as attorney for Mitchell.

In addition to the defense that the DiMarias had been paid in full for all services rendered, Mitchell pleaded and attempted to prove, an accord and satisfaction. He first testified as to the payment of the first $500, and then testified to meeting Joseph at a restaurant in August of 1948. Mitchell testified that at that time he handed Joseph $500 and "told him the case was closed and that was the end of that. * * I just told him that I sold everything, I didn't need him any more and I was closing the bill. He accepted it. Q. And he accepted that $500? A. That's right, the full payment." Joseph admitted meeting Mitchell at the restaurant on the day in question, but denied then receiving or accepting the $500, testifying that Mitchell left a $500 check for him at the restaurant and that he called for it and cashed it several days later. He testified that there was no agreement to accept it in full payment.

This testimony as to an accord and satisfaction is important because the evidence shows that Mitchell paid the DiMarias $1,000, that they also received $220 from the research foundation, and that even defendants' experts admitted that the services as testified to by plaintiffs were reasonably worth more than the amounts already received by the DiMarias. Thus, inasmuch as the jury brought in a verdict for defendants and so awarded plaintiffs nothing, it is reasonable to assume that the jury may have determined that there was an accord and satisfaction.

[1] Plaintiffs first urge that the trial court committed error in refusing to allow them to prove that if an accord and satisfaction had been entered into, they had, in fact, rescinded it. With this contention we agree.

The evidence shows that under date of October 17, 1948, the DiMarias sent, and the Mitchells received, a demand for payment, which was properly admitted into evidence. As part of the same document the DiMarias included a notice of rescission reading as follows: "To Tom Mitchell and Mary Mitchell: You and each of you are hereby notified that Joseph F. DiMaria and Philip A. DiMaria, attorneys at law, as co-partners practicing law under the firm name and style of DiMaria and DiMaria, hereby rescind any/or all agreements for settlement of or compromise of attorneys' fees owing by you or either of you to said firm."

The trial court refused to admit this portion of the document, holding that the document was admissible only for the limited purpose of showing a demand for payment. The exact theory upon which the notice of rescission was excluded is not clear. The court first commented on the fact that rescission was not pleaded by the plaintiffs. But since the accord was first pleaded in defendants' answer, and since allegations in the answer are deemed denied, and since there is no requirement for a replication in this state, it does not appear how the fact that plaintiffs did not plead a rescission is relevant on the issue of admissibility. Then the court stated that the rescission was inadmissible "on the theory of competence." Later in the trial when plaintiffs attempted to elaborate on the reasons why the notice was sent, the trial court pointed out that Joseph had testified that no accord had been entered into and seemed to believe that this precluded evidence of a rescission of the accord. In final justification of its position the trial court expressed the thought that in some unexplained way the attempted rescission was part of an inadmissible offer of compromise. Interestingly enough, this evidence was first excluded before there was any evidence. as to whether or not an accord and satisfaction had or had not been entered into.

It is quite clear that plaintiffs were entitled to show that any accord that may have been entered into had, in fact, been rescinded. The fact that plaintiffs denied the existence of the accord did not prevent them from defending on the ground that if an accord existed it had been rescinded. The accord had been pleaded by defendants as an affirmative defense. The law permits the parties to assume inconsistent positions. Plaintiffs were legally entitled to offer evidence that no contract of accord and satisfaction had been entered into, but, if it had, then such agreement had been rescinded.

[2] Defendants seek to uphold the rulings complained of on the ground that plaintiffs made no offer of proof, contending that such offer was indispensable, citing Deeble v. Stearns, 82 Cal.App.2d 296, 186 P.2d 173. That case undoubtedly held that one asking a question which is excluded must, by an offer of proof, show that the answer to the question would have been favorable before its exclusion will be held to constitute error. But it is equally well settled that no offer of proof is required when an entire class of evidence is excluded where the relevancy of such class of evidence is apparent. Caminetti v. Pacific Mut. Life Ins. Co., 23 Cal.2d 94,

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[2] Defendants seek to uphold the rulings complained of on the ground that plaintiffs made no offer of proof, contending that such offer was indispensable, citing Deeble v. Stearns, 82 Cal.App.2d 296, 186 P.2d 173. That case undoubtedly held that one asking a question which is excluded must, by an offer of proof, show that the answer to the question would have been favorable before its exclusion will be held to constitute error. But it is equally well settled that no offer of proof is required when an entire class of evidence is excluded where the relevancy of such class of evidence is apparent. Caminetti v. Pacific Mut. Life Ins. Co., 23 Cal.2d 94,

142 P.2d 741; Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597. In the instant case it is quite clear from the repeated comments of the trial court that no evidence of a rescission would have been permitted. We do not mean to hold that the notice here involved would, in law, constitute a rescission. But we do hold that the trial court committed serious error in excluding the document from evidence, and necessarily excluding all other evidence of a rescission.

[3] This error was aggravated by the fact that after Joseph had testified that he had never entered into an accord and satisfaction, defendants were permitted to use the notice of rescission, which, of course, presupposes the existence of a valid accord, as an admission against interest, and plaintiffs were precluded from explaining why the notice was sent. It seemed to be the theory of the trial court that, while the notice of rescission amounted to an admission that a valid accord had been entered into, the plaintiffs, because they denied entering into the accord, could not explain the apparent admission. Of course a party against whom an admission operates may explain it if he can. § 2052, Code Civ. Proc.; see cases collected 10 Cal.Jur. p. 1057, § 307.

[4] Appellants also properly claim error in the giving of the following instruction: "If from the evidence presented in this case, you find that an agreement relating to fees was reached between the plaintiffs and the defendants after the relationship of attorney and client already existed between them, and you further find that there were special relations of confidence existing in that relationship; or that plaintiffs failed to fully disclose to defendants the extent of the services already performed and those to be required under said agreement, then you are instructed that regardless of the terms of said agreement, the utmost limit of recovery to which plaintiffs are entitled is the reasonable value of the services actually rendered."

Thus, under this instruction, if any agreements for a fixed fee were entered into after the relationship of attorney and client came into existence and under the circumstances set forth in the instruction, then, as a matter of law, plaintiffs were limited to a recovery of the reasonable value for such services regardless of whether the evidence showed that the agreed fees were reasonable, and without a showing of undue advantage gained. Respondents cite cases like Magee v. Brenneman, 188 Cal. 562, 206 P. 37, and Lady v. Worthingham, 57 Cal.App.2d 557, 135 P.2d 205, as supporting the instruction. Those cases state the proper rule to be that when a contract for a fixed fee is made after the relationship of attorney and client has come into existence, a rebuttable presumption of undue influence and insufficiency of consideration arises. The challenged instruction makes the presumption conclusive.

That the giving of this erroneous instruction was prejudicial is apparent. Plaintiffs testified as to an agreed fee of $2,250 for their work on the country club property, and of $202.35 on the income tax matter. By the instruction these contracts (if found to exist by the jury) were thrown out of the case no matter how reasonable they may have been when entered into.

Plaintiffs urge that various other errors were committed. They need not be discussed in this opinion. The errors discusssed require a reversal.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

112 Cal.App.2d 664

DEVINE v. FREEDOM NEWSPAPERS, Inc. et al.

Civ. 4446.

District Court of Appeal, Fourth District, California.

Aug. 13, 1952.

Action by Charles E. Devine on behalf of himself and all other taxpayers of City of Santa Ana against Freedom Newspapers, Inc., and against City of Santa Ana, and others, to have contract let to defendant corporation for publishing city's legal notices declared null and void. The Superior Court, Orange County, Robert Gardner, J., sustained general demurrers to the complaint without leave to amend, and entered judgment accordingly, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that attempted reservation by corporation of right to cancel "bid" in case of newsprint shortage or advertising rationing was not arbitrary but was to be used only in event of unexpected emergency, and, in absence of fraud or dishonesty, possibility that contract might last for something less than year for which statute prescribed contract should be let did not make contract null and void.

Judgment affirmed.

1. Newspapers ⚿2

Bidder for contract to publish city's notices for a year, which appended reservation to bid purporting to allow cancellation of "bid" on notice, was presumed to know law and was not free to attach reservation contrary to requirements of statute and published notice for bids, and attempted reservation was ineffective and was properly disregarded by city council in accepting bid. Government Code, § 37907.

2. Newspapers ⚿2

Statute relating to publication by a city of notice calling for bids for publishing of legal notices for the fiscal year intentionally leaves the terms of the publishing contract largely to discretion of city council. Government Code, § 37907.

3. Newspapers ⚿2

Where accepted bid for publishing of city's legal notices had appended to it reservation allowing cancellation of bid if there was newsprint shortage or advertising rationing, there was at least substantial compliance with statute regulating such publishing contracts, even if reservation applied to contract, and contract was not null and void. Government Code, § 37907.

4. Pleading ⚿249(1)

Where only possible amendment of complaint to which defendant successfully demurred would have entirely changed the cause of action, trial court committed no error in refusing permission to amend.

◆

Robert B. Webb, Santa Ana, for appellant.

Harvey, Rimel & Johnston, Santa Ana, for respondent Freedom Newspapers, Inc.

John K. Colwell, Santa Ana, for respondent City of Santa Ana and its officers.

BARNARD, Presiding Justice.

This is an action to have a contract declared null and void, and to restrain the respondent city and its officers from paying out any city funds in connection therewith. General demurrers to the complaint were sustained without leave to amend, and the plaintiff has appealed from the judgment which followed.

The admitted facts are as follows. The appellant is a taxpayer in Santa Ana, a city of the fifth class with its fiscal year beginning and ending July 1. The Independent is a weekly newspaper published in Santa Ana. The Register, owned by the defendant corporation, is a daily newspaper published in Santa Ana. It has a paid circulation which covers more than 94% of all the homes in that city.

On June 1 and June 8, 1951, the city published in the Independent a notice calling for bids for publishing legal notices for the fiscal year July 1, 1951 to July 1, 1952, as required by section 37907 of the Government Code. The Independent submitted a bid in accordance with this notice. The Register submitted a lower bid. Below the signature on that bid the following language appears:

> "P.S. In event of acute newsprint shortage or other conditions beyond the control of the Register that may

> necessitate the limiting of the size of the Register or the rationing of advertising, the publisher reserves the right to cancel this bid, without penalty, on 60 days notice in writing."

The city trustees, by unanimous vote, accepted the bid of the Register and awarded the contract to it.

The complaint contains no allegations of fraud or dishonesty. It alleges that by accepting the bid of the Register the city council purported to contract with it for the printing of legal publications in its Saturday issue for the fiscal year commencing July 1, 1951 and ending June 30, 1952; that this purported contract is illegal and void since it was not entered into in the manner prescribed by law; that the city officials had no power or authority to accept this bid; and that this contract is null and void in that it does not comply with the requirement of the statute that such a contract must cover a full year.

The appellant contends that section 37907 of the Government Code requires that such a contract for the printing of legal notices must be one for a full year; that this contract was not one for a year since the bidder reserved the right to cancel it on 60 days' notice; that it must be deemed to be a contract for 60 days only since it was not enforceable for any longer period; that it was not responsive to the call for bids and materially deviated therefrom; and that it follows that the contract does not comply with the statute and is null and void.

[1] The postscript upon which the appellant relies was technically insufficient in that it was not signed and in that it purported to reserve a right to cancel the bid, but not to cancel the contract which would naturally follow an acceptance of the bid. Moreover, it was an unsigned attempt to add something to a previously completed bid, made in accordance with the statute and the published notice calling for bids. The bidder was presumed to know the law and was not free to attach any reservation which was contrary to the requirements of the statute and the published notice. Inyokern, etc., Dist. v. Haddock-Engineers, 36 Cal.2d 450, 224 P.2d 709. The attempted reservation was ineffective for any purpose and the council properly disregarded it.

[2, 3] Even if this postcript should not be entirely disregarded, it does not necessarily follow that it had the effect of making the contract null and void from the beginning. In that event, this must still be regarded as a contract for a year, with a questionable provision in it, and not merely one for 60 days. The statute does not go into details and intentionally leaves the terms of such a contract largely to the discretion of the council. In the exercise of this discretion the council had the right to determine which was the better bid in the light of existing circumstances, and of future probabilities so far as they could be foreseen. The attempted reservation, even if intended to apply to the contract and not merely to the bid, was not an arbitrary right of cancellation but was one to be used only in the event of an unexpected emergency which would probably never arise. If such an emergency did arise it is by no means certain that the city would be unable to enforce the contract and, in any event, it could remedy the situation by making another contract for the rest of the year. In the meantime it would have had the benefit of the more favorable contract. In the absence of any charge of fraud or dishonesty, the vague possibility that the duration of the contract might turn out to be something less than a year could not, and did not automatically make this contract null and void under the circumstances which here appear. Cyr v. White, 83 Cal.App.2d 22, 187 P.2d 834. The admitted facts show at least a substantial compliance with the statute, and it cannot be held that the contract was so illegal as never to have existed.

[4] No error appears in refusing permission to amend. No amendment was possible except by charging fraud, which would have entirely changed the cause of action. Cyr v. White, supra. It is not contended that any fraud existed or that any proper amendment could have been made.

The judgment is affirmed.

MUSSELL, J., concurs.

112 Cal.App.2d 650

GALE v. WOOD et ux.

Civ. 8077.

Sac. 6212.

District Court of Appeal, Third District,
California.

Aug. 12, 1952.

Action by Stanley J. Gale against Alfred Wood, and another, for specific enforcement of alleged contract for sale of realty. The Superior Court, Sacramento County, John Quincy Brown, J., granted summary judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held that question whether agreement was one of purchase and sale or merely an option to sell was for jury.

Judgment reversed.

1. Judgment 🔑181(2)

Where issue of fact is presented, a summary judgment cannot be granted, and the court must permit trial of the issue. Code Civ.Proc. § 437c.

2. Judgment 🔑186

In passing on motion for summary judgment, trial court's primary duty is to decide whether there is an issue of fact to be tried. Code Civ.Proc. § 437c.

3. Judgment 🔑181(11)

An answer is a prerequisite to the motion for a summary judgment. Code Civ. Proc. § 437c.

4. Judgment 🔑185

In considering affidavits upon motion for summary judgment, those of the moving party are to be strictly construed and those of the opposing party are to be liberally construed, and, if there be conflict, opposing party's affidavits must be accepted as true. Code Civ.Proc. § 437c.

5. Vendor and Purchaser 🔑16(1)

Delivery of letter stating that, in consideration of deposit paid, vendors agreed to sell described home for stated price on stated terms and conditions, to be closed at stated date, would constitute no more than an offer to sell which might be accepted before revocation, but which would not constitute an agreement when communicated to purchaser.

6. Vendor and Purchaser 🔑16(1)

If purchaser accepts offer to sell home before offer is withdrawn, bilateral contract of purchase and sale would result which would be wholly capable of enforcement should vendors unjustifiably refuse to carry out their part of the bargain.

7. Vendor and Purchaser 🔑16(1)

If, after receipt of offer to sell home and before its withdrawal, purchaser, with intent to accept, had written word "accepted" upon face of the instrument, signing his name thereunder, and properly communicated these matters to vendor, there would be an effectual acceptance of the offer.

8. Vendor and Purchaser 🔑16(1)

If when written offer to sell home is communicated to purchaser, purchaser adds words "to be closed by July 1, 1950," he would have rejected the offer and made a counter offer containing the additional terms to which assent by vendor would be essential before a binding contract could arise.

9. Vendor and Purchaser 🔑23

If purchaser and vendor by mutual assent add to instrument containing proposed agreement for sale of home the words "to be closed by July 1, 1950," and then sign the instrument, finding that a bilateral agreement of purchase and sale arose would be supported.

10. Specific Performance 🔑123

In action for specific enforcement of alleged contract for sale of realty, question whether agreement was one of purchase and sale or an option was for jury. Code Civ.Proc. § 437c.

Stanley J. Gale, in pro. per., Pease & Lally, Sacramento, for appellant.

Busick & Busick, Sacramento, for respondent.

VAN DYKE, Justice.

This is an appeal from a summary judgment entered on motion of the respondents who were the defendants in the action. The relief asked by appellant's complaint was the specific enforcement of what appellant alleged was an agreement for the sale to him by respondents of certain real property. His complaint averred that on June 5, 1950 respondents "agreed to sell" to him the subject property by a written agreement in form and substance as follows:

"June 5, 1950.

"Mr. Stanley J. Gale
326 Ochsner Bldg.,
Sacramento, Calif.

"Dear Sir:

"In consideration of sum of $50.00 to us paid in hand, we hereby agree to sell you home owned by us located at no. 4332 Tee Street, sacramento, for total price of $14,500.00 on following terms and conditions.

"(1) Sum of 12,000.00 (less deposit) to us in cash and balance of $2500.00 to be evidenced by 2nd trust deed in amount of $2500.00 (behind a first of $9500.00 due in one year from date of making with interest at 5%.

"(2) Home to be delivered to you free and clear of any incumbrances. We will furnish deed and title policy.

"(3) Taxes, water, insurance ect., to be pro-rated as of date of closing.

"(4) If I cannot furnish clear title, I will refund your deposit.

"To be closed
by July 1st 1950

"Yours very truly,
/s/ Alfred Wood
/s/ Esther Wood
5331 25th Street
Sacramento, Calif.
HI 5 0591

"Accepted:
/s/ Stanley J. Gale"

It was further alleged that "pursuant to said agreement (Exhibit 'A'), plaintiff paid to defendant, the sum of $50.00." To these allegations respondents made answer as follows: They denied generally the allegations they had agreed to sell the subject property and in connection with their denial they alleged that the written document, execution of which by all parties they did not deny, constituted an offer to sell the subject property to appellant; they admitted the receipt of the $50, but affirmatively alleged that it was paid to them "in consideration of Defendants' maintaining and keeping open said offer until July 1, 1950." They further affirmatively alleged that after June 5, 1950, the date of the instrument, they placed in escrow as directed by appellant "a Grant Deed to said real property with instructions to deliver the same to Plaintiff upon the receipt of $12,000.00 and a Note and Deed of Trust for $2,500.00 *as provided in said offer to sell*" and that thereafter appellant notified respondents that he could not obtain the necessary funds and that they could withdraw their deed from escrow, which respondents alleged they did. We think it unnecessary to go further into the contents of the complaint and answer except to say that there were allegations in the complaint usually found in specific performance actions which were by the answer substantially denied.

The parties proceeded to trial and after some evidence had been taken appellant asked leave to amend his complaint, which leave was granted and further proceedings were ordered continued. A lengthy amendment to the complaint was then filed, which, however, did not affect those portions of the complaint and answer hereinbefore set out, but did seek to allege facts upon which to base an estoppel of respondents to claim that by failing to complete his end of the bargain within the closing time set by the written document appellant had suffered the loss of his rights to compel a conveyance. From the record before us it appears that no answer was filed to these amendments. Service and filing thereof had been completed December 19, 1950, and without answer thereto, and on December 26th following respondents noticed a motion for summary judgment upon the grounds: 1. That the complaint as amended affirmatively showed that the "offer or option pleaded" was not accepted within the time limited by its terms and that therefore the right to purchase ceased by the mere passing of time; 2. That the rule of equitable estoppel was not applicable to such a situation; 3. That the complaint as amended affirmatively showed the written instrument lacked "the mutuality which is required to state a cause of action for a specific performance"; 4. That if the said instrument be construed as an executory contract its provisions were "so indefinite, ambiguous and uncertain as to make said document not a proper document upon which to base the drastic equitable remedy of Specific Performance." The motion was supported by affidavit of respondent Esther Wood and opposed by affidavit of appellant. Thereafter the motion was granted and the summary judgment appealed from was entered, the court therein stating that it had "concluded as a matter of law, that the contract and offer of sale pleaded by plaintiff and marked Plaintiff's Exhibit 'A' upon which this action is predicated, was an option to sell, and that time was of the essence of said option, and that said option was not accepted by plaintiff within the time limited by the terms of said option, and that plaintiff's right to purchase ceased by the passing of that time." The court declared further that the rule of equitable estoppel was not applicable to such an option situation and that since there was no triable issue of fact and plaintiff's action had no merit the action should be dismissed.

[1–9] Section 437c of the Code of Civil Procedure providing for summary proceedings, where a claim is made that an action is unmeritorious, provides, so far as applicable here, that "when an answer is filed in an action * * * for specific performance of a contract in writing for the sale or purchase of property, * * * if it is claimed * * * that the action has no merit, on motion * * * supported by affidavit * * * the complaint may be dismissed and judgment may be entered, * * * unless the other party, by affidavit * * * shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." If an issue of fact is presented the summary judgment cannot be granted and the court must permit trial of the issue. 7 Cal.Jur. 10-Year Supp. 277. In passing on such a motion the primary duty of the trial court is to decide whether there is an issue of fact to be tried. Walsh v. Walsh, 18 Cal.2d 439, 441, 116 P.2d 62. Issue finding rather than issue determination is the pivot on which the summary judgment turns. Id. It follows as a corollary and from the express language of the section that an answer is a prerequisite to the motion for summary judgment. Loveland v. City of Oakland, 69 Cal.App.2d 399, 402, 159 P.2d 70. Obviously the court cannot tell what the issues are in any case until the answer comes in. (As hereinbefore noted, the allegations of the amendment to the complaint whereby appellant sought to set up an estoppel on the part of respondents to claim that the time limits of the option, if the pleaded document be construed to be an option, had not been extended, were unanswered when the motion was made and passed upon. The record, therefore, was not in the situation required by the statute. However, we prefer not to place our decision upon this ground as there are more cogent reasons why the judgment appealed from must be reversed.) Said the court in Walsh v. Walsh, supra [18 Cal.2d 439, 441, 116 P.2d 64]: The universal practice is "to permit this expedited procedure only where it is perfectly plain that there is no substantial issue to be tried." In considering affidavits pro and con when such a motion has been made, those of the moving party are to be strictly construed, those of the party opposing the motion are to be liberally construed, Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 618, 152 P.2d 774, and if there be conflict the affidavits of the opposing party must be accepted as true. Id. Applying these rules to the pleadings as hereinbefore referred to we find that whereas appellant characterized the document which the parties signed as one whereunder respondents had agreed upon the terms and conditions therein stated to sell the subject property to him the respondents in their answer characterized the same instrument as constituting an option. That is to say, they contend their agreement was that they would, up to and including July 1, 1950, keep in force and unwithdrawn an offer to sell the subject property to appellant upon the expressed terms and conditions. There are fundamental differences, of course, between these two opposing constructions. Thus if the proper interpretation of the instrument was that contended for by respondents then, unless the offer contained in the option was accepted within the limited time, no contract of sale would arise. On the contrary, if the proper construction of the instrument was that contended for by appellant the instrument constituted a bilateral contract of purchase and sale and the provision therein that the deal was "To be closed by July 1st, 1950" was no more than the fixing of the moment of time when the obligation of respondents to convey and the concurrent obligation of appellant to pay were to be performed. And the passing of the date without more would not leave either party in default. Thein v. Sticha, 93 Cal.App.2d 295, 209 P.2d 13. When we look at the instrument itself we find that the word "option" is not contained in the instrument and that the language thereof states that the respondents agree to sell the property to appellant. Further, we see that the instrument in the main part, and excluding the words "To be closed by July 1st, 1950", purports to be a letter or communication signed by the respondents and addressed to the appellant. Notwithstanding the use of language of agreement as noted, such a communication if delivered would constitute no more than an offer to sell which might be accepted before revoked, but which would be no agreement of any sort when communicated to appellant. It is to be observed further that if before the offer was withdrawn the same should have been accepted by appellant the result would have been a bilateral contract of purchase and sale wholly capable of enforcement should respondents unjustifiably refuse to carry out their part of the bargain. It is further observable that if, after receipt of the offer and before its withdrawal, appellant, with intent to accept, had written the word "Accepted" upon the face of the instrument, signing his name thereunder and he properly communicated these matters to respondents there would have been an effectual acceptance of the offer. O. A. Olin Co. v. Lambach, 35 Idaho 767, 209 P. 277, 44 A.L.R. 354. Further, if when the offer was communicated to appellant the words "To be closed by July 1st, 1950", which appear upon the face of the instrument in a position separating them from the main body of the communication, were not then on the instrument and were put on by appellant without respondents' assent, the legal result would have been simply the rejection of the offer and the making of a counter offer containing the additional terms so added, to which counter offer an assent by the respondents would be essential before a binding contract would arise. Ajax Holding Corp. v. Heinsbergen, 64 Cal.App.2d 665, 149 P.2d 189; see, also, West's California Digest, Contracts, 🔑23 "Qualified or conditional acceptance of offer". If, on the other hand, we suppose, touching the circumstances under which the instrument was executed, the parties were together negotiating for the sale of the property and the instrument, excluding the words "To be closed by July 1st, 1950" and "Accepted Stanley J. Gale", had been written as evidencing the proposed agreement of the parties and was yet unsigned, and if at that point further discussion had arisen concerning the time when the sale might be closed and the parties then with mutual assent caused to be added anywhere in the instrument the words "To be closed by July 1st, 1950" and that having been done all parties signed, a finding that a bilateral agreement of purchase and sale arose would be supported. According to the affidavit of appellant that is exactly what occurred.

[10] What has been said is not intended as in any sense a decision by this Court as to the exact nature of the instrument, but has been said to point up the proposition that by reason of the form of the instrument and the opposing pleadings and affidavits of the parties as to what the parties intended to accomplish by its execution, there were presented issues of fact which necessitated a trial and precluded the granting of a summary judgment.

The situation is similar to that disclosed in Walsh v. Walsh, supra, where the controversy between the parties to the action was as to the meaning with which certain words were used, the one party claiming that the pertinent words were intended as terms of description, while the opposing party claimed that they were words of limitation. Said the court, 18 Cal.2d at page 443, 116 P.2d at page 65:

> "We are of the opinion * * * that the words 'child or children' as there used are ambiguous and indefinite. * * * On its face the phraseology * * * in its entirety is reasonably consistent with either of the interpretations advanced here by the litigants. When a contract is in any of its terms or provisions ambiguous or uncertain, 'it is primarily the duty of the trial court to construe it *after a full opportunity afforded all the parties in the case to produce evidence of the facts, circumstances, and conditions surrounding its execution and the conduct of the parties relative thereto.*' * * * 'When the meaning of the language of a contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, *the question of its meaning is one of fact.* * * *'
>
> "Applying the rules of law above stated, it is clear that the trial court should have denied defendant's motion for a summary judgment so that the issue raised between the parties hereto as to the duration of defendant's undertaking to furnish support and maintenance to the plaintiff might be tried upon its merits." See also Loveland v. City of Oakland, 69 Cal.App.2d 399, 159 P.2d 70.

See, also, Grueninger v. Livingstone & Co., 90 Cal.App.2d 266, 202 P.2d 785, wherein the issue was as to whether or not a document should be construed as a contract for a cash sale of securities or as one wherein the price was to be paid by installments. See, also, Travelers Indemnity Co. v. McIntosh, 112 Cal.App.2d 177, 245 P.2d 1065, where this Court said that in an action for money allegedly due under an assignment where interpretations in the affidavits of both parties, one asserting that no money was due under the assignment, and the other to the contrary, were reasonable, a question of fact was thereby presented to be resolved on the admission of parol evidence.

We think it apparent from what has been said that both by the pleadings and by the affidavits there were presented issues of fact involving the intentions of the parties who signed the instrument upon which the action is based, which issues were and are factual, precluding the granting of a summary judgment based upon the trial court's assumption, in passing on the motion, that the construction contended for by respondents that the contract was an option merely was as a matter of law correct, so that when the time limit had passed without acceptance the parties were mutually free from obligations to each other. By reason of the fact that the words "To be closed by July 1st, 1950" were placed upon the document, separated from the main part thereof, doubt is cast as to just what the parties intended. These and other factors hereinbefore stated show that the instrument might be susceptible of either of the opposing constructions advanced by the parties, thus necessitating testimony of the facts and circumstances under which the document was executed and presenting factual issues as to the intentions of the parties and therefore as to what in fact their undertakings had been.

The judgment is reversed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

112 Cal.App.2d 763

PEOPLE v. FRICKEL.

Cr. 4803.

District Court of Appeal, Second District, Division 1, California.

Aug. 18, 1952.

An accused was convicted in the Superior Court of Los Angeles County, Kenneth C. Newell, J., of violating the Dangerous Weapons Control Law by having in his possession and under his control a .38 caliber revolver, and he appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to establish that revolver in defendant's possession had a barrel less than twelve inches in length, and was legally sufficient to establish that revolver in defendant's possession was capable of being fired.

Judgment affirmed.

Weapons 🔑17(4)

In prosecution for violating Dangerous Weapons Control Law by having in defendant's possession and under his control a .38 caliber revolver, testimony that witnesses saw gun in defendant's possession, that barrel was about six inches long and that it was a .38 caliber and was loaded, was legally sufficient to establish that revolver in defendant's possession had a barrel less than twelve inches in length and that revolver was capable of being fired. Gen.Laws, Act 1970.

◆

Ward Sullivan, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was charged by information with the violation of the Dangerous Weapons Control Law, Gen.Laws, Act 1970. The information alleged that defendant, having been convicted of certain felonies, had "in his possession and under his control" a .38 caliber revolver. The issue was, by stipulation, submitted on the transcript of the preliminary hearing. No evidence was offered for the defense. Defendant was adjudged guilty.

It is contended on appeal that "The evidence is legally insufficient to establish that the revolver in appellant's possession had a barrel less than twelve inches in length" and that, "The evidence is legally insufficient to establish that the revolver in appellant's possession was capable of being fired."

With regard to the first contention, three witnesses testified to seeing the gun in defendant's possession; that the barrel was about six inches long; that it was a .38 caliber and loaded. There can be no question that such evidence refutes appellant's contention.

The above mentioned evidence also refutes appellant's second contention for as pointed out by respondent, "There is no failure of proof concerning the nature of the weapon possessed by appellant".

The judgment is affirmed. There is no appeal from the "sentence", and the attempted appeal therefrom is dismissed.

WHITE, P. J., and DRAPEAU, J., concur.

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112 Cal.App.2d 574

PEOPLE v. SICA et al.

Cr. 4781.

District Court of Appeal, Second District, Division 2, California.

Aug. 7, 1952.

Rehearing Denied Aug. 21, 1952.

Hearing Denied Sept. 4, 1952.

Defendants were convicted of conspiracy to carry on a bookmaking enterprise in violation of the Penal Code. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and denied motions for new trial, and defendants appealed. The District Court of Appeals, Fox, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Conspiracy 🔑23

The gist of a criminal conspiracy is a corrupt agreement of two or more persons to commit an offense prohibited by statute, and an overt act in furtherance of the objects of the conspiracy. Pen.Code, § 337a, subds. 1–6.

2. Conspiracy 🔑44½

The existence of an agreement between conspirators may be inferred from their acts and conduct in mutually carrying out a common purpose in violation of a statute. Pen.Code, § 337a, subds. 1–6.

3. Conspiracy 🔑27

The overt acts necessary to the existence of a conspiracy need not be criminal but are sufficient if done as step in furtherance of the conspiracy, and then may bind all members of the conspiracy even if accomplished by only one of the conspirators. Pen.Code, § 337a, subds. 1–6.

4. Conspiracy 🔑47

Evidence was sufficient to sustain conviction for conspiracy to carry on a bookmaking enterprise in violation of the Penal Code. Pen.Code, § 337a, subds. 1–6.

5. Criminal Law 🔑741(2)

In prosecution for conspiracy to carry on a bookmaking enterprise in violation of the Penal Code, question of correctness of identification of voice of one of defendants by police officers who were listening to telephone conversations by use of dictaphone was for jury. Pen.Code, § 337a, subds. 1–6.

6. Criminal Law 🔑554

In prosecution for conspiracy to carry on a bookmaking enterprise in violation of the Penal Code, the jury, in resolving conflicts between one defendant's testimony and that of police officers, properly considered fact that the defendant had suffered two prior felony convictions. Pen.Code, § 337a, subds. 1–6; Code Civ.Proc. § 2051.

7. Criminal Law 🔑427(2, 5)

Before evidence of acts and declarations of an alleged conspirator is admissible against another defendant, the fact of the conspiracy must be proved, but it need be proved only to extent of establishing prima facie case and not beyond a reasonable doubt. Code Civ.Proc. § 1870, subd. 6; Pen. Code, § 337a, subds. 1–6.

8. Criminal Law 🔑422(1), 427(5)

In prosecution for conspiracy to carry on a bookmaking enterprise in violation of the Penal Code, evidence was sufficient to establish prima facie case of conspiracy which included principal defendant, and, therefore, acts of alleged conspirator at time of his arrest and documents with notations thereon found in apartment of another alleged conspirator were admissible in evidence against the principal defendant. Pen.Code, § 337a, subds. 1–6; Code Civ. Proc. § 1870, subd. 6.

9. Conspiracy 🔑41

When the existence of the conspiracy is shown, the act of each coconspirator in pursuance thereof is attributable to each of the others even though they were not personally present when such acts were committed. Pen.Code, § 337a, subds. 1–6; Code Civ.Proc. § 1870, subd. 6.

10. Criminal Law 🔑672, 680(1)

In prosecution for conspiracy to carry on a bookmaking enterprise in violation of the Penal Code, recorded conversations of other defendants were admissible in evidence against principal defendant before sufficient proof of conspiracy was given where facts from which the conspiracy was to be inferred were so enmeshed with other facts going to constitute the crime that it was difficult to separate them, but such evidence was received conditionally for jury first had to pass judgment on the question whether the asserted conspiracy was proven. Pen.Code, § 337a, subds. 1–6; Code Civ.Proc. § 1870, subd. 6.

11. Criminal Law 🔑680(1)

The order in which evidence is admitted is a matter within the sound discretion of the trial court. Code Civ.Proc. § 1870, subd. 6.

12. Criminal Law 🔑394

Neither Fourth Amendment to federal Constitution nor state Constitution require that evidence illegally obtained be excluded in a criminal prosecution in the state courts. U.S.C.A.Const. Amend. 4; Const. art. 1, § 19.

13. Criminal Law ⚷393(1)

The constitutional protection of the Fifth Amendment against compulsory self-incrimination may not be invoked as a restriction on a state court to prevent the use of otherwise competent evidence allegedly obtained by illegal means, so long as due process requirements of Fourteenth Amendment are not infringed. U.S.C.A. Const. Amends. 5, 14.

14. Criminal Law ⚷394

In a state court, the contents of telephone messages intercepted without consent of the sender are admissible in evidence notwithstanding such interception was in violation of the Federal Communications Act. Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

15. Criminal Law ⚷386

In prosecution for conspiracy to carry on a bookmaking enterprise in violation of the Penal Code, upon issue of identification of participants in recorded conversations, testimony of witness who recognized a voice and used this identification to name the speaker was properly admissible and any uncertainty in the recognition went only to weight of the testimony. Pen.Code, §§ 337a, subds. 1–6, 640, 653h.

16. Witnesses ⚷255(4)

In prosecution for conspiracy to carry on a bookmaking enterprise in violation of the Penal Code, use of memoranda prepared by stenographer from recorded conversations overheard by the officers was properly used to refresh officers' recollections where the transcriptions were corrected by the officers to correspond with what each had actually heard, and memoranda was used only to refresh officers' memories concerning information directly obtained by them. Pen.Code, § 337a, subds. 1–6; Code Civ. Proc. § 2047.

17. Criminal Law ⚷400(1), 438

In prosecution for conspiracy to carry on a bookmaking enterprise in violation of the Penal Code, contemporaneous recordings of defendants' conversations were competent, but not sole, evidence admissible on the point, and testimony of officers who had seen the conversation and heard the recording being made was primary evidence even though part of the same matter was incorporated into the sound recording. Pen. Code, § 337a, subds. 1–6; Code Civ.Proc. § 1829.

18. Criminal Law ⚷386

In prosecution for conspiracy to carry on a bookmaking enterprise in violation of the Penal Code, sufficient foundation was laid for admission of police officers' testimony concerning conversations in gasoline station where officers testified that dictaphone was placed in station and recording machine in their listening post, that they could hear conversations in the station and identify some of the speakers by their voices, and that they identified voices of other defendants by conversations held with them after their arrest. Pen.Code, §§ 337a, subds. 1–6; Const. art. 1, § 13.

19. Criminal Law ⚷1023(10)

In prosecution for conspiracy to carry on a bookmaking enterprise in violation of the Penal Code, purported appeals of defendants against whom no judgment was pronounced would be dismissed and order denying their respective motions for new trial would be affirmed. Pen.Code, § 337a, subds. 1–6.

◆

Russell E. Parsons, Los Angeles, for appellant Joseph Sica.

Philip Erbsen, Los Angeles, for appellants Weisbart and Chaiken.

Joseph H. Wolf, Los Angeles, for appellants Alfredo Gerardo Sica and Emilie Ann Williams.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendants were convicted of a conspiracy to violate section 337a of the Penal Code and each subdivision thereof. They have appealed from the judgment and from the order denying their motion for a new trial on the grounds of the insufficiency of the evidence and errors of law in certain rulings that occurred during the trial.

The evidence established that Chaiken and Weisbart were proprietors of a service station on North Main Street, in Los Angeles, where from time to time they were visited by defendants Joseph and Alfredo (Fred) Sica. Having suspected unlawful acts were being committed by the four men, the police installed a dictaphone in the station and established a listening post at a distance of about 300 feet. Between the post and the station was a chain link fence through which the officers looked directly into the station to observe all who came and departed. The officers knew Joe and Fred Sica and the sounds of their voices. Many of the telephonic conversations coming in were recorded while the officers listened to and made notes of all the conversations concerning which they testified. The incoming calls were received at periodic intervals from "Carmen" at which times bets on horse races which had been received by Joe and Fred Sica, Weisbart and Chaiken were reported to her. Commencing on March 31, 1951, the officers heard and took recordings of the conversations at the station over a period of 13 days. Chaiken reported a cash bet by "Ernie" on "Short Sale" at Bay Meadows, and a bet on "Carry Message," $2 to win. Weisbart took a call from "Carmen," gave it to Chaiken who in turn placed a bet for "Fred," parlayed from "Pater" to "Slow Poke," and placed a bet for "Frank" on "Miss New Year." April 3d Chaiken forwarded cash bets for "Lloyd" on "Royal Saint," "Sun Rene," "Deep Secret" and "Baby Battler," running at Bay Meadows. Chaiken called in two bets "across the board" on "Gray Arrow," for "Frank" and took a bet from "Duff," $5 across the board on "Baby Battler." These he reported to "Carmen." When that lady called, Weisbart told her he had some bets and "Freddie would call them in." April 4th Chaiken forwarded a "round robin" on "Thelma Bago" and "Battlefield" and two bets on "British Isles" and one on "Trade Winds" for one "Fred." Chaiken reported other bets to Carmen. When she called on April 5th, to inquire whether they had other bets, Chaiken reported a bet for "Sam" to win on "Loose Change," and bets on "Solano," "American Glory," "Dispatcher," "Don Conejo" and "Bangston." Subsequently Weisbart and Chaiken reported to Carmen bets on "Chick's Delight," "Sponsor," "High Notion," "Powder Dry," "Grog's Swizzle," "Chick's Delight," "Presidente," "The Bam," "Pacomialad," "Vistison," "One Pint," "Mucho Hosso," "Yeckes," "Foxy Green" and "Great Dream." During the 13 days' lookout, "Carmen" called constantly on the telephone in the service station and received names of bettors, horses, amounts of bets and race tracks. At the station the conversations were about bettors and their successes, race tracks in the east, horses currently running, the amounts and names of bettors. Each of the male defendants was at the station daily or called on its telephone to engage in conversations about betting. In some instances Joe Sica instructed his codefendants on the art of handling bets, specified the amounts of expense money to be advanced to agents, assigned numbers to them, and arranged for the checking of sheets every night and for them to be left at Chaiken's home on South Houser Boulevard.

"Carmen," who participated in the telephonic conversations with those at the service station, was defendant Williams, an intimate of Fred Sica, sometimes known as Ann Starke. After the officers had arrested Fred Sica, near Chaiken's home on Houser Boulevard at 1:00 A.M. on April 12, they discovered in his automobile a telephone bill to Ann Starke for apartment 1 at an address on North Laurel Avenue. They caused Fred to recover from Chaiken's mail box an envelope containing betting markers and top sheets which contained "22," the agent's number, the names of bettors, also betting markers, indicating bets on horses, also a white sheet with "44," an agent's number and the names of bettors, the status of their accounts, and other inculpatory proof. Later, on the same day, a police officer gained admittance into the 1421 address on Laurel Avenue, and after "Carmen" had denied knowledge of the "sheets," the officer found them in the secret compartment of a chair. Included in the package thus recovered were: California Digest for the four preceding days, betting markers, and top sheets. On one of the sheets for the 12th was the number "44" and the names of bettors; on another was "22." Also, there were markers for the same day for other bettors under agents "10," "11," "99" and "88." The officer found Ann Starke's telephone bill for $40.91, marked paid March 12. She stipulated that the notations on all papers found in her possession were in her handwriting as well as the notations on the top sheets and betting markers for horse races, taken from Fred Sica's car and Chaiken's mail box. The California Digest for April 12 showed that Miss Williams had recorded the winners and the mutuels for Laurel and Jamaica Race Tracks. Also in the apartment was a photograph of "Carmen" and Fred Sica whom she had known since 1946 and who had assisted her to move in. Prior to her arrest she had telephoned the service station: "Carmen; have you got anything"? Officer Lestelle answered: "No, not just yet." He recognized her voice when she called again. The top sheets and betting markers were shown by expert proof to contain the code numbers, name of agent, rundown on names of bettors, amounts wagered on various horses, showing their index number to win, place or show, and the amount to be collected from the bettors. Many other items showing the character and extent of the defendants' operations were introduced into evidence but they are of kindred import to those recited above.

[1–4] Defendants' first contention is that the evidence is insufficient to establish a conspiracy. The gist of a criminal conspiracy is a corrupt agreement of two or more persons to commit an offense prohibited by statute, accompanied by some overt act in furtherance of the objects of the conspiracy. Pen.Code, secs. 182, 184; People v. Brownstein, 109 Cal.App.2d 891, 892, 241 P.2d 1056; People v. Pierce, 110 Cal.App.2d 598, 243 P.2d 585. The existence of the agreement may be established by circumstantial evidence. People v. Steccone, 36 Cal.2d 234, 237–238, 223 P.2d 17. The agreement may be inferred from the acts and conduct of the defendants in mutually carrying out a common purpose in violation of the statute. People v. Benenato, 77 Cal.App.2d 350, 358, 175 P.2d 296; People v. Brownstein, supra. It is not necessary that the overt acts be criminal. People v. Gordon, 71 Cal.App.2d 606, 628, 163 P.2d 110. If such acts are done as a step toward the furtherance of the conspiracy they are sufficient. People v. Gilbert, 26 Cal.App.2d 1, 23, 78 P.2d 770. Further, the overt act may be accomplished by only one of the conspirators and yet be sufficient, for all the members of the conspiracy are bound by all acts of all members done in furtherance of the agreed plot. People v. Creeks, 170 Cal. 368, 374, 149 P. 821; People v. Pierce, supra. Applying these principles it is clear the jury was amply warranted in drawing the inference that a plan and agreement existed among the defendants to carry on a bookmaking enterprise in violation of the various subdivisions of section 337a of the Penal Code and that the acts performed by the several defendants were in accordance with and in furtherance of such plan and agreement.

The contention of Joe Sica that the evidence relative to a conspiracy merely shows suspicion and association is in disregard of the record. The evidence is that the apartment on North Laurel Avenue had been rented to Fred Sica and Williams and that it was being used as a "phone spot." The voice of Williams was identified as that of the person who called herself "Carmen." Fred Sica was caught at 1:00 o'clock in the morning delivering top sheets and betting markers to Chaiken's mail box, to which he had a key. These top sheets contained the agent's numbers "22" and "44" which had been assigned to Chaiken and Weisbart by Joe Sica who had made arrangements for the delivery of the sheets. Bets on horse races were taken at the gasoline station by Chaiken and Weisbart. They telephoned them to Williams, who used the name "Carmen" when she called. Both Joe and Fred Sica gave instructions to Chaiken and Weisbart with reference to their taking of bets and relaying them to Williams. The bettors handled by Chaiken and Weisbart were those for whom Williams accounted at her apartment. They included LaPorte whose telephone number was given to her so she could call him direct for his bets. The conversation at the station centered around betting and settling up of accounts and bets by all defendants except Williams. Such evidence, without going further, goes far beyond mere suspicion and association, and shows a well-organized business being operated by these defendants in a consciously cooperative fashion in violation of section 337a, supra.

Joe Sica contends the evidence is insufficient to show him to be a co-conspirator. The testimony, however, of the police officers justifies the inference that he was one of the principal operators of the bookmaking activities at the service station. In one conversation in which he was identified as a participant there was a discussion concerning a bet on a horse named "Peaches" which had been erroneously applied to another horse. To avoid mistakes of this nature, Joe instructed Chaiken and Weisbart to give the number of the race when they called the races in, stating he did not take quarter horses and they ought to know better than that. The conversation continued with a discussion over the settlement of accounts between himself and the other two men. Also, he had a later conversation with them regarding their taking expenses and his giving them credit. He not only gave them instructions as to the handling of bets, but told them how much expenses they were to get and under what circumstances they were to get commissions. Also he told them he was going "to service" two of their customers. He assigned certain other bettors to them. He indicated he tallied up the sheets at the end of the day, and made arrangements for the delivery of them to Chaiken's house at night. He took calls from "Carmen" while at the station, and on one occasion he telephoned in a bet giving instructions to scratch it if it was too late. He assigned numbers "22" and "44" to Chaiken and Weisbart. It is significant these numbers appeared on the top sheets in the possession of Williams at her apartment, and were on the top sheets delivered by Fred to Chaiken's house. These conversations and circumstances not only support an inference that Joe was a part of the conspiracy but justify the further inference that he was directing its operations.

[5, 6] Joe challenges the correctness of the identification of his voice by the officers, particularly by reason of its similarity to that of his brother Fred. This was a question of fact primarily for the jury's determination. In this connection it will be recalled Joe admitted his presence at the service station at certain times indicated by the police officers by admitting the correctness of portions of the conversations which they attributed to him which were not of an incriminating character. However, he sought to have the jury believe he did not participate in the inculpatory portions, even though in several instances these conversations either immediately preceded or immediately followed the conversations which he admitted. Furthermore, he failed to deny the conversation in which the officers identified his voice as being the one which made the arrangements with Chaiken to have the "sheets" delivered to the latter's home. Moreover, by replaying the portions of the reels in which his voice allegedly appeared, the jury had the opportunity to make a direct comparison between his voice and the voice attributed to him on the reels. In resolving the conflicts between Joe's testimony and that of the officers and in determining the weight that should be given to his denials, the jury properly took into consideration the fact he had suffered two prior felony convictions. Code Civ.Proc. sec. 2051; People v. Gould, 111 Cal.App.2d 1, 243 P.2d 809. It cannot be said, as a matter of law, that the jury was not justified in impliedly finding he was present at the service station on the designated occasions and made the statements attributed to him.

[7–9] Joe Sica further argues that the court erred in admitting in evidence against him (1) the documents, together with the notations thereon, recovered by the officer from the Williams apartment; (2) testimony concerning the acts and statements of his brother Fred upon his arrest; and (3) the recordings of the conversations of the other defendants at the gas station. He bases this contention on the general rule that before evidence of the acts and declarations of an alleged conspirator is admissible against another defendant the fact of the conspiracy must be proved. Code Civ.

Proc., sec. 1870, subd. 6; People v. Steccone, supra, 36 Cal.2d at page 238, 223 P.2d 17. This principle was not violated. As pointed out in the Steccone case, the issue of conspiracy need be proved only to the extent of establishing prima facie evidence of such fact. It need not be established beyond a reasonable doubt before such evidence is admissible. The listening post was set up and the recording device put in operation on March 31st. The arrest of Fred took place in the early morning of April 12th. Williams was arrested later that day. The recording ceased early that afternoon. There can be no doubt a prima facie showing of a conspiracy which included this defendant had already been made. Hence the acts and declarations of Fred at the time of his arrest and the documents with notations thereon found in the Williams apartment were admissible against him. The existence of the conspiracy having been shown, the act of each co-conspirator in pursuance thereof is attributable to all of the others even though they were not personally present when such acts were committed. People v. Ash, 88 Cal.App.2d 819, 828, 199 P.2d 711; People v. Benenato, supra, 77 Cal.App.2d at page 356, 175 P.2d 296; People v. Steccone, supra, 36 Cal.2d 234 at page 238, 223 P.2d 17.

[10, 11] The admissibility of the recorded conversations of the other defendants falls within a recognized exception to the general rule since the facts from which the conspiracy is to be inferred are so enmeshed with other facts going to constitute the crime and so interwoven with conversations of this defendant that it is difficult to separate them. While it is the general rule that proof of the existence of the conspiracy ordinarily should precede proof of the acts or declarations of a co-conspirator made pending the conspiracy and in aid and furtherance of the common design, that rule is not unyielding. Sometimes, for the sake of convenience, evidence of the acts and declarations of an alleged conspirator is admitted before sufficient proof of the conspiracy is given. People v. Matthew, 68 Cal.App. 95, 107, 228 P. 417; People v. Griffin, 98 Cal. App.2d 1, 48, 219 P.2d 519; People v. Ferlin, 203 Cal. 587, 599, 265 P. 230. Furthermore, any evidence received by virtue of this practical exception is necessarily received conditionally, for in the final analysis the jury must first pass judgment on the question as to whether the asserted conspiracy has been proved. People v. Steccone, supra, 36 Cal.2d at page 238, 223 P.2d 17; People v. Griffin, supra, 98 Cal.App.2d at page 53, 219 P.2d 519. Also, the order in which the evidence in a trial is admitted is a matter within the sound discretion of the trial court. People v. Ferlin, supra, 203 Cal. 587 at page 599, 265 P. 230; People v. Griffin, supra, 98 Cal.App.2d at page 53, 219 P. 2d 519. There was no abuse of such discretion.

[12, 13] Defendant Joe Sica urges that the court erred in admitting the testimony of the police officers with respect to the conversations in the gasoline station and over the telephone on the grounds that the admission of this evidence violated the guaranties of the Fourth and Fifth Amendments to the United States Constitution and Article I, section 19 of the Constitution of California. Even though it be assumed that the evidence of the conspiracy was obtained illegally the Fourth Amendment does not require that evidence so procured be excluded in a criminal prosecution in the state courts. Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782. Neither is the use of such evidence precluded by the California Constitution. People v. Gonzales, 20 Cal.2d 165, 169, 124 P.2d 44. The constitutional protection of the Fifth Amendment against compulsory self-incrimination may not be invoked as a restriction on a state court to prevent the use of otherwise competent evidence allegedly obtained by illegal means, so long as the requirements of the due process clause of the Fourteenth Amendment are not infringed. Adamson v. People of State of California, 332 U.S. 46, 54, 67 S.Ct. 1672, 91 L.Ed. 1903. See People v. Gonzales, supra, 20 Cal.2d at page 170, 124 P.2d 44. The vitality of these cases is not undermined by the decision in Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, where the court specifically held that the evidence objected to was obtained in a manner so shocking to the established traditions of American justice, in view of the brutal treatment inflicted on defendant by police officers, as to offend the concept of a fair trial as embodied in the due process clause of the Fourteenth Amendment. See People v. Kendall, 111 Cal.App.2d 204, 244 P.2d 418. No such claim is advanced by defendant in the case at bar. Neither do the circumstances of their arrest nor the conduct of the law enforcement officials even remotely parallel the events condemned by the United States Supreme Court in the Rochin case.

[14] Joseph Sica makes the further contention that the testimony concerning the "intercepted" telephone messages were improperly admitted because they were secured in violation of the Federal Communications Act, 48 Stats. at L. 1064, 1103, 47 U.S.C.A. § 605, which contains provisions making it an offense for any person to intercept and divulge to another, without the consent of the sender, the contents or substance of any wire communication. There is no merit in this argument. In a state court, the contents of telephone messages intercepted without the consent of the sender are admissible notwithstanding such interception was in violation of the Federal Communications Act. People v. Channell, 107 Cal.App.2d 192, 199, 236 P.2d 654; Hubin v. State, 180 Md. 279, 23 A.2d 706, 709, certiorari denied Neal v. State, 316 U.S. 680, 62 S.Ct. 1107, 86 L.Ed. 1753. Furthermore, the record shows that the recordings of the telephone conversations were made not by any mechanical interception (wiretapping) but through the use of a microphone which transmitted the conversations to the recording instrument and to the listening post. Even in the federal courts, where evidence obtained by wiretapping is excluded, United States v. Bernava, 2 Cir., 95 F.2d 310; Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314, the use of a microphone to overhear a telephone conversation is considered neither as wiretapping nor an interception of a communication within section 605 of the Federal Communications Act. Goldman v. United States, 316 U.S. 129, 133–134, 62 S.Ct. 993, 86 L.Ed. 1322. Since the dictaphone was not physically connected with any telephone wire, section 640 of the Penal Code has no application to the facts of this case. Section 653h of the Penal Code, which makes the unauthorized installations of dictagraphs on certain designated premises a misdemeanor, permits a peace officer who is expressly authorized by the head of his department to use and install such instruments "when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals." The evidence indicates a compliance with that section.

[15] All defendants attack the admission of testimony given by the police officers on these additional grounds: (1) the court erred in permitting the officers to testify as to their opinions of the identity of the speakers whose voices they were listening to at various stages of the recorded conversations after the jury had already heard the original recordings; (2) the use by the officers of memoranda to refresh their recollections of conversations was improper, since the memoranda were not prepared by the officers themselves or under their immediate direction, but were notes independently transcribed by a police stenographer and collectively corrected and revised by the testifying officers; and (3) the best evidence and hearsay rules were violated by the evidence thus introduced. From the preceding observations it is clear that on the issue of identification of the participants in the conversations, testimony of a witness who recognizes a voice and uses this identification to name the speaker is properly admissible, People v. Lorraine, 28 Cal.App.2d 50, 54, 81 P.2d 1004; Connell v. Clark, 88 Cal.App.2d 941, 947, 200 P.2d 26 and any uncertainty of the recognition goes only to the weight of the testimony. See People v. Harris, 87 Cal.App.2d 818, 824, 198 P.2d 60. It was necessary for the officers to identify the voices, otherwise the jury would not know who was speaking.

[16] Defendants' contention that the memoranda used to refresh the recollection of the officers was improperly prepared cannot be sustained. The requirements of section 2047 of the Code of Civil Procedure were fully satisfied by the nature of the writing used to refresh the officers' recollection. The transcriptions made by

the stenographer under the direction of the police officers came from recordings of conversations which had been concurrently overheard by the officers. These transcriptions were corrected by the officers to correspond with what each had actually heard soon enough after the conversations to make the memoranda accord with their recollections while the events were still fresh in their memories. That a witness may refresh his memory with a memorandum so prepared is abundantly supported. People v. Deckert, 77 Cal.App. 146, 151, 246 P. 157; People v. Amaya, 44 Cal.App. 2d 656, 658, 112 P.2d 942; People v. Zammora, 66 Cal.App.2d 166, 152 P.2d 180. The record shows that the officers simply used the memoranda to refresh their memories as to information directly obtained by them.

There is no merit in defendants' attempt to characterize the officers' testimony as an expert opinion or as an interpretation of evidence already before the jury on which the latter were competent to form their own conclusions. No error may be predicated on the use by the officers of the memoranda to refresh their recollection of the things they had heard and whom they remembered to have said them.

[17] In the light of this discussion, it must appear obvious that defendants' contention that the admission of the police officers' testimony was a violation of the best evidence rule is based upon a misconception of that rule. Under the facts herein the rules that "a written instrument is itself the best possible evidence of its * * * contents," Code Civ.Proc., sec. 1829, and that an "original writing must be produced and proved" are inapplicable. The issue before the court did not relate to the contents of a document or even to what context the recordings contained, but rather to the substance of conversations concerning unlawful transactions which were set out both on the recordings and in the officers' own notes of what had taken place at the station. The contemporaneous recordings were competent evidence, but not the sole evidence admissible on this point. Since the officers were testifying to what they had seen and heard, their testimony was primary evidence despite the fact that part of the same matter was incorporated into a sound recording. People v. Kulwin, 102 Cal.App.2d 104, 109, 226 P. 2d 672.

[18] Defendants other than Joe Sica raise the further objection that sufficient foundation was not laid for the admission of the testimony of the police officers as to the conversations in the gas station. The officers established that a dictaphone was placed in the station near the business telephone and that they set up a Pentagon recording machine in their listening post, that they could hear the conversations held in the station and identify some of the speakers by their voices with which they had already become familiar. They identified the voices of other defendants by conversations held with them after their arrest. "There are other ways of identifying voices than be seeing the speaker." People v. Pustau, 39 Cal.App.2d 407, 414, 103 P.2d 224, 227. Such identification may be made as a result of conversation with the defendant after his arrest as well as before. People v. Kulwin, supra, 102 Cal.App.2d at page 110, 226 P.2d 672. The officers were also aided in their identification by the names used in the conversations, and by observation of the physical presence of the parties whom they had seen many times at the station and listened to over a period of time. The foundation for the admission of the officer's testimony was sufficiently established. People v. Schultz, 18 Cal.App. 2d 485, 488, 64 P.2d 440; People v. Pustau, supra, 39 Cal.App.2d at page 414, 103 P.2d 224; People v. Collins, 80 Cal.App.2d 526, 535–536, 182 P.2d 585; People v. Kulwin, supra, 102 Cal.App.2d at page 110, 226 P. 2d 672.

That the conversations recorded by the officers were those of the defendants is virtually demonstrated. Joe Sica identified his own voice on the recordings and also identified the voice of his brother Fred and those of Chaiken and Weisbart. The failure of these defendants to deny their participation in any of the recorded conversations justified the jury in drawing an inference unfavorable to them on this issue. California Constitution, Art. I, sec.

13; People v. Adamson, 27 Cal.2d 478, 490–491, 165 P.2d 3.

[19] Since no judgment was pronounced against defendants Fred Sica, Williams, Chaiken and Weisbart, each of their purported appeals from the judgment is dismissed. People v. Brownstein, 109 Cal.App.2d 891, 241 P.2d 1056. The order, however, denying their respective motions for a new trial is affirmed. The judgment and order denying the defendant Joe Sica's motion for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

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112 Cal.App.2d 760

PORTER PIN CO. v. SAKIN et al.

Civ. 18959.

District Court of Appeal, Second District, Division 1, California.

Aug. 18, 1952.

Action by Porter Pin Company against Charles P. Sakin and others for an accounting under patent license agreement. From that portion of judgment of the Superior Court of Los Angeles County, Ingall W. Bull, J., denying relief against individual licensee, plaintiff appealed. The District Court of Appeal, Doran, J., held that the evidence sustained finding that individual licensees, having assigned license to a corporation as contemplated by original agreement and never having sold or distributed any pins thereunder, were not liable under license agreement to pay specified royalty monthly so long as licensees should sell and distribute pins under license.

Judgment affirmed.

1. Novation 🔑1

Conduct may form the basis for a novation.

2. Patents 🔑219(5)

Where exclusive license to manufacture, sell and distribute safety pins under specified patent had been assigned by individual licensees to a corporation as contemplated by original agreement, evidence sustained finding that individual licensees, never having sold or distributed pins under license, were not liable under license agreement providing for payment of specified royalty monthly so long as licensees should sell and distribute pins produced under license.

◆

Halverson & Halverson, George Halverson, Los Angeles, for appellant.

John W. Preston, John W. Preston, Jr., Los Angeles, for respondent, Leo L. Schaumer.

DORAN, Justice.

The action herein is for an accounting under a license agreement whereby plaintiff, the owner of certain letters patent on safety pins, granted to the defendants, Charles P. Sakin and Leo L. Schaumer, "the exclusive right to manufacture, cause to be manufactured, sell, cause to sell, distribute and cause to be distributed, said safety pin containing said patented improvement, and any and all improvements and extensions thereon, to the end of the term, for which said letters patent were granted, * * * for which said defendants agreed to pay the plaintiff an amount equal to five per cent (5%) of the net sales of all safety pins manufactured, sold or distributed, * * * with a minimum guarantee as and for said license fee of $300.00 per month, to be paid monthly thereafter so long as the defendants should sell and distribute safety pins produced thereunder * * *".

It was further agreed that defendants should have the right to assign the contract to a corporation to be organized. This was done and the contract assigned to the defendant, Safe Safety Pin Corporation of America, the individual defendants becoming officers and directors. Subsequently, by agreement, the guaranteed royalty was reduced to $100 per month, to be later increased to $200, and then to $300 per month, "said respective payments to be made monthly so long as the parties of the second part (Sakin and Schaumer) shall sell and distribute safety pins". It appears that the individual defendants, Sakin and Schaumer, never did manufacture, sell or distribute safety pins, but that the Safe Safety Pin Corporation did so manufacture, sell and distribute until about July 31, 1947.

No service of summons was had upon the defendant Charles P. Sakin and said defendant made no appearance in the case. The trial court, sitting without a jury, rendered judgment in favor of plaintiff against the Safe Safety Pin Corporation for $4,340 with interest, and against the plaintiff in favor of the defendant Leo L. Schaumer. Plaintiff has appealed from that part of the judgment denying relief against defendant Schaumer, appellant's brief stating that the corporate defendant was "execution proof".

Appellant's first question on appeal is phrased as follows: "Were defendants Sakin and Schaumer, released from liability by assigning all benefits thereunder to the corporate defendant?" The appellant claims that this should be answered in the negative, citing Section 1457 of the Civil Code, which provides that "The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise * * *."

The trial court found that the defendants Sakin and Schaumer "never manufactured, sold or distributed and neither of them ever manufactured, sold or distributed any safety pin. Said defendants never paid anything on account of royalties in the premises and were never asked by plaintiff to pay anything in the premises. Said defendants never rendered the plaintiff any accounting and were never asked by the plaintiff to do so". The conclusion necessarily followed that the only defendant liable to the plaintiff was the Safe Safety Pin Corporation, and judgment was rendered accordingly.

[1] It is appellant's contention that there is nothing in the contract indicating any intention to release the individual defendants from liability to plaintiff, and that the assignment by such defendants to the Safe Safety Pin Corporation did not relieve Sakin and Schaumer from individual liability to pay royalties. On the other hand, respondent Schaumer takes the position that "By agreement of all parties * * * Safe Safety Pin Corporation was substituted for and assumed the obligations of Sakin and Schaumer under said agreement", and that "the evidence shows facts sufficient to establish a novation". As said in Silva v. Providence Hospital, 14 Cal.2d 762, 773, 97 P.2d 798, 804, "conduct may form the basis for a novation * * * (Producers' Fruit Co. v. Goddard, 75 Cal. App. 737, 243 P. 686)".

[2] The record discloses substantial evidence in support of the trial court's finding that there was no liability on the part of the defendant Schaumer and that the only party responsible to the plaintiff for royalties under the contract was the corporate defendant. As hereinbefore mentioned, the payment of royalties under the license agreement was to be made "so long as the defendants should sell and distribute safety pins produced thereunder". And, as found by the court, the individual defendants never sold or distributed any safety pins.

It was contemplated by the parties, as stated in the contract, that a corporation should be organized to produce and market the pins. This was done, and thereafter all dealings were between plaintiff and the Safe Safety Pin Corporation, and not with the individual defendants. The Corporation furnished plaintiff with sales statements and computations of royalties; the individual defendants never paid any royalties and were never asked to pay or to account therefor. This state of affairs continued to exist during the period that the Safe Safety Pin Corporation manufactured and sold the pins, namely from August 1942 until July 31, 1947. This arrangement was apparently satisfactory to all parties concerned. Indeed, appellant does not appeal from the trial court's judgment against the Corporation, but complains that such defendant "is execution proof",—a matter in no way affecting the liability of the individual defendants.

Under the usual rule relating to appellate review where the record reveals substantial evidence in support of the findings, no cause for reversal has been shown.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

112 Cal.App.2d 794

ROBINSON et al. v. PEARDON et al.

Civ. 8104.

District Court of Appeal, Third District, California.

Aug. 22, 1952.

Action by J. W. Robinson and J. Ralph Robinson, copartners doing business under the firm name and style of Robinson Paint Co., against Fred Peardon and another, for labor and materials furnished. The Superior Court, Yuba County, Arthur Coats, J., rendered judgment for plaintiffs, and defendant Peardon appealed. The District Court of Appeal, Schottky, J. pro tem., held that the evidence sustained judgment for plaintiffs.

Judgment affirmed.

1. Appeal and Error 🔑1010(1)

Before appellate court is justified in reversing judgment for insufficiency of evidence, it must appear from the record that, accepting full force of the evidence, together with every inference favorable to prevailing party which may be reasonably drawn therefrom and excluding all evidence in conflict therewith, the law precludes such party from recovering judgment.

2. Work and Labor 🔑28(2)

In action by painters against owner of building for labor and materials furnished in both leased portion of building and portion retained by owner, the evidence sustained finding that work was performed at special instance and request of owner.

3. Mechanics' Liens 🔑303(1)

Where painters performed work in both leased portion of building and portion retained by owner, at special instance and request of owner, owner was personally liable for labor and materials furnished by painters, notwithstanding failure of painters to establish lien against the premises.

◆

Rich, Carlin & Fuidge, Marysville, for appellant.

Manwell & Manwell, Marysville, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiffs commenced an action upon a common count for labor and materials furnished to defendants. Judgment was rendered in favor of plaintiffs against defendant Peardon for $810.20 and against defendant McCue for $22. Defendant Peardon has appealed from the judgment.

Appellant, Peardon, is the owner of a building located on Third and Oak Streets, Marysville, California. McCue, the codefendant in the action, was the lessee of the downstairs portion of the building which he operated as a restaurant and bar. The upstairs was retained by the appellant and operated as a rooming house. In 1949 a fire occurred in the restaurant, causing damage to the building in both the leased and retained areas. The respondents did the painting work in the repairing of the premises. The total bill for their work was $2,590.06, of which all but $1,030.20 had been paid. No question is raised as to the reasonableness of the amount.

[1–3] Appellant contends he, as owner, is not liable personally upon the failure to establish a lien against the premises by one performing work or furnishing materials. Although the principle of law is as stated by appellant, it is not applicable to the instant case as the court found that the work was performed at the special instance and request of appellant, and the sole question to be determined upon this appeal is whether or not the evidence is sufficient to support that finding.

Appellant's argument upon the question of the sufficiency of the evidence is but an argument as to the weight of conflicting evidence, and we are bound by the familiar and oft-declared rule that before an appellate tribunal is justified in reversing a judgment for insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom and excluding all evidence in conflict therewith, it still appears that the law precludes such party from recovering a judgment. Applying this rule to the instant case, we find ample support for the judgment.

There is testimony to the effect that immediately after the fire a conference was held in the alley adjoining the building at which appellant Peardon, respondent J. R. Robinson, McCue, Johnson, an insurance adjuster, and Otto, the general contractor on the repair job, were present. The following appears in Otto's testimony:

> "Q. Now, tell us just what happened, Mr. Otto, as you remember it. A. Well, our final authorization to go ahead was made right in the alley alongside the building with Mr. Peardon and Mr. McCue and Mr. Johnson and Robinson and myself were there together, and the authorization that I naturally looked for is from the owner, although the insurance man has to coordinate the job and put his okay to do repairs.
>
> "Q. This Mr. Johnson, do you know who he was, Curt? A. He is the adjuster, yes, sir.
>
> "Q. And do you recall what orders if any he gave? A. Well, he will okay a job to go ahead any time it is in line with the repairs. On a job like that he can't authorize as far as the—the owner has to authorize the job, he can't do that but I looked to the owner for the award of a job.
>
> "Q. I see, and the owner was who? A. Mr. Peardon.
>
> "Q. And do you know who told Mr. Robinson to go ahead? A. Well, he authorized Robinson.
>
> "Q. But on Mr. Peardon's and Mr. Johnson's say so? A. Yes.
>
> * * * * * *
>
> "Q. Well, I don't mean who you looked to, I mean as to who directed the work. A. I looked to the owner for my instructions.
>
> "Q. Yes, but I believe you testified that you got the instructions for the downstairs work from Mr. McCue, did you not? A. Well, he authorized it also, he and Peardon were together when the authorization was made.
>
> * * * * * *
>
> "By Mr. Steel: Q. Mr. Otto, who employed you to do the work that you did on the premises? A. The owner.
>
> "Q. Mr. Peardon? A. Peardon, yes.
>
> "Q. And with respect to the downstairs, Mr. Peardon at the time the painting work was discussed gave instructions likewise, did he not as to what should be done down there? A. Yes.
>
> "Q. And he ratified all the proposals, including painting, that were discussed and agreed upon at the time of the conference you have mentioned? A. Yes.
>
> * * * * * *
>
> "By The Court: Q. You were the general contractor, you might term it, is that correct? A. Yes.
>
> "Q. Was this work that was done by Robinson, was that all the work that was done downstairs, or did you do any? A. Oh, no, we did quite a bit of carpenter work besides."

The foregoing evidence is sufficient to support the finding of the trial court that respondents' work was done at the special instance and request of appellant.

No other points raised require discussion.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

112 Cal.App.2d 507

BLISS et al. v. CALIFORNIA CO-OPERATIVE PRODUCERS et al.
Civ. 7943.
Sac. 6147.

District Court of Appeal, Third District, California.
Aug. 4, 1952.
Rehearing Denied Sept. 3, 1952.
Hearing Denied Sept. 25, 1952.

Charles A. Bliss, and others, brought an action against California Co-Operative Producers (a co-operative corporation), I. C. Shidler, Helen A. Winchester, B. J. Galbreath, and others, upon fruitgrowers' installment notes which payee co-operative endorsed to bank as agent for plaintiff and for co-operative and as collateral security for payment of note executed by co-operative in favor of plaintiffs, which endorsement was made after first installments were due but were unpaid. The Superior Court, Sacramento County, Malcolm C. Glenn, J., rendered a judgment adverse to the named individual defendants and they appealed. The District Court of Appeal, Schottky, J. pro tem., held that plaintiffs were not holders in due course against whom defenses of fraud and failure of consideration could not be asserted.

Judgment reversed with directions.

1. Bills and Notes 🔑349, 351

In action on fruitgrowers' installment notes which payee co-operative endorsed to bank as agent for plaintiffs and for co-operative and as collateral security for payment of note executed by co-operative in favor of plaintiffs, which endorsement was made after first installments were due but were unpaid, plaintiffs were charged with notice of default and were not holders in due course against whom defenses of fraud and failure of consideration could not be asserted.

2. Jury 🔑28(17)

Generally waiver of jury trial is not operative as regards a subsequent trial, and after waiver of jury trial and trial without jury, right of trial by jury, as regards subsequent proceedings to which it is otherwise guaranteed or applicable, remains available, and may be demanded and exercised as in original proceedings, in absence of statute or stipulation governing the matter and compelling contrary conclusion.

3. Jury 🔑28(17)

Where there has been a complete reversal and an order for a completely new trial in action in which a trial by jury is matter of right, a party is entitled to jury upon second trial even though he may have waived it at first trial.

B. J. Galbreath, Marysville, for appellants.

C. K. Curtright, Sacramento, Charles A. Bliss, Sacramento, for respondents.

SCHOTTKY, Justice pro tem.

The instant action was commenced in December, 1933, upon seven promissory installment notes, each having a separate maker, the payee of all of the notes being California Co-operative Producers, a corporation, which had contracted with the various note makers, and others, to can and process crops of cling peaches to be grown by the various note makers. The respondents are transferee of the seven installment notes, California Co-operative Producers having pledged them to respondents to secure the payment of a $5,000 note executed by that corporation payable to the order of respondent.

Following the filing of answer setting up various defenses the action was tried before the court, without a jury, and judgment was rendered in favor of respondents. The three appellants upon the instant appeal appealed from the judgment, and the Supreme Court in Bliss v. California Cooperative Producers, 30 Cal.2d 240, at page 258, 181 P.2d 369, 374, 170 A.L.R. 1009, said:

> "* * * In the state of the evidence and the findings we believe the issue of notice should be retried. In the event it is found that plaintiffs had notice, and were not therefore holders in due course, for the guidance of the court we will discuss the issues pertinent to the defenses interposed by appellants."

And 30 Cal.2d at page 255, 181 P.2d at page 378:

> "The judgment is reversed and the case may be retried only upon the issue of notice of non payment of the first installment at the time of the transfer, and judgment may thereafter be entered in accordance with the views expressed herein in the light of the determination of the issue of notice."

As to the law applicable to the issue to be determined upon the retrial the Supreme Court said, 30 Cal.2d at page 246, 181 P.2d at page 372:

> "* * * Therefore, the rule is that a transferee of an installment note is a holder in due course as to the installments to mature in the future when the transfer is made after one or more but not all of the installments are due on its face unless the past due installments have not in fact been paid and he has notice of that fact."

Upon the retrial of the action the trial court determined that respondents did not have notice of the default on the first installment; that they were holders in due course against whom the defenses of fraud and failure of consideration could not be asserted; and ordered judgment in favor of plaintiffs and respondents.

Defendants, the three appellants upon the instant appeal, have appealed from said judgment, and their major contention for a reversal of the judgment is that the evidence establishes that the respondents under the law must be charged with notice of the failure to pay the first installments of said promissory notes.

The general background of the transactions here involved and the nature of appellants' defenses have been set forth in the decision of the Supreme Court in the former appeal. From this decision and the evidence introduced upon the retrial it appears that a number of bankers and public-spirited citizens of Sacramento were interested in having the California Co-operative Producers locate a cannery in Sacramento, and that in order to finance the enterprise it was proposed that loans would be made to the Co-operative by these citizens upon notes of the Co-operative, which notes would be secured by growers' notes to the Co-operative. The banks would then advance the money to the Co-operative upon promissory notes of these citizens and would hold the note of the Co-operative and the notes of the growers as collateral. Mr. Alden Anderson, the President of the Capital National Bank, the bank in whose favor respondents' note was made, was, according to the testimony of respondent Bliss, the official of the bank with whom all of the discussions relating to the note transaction were had prior to the execution of the note of the Co-operative, and the entire transaction appears to have been handled in the bank where all of the notes remained. The note of respondents to the bank was dated April 17, 1928; the note of California Co-operative Producers to respondents was dated April 17, 1928; the so-called growers' notes were dated on different dates in May, June and July of 1927, each of said notes being an installment note, with the first installment payable on January 2, 1928. While the testimony is somewhat conflicting as to whether respondents had actual notice that the first installment of the growers' notes was unpaid at the time the notes of the respondents to the bank and the note of the Co-operative to respondents were executed, the trial court evidently accepted the testimony of respondent Bliss, who handled the transaction for respondents, that he did not know and did not learn that said first installment had not been paid until several months after April 17, 1928.

Among the findings made by the trial court were the following:

> "–XII–
>
> "That on or about the 17th day of April, 1928, the said notes of said defendants Shidler, Winchester, Galbreath et al were endorsed by said corporation and delivered for value to said Capital National Bank as collateral security for the payment of the said corporate note of said corporation, and that, at that time, and for a long time thereafter, neither said plaintiffs nor any of them, had any knowledge or notice that the first installment of said promissory notes, or any of them, so

endorsed and delivered had not been paid by the makers thereof in accordance with the provisions of said notes or otherwise, and that the plaintiffs were and they are, holders in due course, and for value of the said promissory notes of the said defendants, Winchester, Shidler, Galbreath, et al.

"–XIII–

"That on the 17th day of April, 1928, and at the time said notes of said corporation and of defendants, Shidler, Winchester, Galbreath et al were delivered to said Capital National Bank by said corporation, said bank was acting as the agent, both for said plaintiffs and said defendant corporation, in the taking and acceptance of said promissory notes; that the agency of said Bank, as the agent for plaintiffs, was limited in scope to the right and duty of said bank as such agent, to take and accept on behalf of plaintiff, in the usual course of business, the said note of defendant corporation, and the notes of growers under contract to said defendant corporation, as collateral thereto, and to hold all of said notes as collateral to and as security for the note of plaintiffs to said bank; so that in taking and accepting said notes of defendants, Shidler, Winchester, Galbreath, et al., which notes were over due and unpaid as to the first installment thereof, said bank acted beyond and without the scope of its authority, as agents for the plaintiffs herein.

"That neither said California Cooperative Producers, nor said Capital National Bank informed plaintiffs, or either of them, that the collateral notes or any of the same, which were given as security for the payment of the said California Cooperative Producers note was or were overdue and unpaid in the first or any of the installments thereof, and said plaintiffs had never been consulted or had any notice which collateral notes were to be given as such security, nor did said plaintiffs discover such fact until long after the transaction whereby plaintiffs had made and delivered their note to the Capital National Bank; but the said collateral notes were during all of said time kept in the possession of said Bank. That the said Bank, acting through its President, represented to plaintiffs that if plaintiffs would advance to said California Cooperative Producers the sum of $5,000 the said corporation would secure payment of said note with certain notes payable to said corporation in number and amount sufficient to insure the payment of the said note of said corporation when and as the same became due. That plaintiffs relied upon such statements and expected and intended and directed the said Bank to secure notes which were of such character."

Appellants do not challenge the finding that the bank was to take the notes in the usual course of business, and that in taking notes with overdue and unpaid installments, it acted beyond the scope of its authority. However, appellants argue that the bank, not having any authority to accept said notes for respondents, respondents were not bound by such acts, but that the acts of the bank in accepting said notes was subject to ratification by respondents, and that the bringing of suit upon said notes after knowledge of the facts was such ratification. Appellants cite Restatement of Agency, Section 97, where it is stated:

> "There is affirmance if the purported principal, with knowledge of the facts, in an action in which the third person or the purported agent is an adverse party:
>
> "(a) brings suit to enforce promises which were part of the unauthorized transaction or to secure interests which were the fruit of such transaction and to which he would be entitled only if the act had been authorized; * * *."

Appellants also cite Cowan v. Tremble, 111 Cal.App. 458, 462, 296 P. 91, 93:

> "It is well settled as a general rule that an undisclosed principal can either sue or be sued on the contract made by his agent (1 Cal.Jur. Agency, § 131, p. 854; Parker v. Otis, 130 Cal. 322,

> 62 P. 571, 927, 92 Am.St.Rep. 56; Schader v. White, 173 Cal. 441, 160 P. 557); and the fact that plaintiff brought the action thereon was a sufficient ratification of the acts of Jacobson (2 Corp.Jur. Agency, § 132, p. 513; Argenti v. Brannan, 5 Cal. 351; Thompson v. Spray, 72 Cal. 528, 14 P. 182)."

In Moody v. Judah Boas Finance Corp., 93 Cal.App. 21, at page 25, 268 P. 974, at page 976, the court said:

> "* * * It is well settled, however, that whenever an agent acting under a specific authorization has exceeded his authority in the performance of a lawful act, which the principal could have authorized, the principal may thereafter ratify such unauthorized act, and when so ratified it acts retrospectively and the principal is equally bound as he would have been had the original authority been ample, or had he originally performed the act in person (Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 P. 225); and, furthermore, as declared by section 1589 of the Civil Code, a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to have been known, to the person accepting."

Respondents, in reply, assert that the bank, as pledgee, was interested in the transactions. They argue that, assuming the testimony that the bank knew the notes to be a default as true (and in view of the findings and the uncontradicted evidence in the record it must be considered as true), nevertheless its agency was strictly limited to the acceptance of valid negotiable paper as collateral security, and that in accepting overdue paper and failing to communicate its knowledge of same to respondents, it acted outside of the scope of its authority and respondents are not bound by that knowledge. They quote from 3 C.J.S., Agency, § 271, page 205, as follows:

> "* * * It must be remembered, however, that the agent's knowledge or notice which is imputed to his principal is limited to that gained by the agent in the scope of his employment, as already discussed in § 264, and consequently the principal is not chargeable with notice of facts within the knowledge of his agent, when such knowledge was acquired while representing interests adverse to those of his principal."

We are unable to agree with respondents' contention that the conclusion of the court that respondents were holders in due course is sustained either by the findings or by the record. The notes of appellants were executed many months before they were delivered to the bank by the California Cooperative Producers. Respondent Bliss, who handled the transaction for the respondents, testified that he knew that notes of growers were to be taken as collateral, but "that neither Governor Anderson nor we knew whose notes would be attached as collateral", and that he (Bliss) did not see the collateral notes until weeks after April 17th. Respondents knew that the bank was to accept and hold the grower's notes "as collateral security to our note when we borrowed the five thousand dollars." The California Co-operative Producers, to whom the growers' notes were made, knew that the first installment was in default, the bank knew this also when it took the notes. Respondents apparently were quite willing to have the bank handle the transaction for them and the record fails to show that they made any objection when respondent Bliss saw the growers' notes some time after the loan was made. The record and findings show that the promissory notes sued upon were delivered to respondents by the bank prior to the filing of the instant action and that they filed suit to recover upon said notes.

[1] In the face of the finding that the bank was acting as the agent of both parties in the taking and acceptance of said promissory note, and that the bank did accept said promissory notes with the knowledge that the first installment thereon was past due, and in view of the fact that respondents accepted said notes from the bank and filed action thereon, we do not believe that it can be held that respondents were

holders in due course against whom the defenses of fraud and failure of consideration could not be asserted. In other words, respondents cannot seek to recover upon promissory notes which the bank accepted with knowledge of the first installment being in default, and then, when defenses of fraud and failure of consideration are set up by the appellant grower makers, defeat the right to assert these defenses by contending that the bank only had authority to accept notes on which no installments were past due, and that therefore respondents must be considered holders in due course. For when respondents brought suit upon said notes, they certainly must be held to have ratified the act of the bank in accepting them and the knowledge of the bank at the time the notes were accepted must also be held to have been the knowledge of respondents.

We therefore conclude that the trial court erred in concluding that respondents were not charged with notice of the default on the first installment of the notes and that they were holders in due course against whom the defenses of fraud and failure of consideration could not be asserted.

Having reached this conclusion on the only issue ordered to be retried by the decision of the Supreme Court, it follows that appellants were entitled to judgment as the Supreme Court stated that "judgment may thereafter be entered in accordance with the views expressed herein in the light of the determination of the issue of notice." For as stated by respondents in their brief:

> "We think it apparent from the foregoing that the Supreme Court, in pursuance of whose remittitur this case was retried, was satisfied with the evidence and findings in respect of the other matters in issue in the case, except the single and isolated matter of notice to the appellants of any infirmities in the instruments at the time they were taken by them. In fact the Supreme Court was so far satisfied with the evidence in the matter that it felt itself called upon to discuss the law with respect to defenses interposed by the appellants and treated the evidence as establishing those defenses in the event it should appear that the plaintiffs in the case were not holders in due course."

And as stated by appellants in their reply brief:

> "* * * The case was being tried *de novo* as to the single issue of notice, decision to go to the party entitled thereto under the law of the case laid down in the decision."

Appellants contend also that the court erred in denying them a jury in the second trial. They argue that even though they waived a jury upon the first trial, and the case was ordered to be retried upon the single issue of notice of nonpayment of the first installment at the time of the transfer, they were nevertheless entitled to a jury trial. Respondents in reply contend that the effect of the decision of the Supreme Court in the former appeal was not to order a complete new trial as in the case of a complete reversal, but was a direction for a continuation of the former trial for the reception of further evidence on the one issue, and that the waiver of the jury was still operative.

[2] The general rule appears to be as stated in a note in 106 A.L.R. at page 205, as follows:

> "The weight of authority is that a waiver of a jury trial is not operative as regards a subsequent trial, but that after waiver of a jury trial and a trial without a jury, the right of trial by jury, as regards subsequent proceedings to which it is otherwise guaranteed or applicable, remains available, and may be demanded and exercised as in original proceedings, in the absence of statute or stipulation governing the matter and compelling a contrary conclusion." See, also, 50 C.J.S., Juries, § 110, page 821.

[3] While it is no doubt true that where there has been a complete reversal and an order for a completely new trial in an action in which a trial by jury is a matter of right, a party is entitled to a jury upon the second trial even though he may have waived it at the first trial, we are inclined to doubt appellants' right to a

jury trial upon the limited retrial ordered by the Supreme Court in the instant case. However, it is unnecessary to determine this question in view of the fact that we have sustained appellants' contention that the judgment must be reversed upon the single issue involved.

No other points raised require discussion.

In view of the foregoing, the judgment is reversed with directions to enter judgment in favor of appellants.

PEEK and VAN DYKE, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.

112 Cal.App.2d 684

STOCKTON MORRIS PLAN CO. v. CALIFORNIA TRACTOR & EQUIPMENT CORP.

Civ. 8037.

District Court of Appeal, Third District, California.

Aug. 15, 1952.

Hearing Denied Oct. 9, 1952.

Action by the Stockton Morris Plan Company against California Tractor & Equipment Corporation upon a conditional sales contract under which county supervisor purported to purchase motor patrol from defendant company for county district which he represented. As part of same transaction, the sales contract was assigned to plaintiff, but sales contract violated statutory provisions concerning purchase of such equipment and called for unlawful diversion of county funds. The Superior Court, San Joaquin County, Thomas B. Quinn, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal held that finance company was not entitled to relief.

Judgment reversed.

1. Counties 🔑124(1)

Even if instrument by which county supervisor, purporting to act for his county district, attempted to purchase motor patrol would constitute a contract of the county, instrument would be void in view of fact that it was not signed by required number of county supervisors and because it purported to incur an indebtedness which exceeded the income and revenue provided for the year. Streets and Highways Code, § 909; Const. art. 11, § 18.

2. Counties 🔑126½

Where finance company directly participated in transaction wherein county supervisor purported to purchase motor patrol for his county district, from tractor company upon conditional sales contract which was assigned to finance company as part of same transaction, but sales contract violated statutory provisions concerning purchase of such equipment and called for unlawful diversion of county funds, finance company was not entitled to relief against tractor company on the assignment. Streets and Highways Code, § 909; Const. art. 11, § 18.

3. Contracts 🔑136

A contract against public policy or against the mandate of a statute may not be made foundation of any action, either in law or in equity.

◆

Leon E. Warmke, Stockton, for appellant.

Lafayette J. Smallpage, Harold J. Willis, Stockton, for respondent.

PER CURIAM.

This is an appeal from a judgment in favor of plaintiff arising out of the assignment of a conditional sales contract by defendant to plaintiff. By its complaint plaintiff and respondent (referred to hereinafter as the finance company) alleged as follows: That on March 31, 1947 defendant and appellant (hereinafter referred to as the tractor company) transferred to the finance company a document, a copy of which is attached to the complaint; that this document was purportedly executed by the tractor company, as seller, and "Mariposa County District No. 5", as buyer, for the sum of $6,500, upon which there was $2,744 of the contract price unpaid; that the finance company paid to the tractor company $2,362.57 for an assignment of the rights of the tractor company in said document; that the document was not executed by the said "Mariposa County District No. 5" and that that district never agreed to pay any sum thereon to the tractor company; that the document was valueless as a claim by the tractor company or the finance company, its assignee, against "Mariposa County District No. 5" for the payment of any money.

The trial court made the following findings of fact: That at all times mentioned in the complaint one S. A. Milton was a supervisor of Mariposa County for District 5 thereof and serving as such; that on March 31, 1947, Milton, purporting to act for the district, arranged with the tractor company for the purchase of an Adams Motor Patrol; that a conditional sales contract with the district, incorporating the details of the proposed transaction, was executed thereafter in the office of the finance company on a form supplied by it; that the financing details incorporated in said contract followed negotiations between the finance company, the tractor company and Milton; that on March 31, 1947 the tractor company sold and assigned to the finance company, without recourse, for a consideration of $2,362.50, all its interest in the contract "purportedly executed by [the tractor company] as seller and Mariposa County District No. 5 as buyer"; that the contract was not what it purported to be for the reason that the district never was a legal entity capable of making a valid contract, that Milton had no authority to bind the County of Mariposa through the execution of the contract because the Board of Supervisors of the County had never approved the contract nor authorized Milton to execute it; that the contract was valueless; that neither the finance company nor the tractor company had "actual" knowledge that the contract was invalid and unenforceable. As a conclusion of law the court declared that plaintiff was entitled to judgment as prayed. These findings are not attacked and could not be attacked as being unsupported by the record and the evidence.

[1] Mariposa County District No. 5, while constituting an intracounty administrative agency, is not a legal entity capable of contracting. If the instrument be treated as in some manner a contract of the county, then it was void as not having been signed by the required number of supervisors (sec. 909, Streets & Highways Code), and because it violated the provisions of section 18 of Article XI of the State Constitution, which provide that "No county * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year". (This purported contract provided for installment payments extending considerably more than one year into the future.)

It appears from the transcript of the evidence taken by the court that Supervisor Milton wanted to obtain the motor patrol for use upon the roads in his district and proposed to turn in as part payment therefor certain road-working equipment already owned by the county, leaving a balance to be paid; that though the law specifically forbade such action to be taken by a single supervisor, under whatever guise he might purport to act, without following the procedure laid down for the acquisition of such road-working machinery and for the disposition of county property, he nevertheless began negotiating with the tractor company, proposing to accomplish his desires by simply purchasing the needed motor patrol through a conditional sales contract, receiving upon the price a credit for an agreed amount in consideration of turning over to the tractor company the road-working machinery he already was in charge of, and providing for the payment of the balance out of county revenues. The tractor company and Milton agreed upon the purchase price of the motor patrol and further agreed on the amount to be credited by the trade in of the other road-working machinery, thus fixing the unpaid part of the purchase price. The tractor company informed Milton that so far as it was concerned, however, it would not carry the paper and the deal would have to be a cash deal, that is, that he would have to procure other financing. He thereupon submitted the facts to a bank and was at first informed that the bank would agree to finance the deal but was later informed that the bank would not handle the transaction. He thereupon contacted the tractor company, asking if it could suggest other financing and was told that the finance company, respondent here, might be interested. Thereupon Milton, with a salesman for the tractor company, and an executive of the finance company, met at the finance company's offices and the proposed deal was discussed. Milton was introduced as the supervisor from District 5 in Mariposa County. The details of the proposed transaction, as it had been tentatively agreed upon between Milton and the tractor company, was stated and the finance company's representative inquired as to how the unpaid balance of the purchase price would be met. He was told by Milton that the first payment would have to be made not earlier than August of that year because it would have to be met from the county's share of gas tax moneys collected by the State and paid to the county, which funds would not be available until then; that, by reason of the way in which these funds were received, it would be necessary to spread out the installment payments for eight months so that funds would be available as the demands were made. These matters having been talked over and tentatively agreed upon, the finance company caused the document hereinbefore referred to to be prepared. There was added to the unpaid purchase price the finance company's charges for carrying the paper, designated in the document as the time price differential, so that the unpaid contract price which would thus become payable out of the county tax moneys was fixed at $2,744, an addition to the purchase price of $381.50. Thereupon the document was executed, the salesman signing for the tractor company and Milton signing for the district. The salesman for the tractor company thereupon signed the seller's assignment to the finance company, and the finance company's check for the net amount of the unpaid purchase price was received by the salesman for the tractor company. Thus the matter was closed.

[2] Appellant advances several contentions by reason of which it asks a reversal of the judgment appealed from. Principally, it claims that the implied warranty of validity upon which the trial court primarily based its judgment did not arise under the circumstances here. We think that it is unnecessary to discuss these contentions because the further contention advanced by appellant here and also advanced by it in the trial court must be sustained. That contention is that under the circumstances of this case, as hereinbefore stated, the respondent, finance company, has directly participated for its own intended benefit in a transaction resulting in a purported agreement having for its purpose, if it be carried out, a violation of the specific statutory provisions governing the purchase by or for a county of such road-working equipment, the disposition, as a part of such purchase of property already owned by the county and the unlawful diversion of county funds. Appellant, tractor company, contends, and we think correctly, that under such circumstances no relief to any of the parties to this transaction can be given by a court.

[3] We may say with respect to the finance company and the tractor company, that full effect may be given to the finding of the trial court that the men involved in this transaction and representing those companies had no actual realization that the entire proposal of Supervisor Milton whereby he was attempting unlawfully to acquire and to dispose of property for and owned by the County of Mariposa was illegal and contrary to express provisions of pertinent statutes. But this cannot justify the courts of the State in placing their stamp of approval upon any part of the transactions involved here, for the benefit of either of the two companies involved, who actively participated therein for profit. "* * * [A] contract against public policy or against the mandate of a statute, may not be made the foundation of any action, either in law or in equity." Hooper v. Barranti, 81 Cal.App.2d 570, 574, 184 P.2d 688, 691.

> "The illegality of an agreement may be in the consideration, in a promise, or in its performance. An agreement to do an illegal act is illegal. Usually the element that destroys the validity

> of an agreement is the purpose of the parties to accomplish or to aid an unlawful object. An agreement which discloses an intention to contravene a statute in fraud of the public or to the injury of private parties savors of a conspiracy and is vicious and unenforceable. If such an intention is once found to exist, the law cannot presume that the agreement is without the effect intended by the parties in order to confer upon it the quality of enforceability.
>
> "* * * Moreover, agreements which, though legal when standing by themselves, are merely steps intended for the accomplishment of an illegal object will be declared illegal. If the effect of the agreement is to accomplish an unlawful purpose, however, the agreement will be declared illegal regardless of the intention of the parties. Indeed, the mere tendency of an agreement to promote unlawful acts may render it illegal as against the policy of the law." (12 Am.Jur. "Contracts", pp. 643–644.)

Our courts have by decisions too numerous to mention enforced the principle of law involved in the foregoing quotations. Suffice it to refer to a few. See Levinson v. Boas, 150 Cal. 185, 88 P. 825, 12 L.R.A., N.S., 575. See, also, Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570, in which last case a taxpayer was allowed to recover for the County of Santa Clara moneys paid to contractors engaged in the erection of a public building for the county upon the ground that the law concerning the letting of such contracts had not been followed. So far-reaching is the principle here being discussed that it has been declared that such a contract cannot be ratified nor can any person be estopped from denying its validity. Fewel & Dawes, Inc. v. Pratt, 17 Cal.2d 85, 91, 109 P.2d 650. And our Supreme Court has declared that if a contract is illegal as a matter of law that court may refuse to enforce it, regardless of whether or not the matter has been advanced in the lower court. Fewel & Dawes, Inc. v. Pratt, supra, page 92, 109 P.2d 650, citing Morey v. Paladini, 187 Cal. 727, 203 P. 760.

In reply to this contention the respondent, finance company, urges that because it grounds its cause of action upon the assignment to it of the illegal contract and not upon the contract itself, the rule being discussed has no application. We do not agree. The respondent must be charged with knowledge of the laws being violated and of the unlawful purpose which Milton, through the guise of this purported contract with Mariposa County District No. 5 was seeking to accomplish. The entire plan was discussed directly with respondent according to the evidence and in particular it knew that Mariposa County tax funds were to be paid in to it in carrying out this unlawful plan. It participated therein solely for the purpose of profit which it expected to receive through the payment to it of these same tax moneys. Its participation preceded the execution of the purported contract, and the document of which it took an assignment was written in its own offices upon its own forms. To be sure, it was not nominally a party to the purported contract, but it knew that the transaction would not occur unless it participated and took an assignment of the instrument which was necessary to the consummation of the unlawful transaction. Though it seeks to base its cause of action on the asserted implied warranty of validity breached by the actual invalidity, yet so close and intimate from the inception has been its association with all those concerned in this transaction and with all things done to further it that it must be here held to be particeps criminis therein. See Asher v. Johnson, 26 Cal.App.2d 403, 411, 79 P.2d 457. To grant relief in this case would be for the courts to lend themselves to the tearing down of the safeguards which the statutes have erected to protect public property and public funds.

The judgment is reversed.

112 Cal.App.2d 676

HAY et al. v. ALLEN et al.

Civ. 8088.

Sac. 6216.

District Court of Appeal, Third District, California.

Aug. 14, 1952.

Rehearing Denied Sept. 13, 1952.

Hearing Denied Oct. 9, 1952.

Quiet title action by William G. Hay, and another, against Delmer E. Allen, and another. The parties' common predecessor did not include in description in deed all realty pointed out as being conveyed to defendants' predecessor, and trustee of common predecessor's trust deed released realty described and then, upon default, conveyed remainder of original tract to plaintiffs' predecessor, but neither plaintiff nor his predecessor believed they had purchased the omitted realty. The Superior Court, Mendocino County, Lilburn Gibson, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that release would be interpreted to cover the omitted realty, and that plaintiffs were estopped from asserting claim thereto.

Judgment affirmed.

1. Quieting Title 🔑52

In quiet title action judgment, description, commencing at stake at southerly line of N.W.¼ of S.E.¼ of section 34, midway between easterly and westerly halves of said quarter quarter, thence northwesterly to point 50 feet west of most westerly point of named dwelling, thence northeasterly to stake in fence line to south boundary of named county road, which point is north 00° 53′ 30″ east, 625.97 feet from point of beginning, and thence to point of beginning was legally sufficient, since all three corners of the triangle could be located with certainty.

2. Appeal and Error 🔑852

Trial court's judgment must be affirmed if the findings, supported by evidence, are sufficient to warrant the relief granted on any legal theory.

3. Appeal and Error 🔑931(1), 1071(1, 2, 3)

An appellate court must make every intendment in favor of the judgment, and erroneous conclusions of law or unsupported or erroneous findings of fact will be disregarded as being harmless error if judgment, as rendered, can be sustained on the supported and proper findings made by the trial court.

4. Deeds 🔑101

If language used in deed is ambiguous, the court may look to the acts of the parties thereunder and to the practical construction placed on it by them in determining the parties' intent.

5. Estoppel 🔑98(1)

Mortgages 🔑309(1)

Where deed to defendants' predecessor did not include in its description all realty pointed out as being conveyed by parties' common predecessor, and trustee of common predecessor's trust deed released realty described and then, upon default, conveyed remainder of original tract, except for the realty described, to plaintiffs' predecessor, but neither plaintiff nor his predecessors believed they had purchased the omitted realty, and defendants' predecessors built house thereon, release would be interpreted to cover the omitted realty also, and plaintiffs were estopped from asserting a claim thereto. Code Civ. Proc. §§ 318, 1860; Civ.Code, §§ 1636, 1654.

6. Evidence 🔑66

Fraud 🔑21

The land owner is presumed to know the boundaries and area thereof, and a purchaser is warranted in relying upon owner's representations concerning boundaries, whether designated by acres or dimensions, and such representations, if false, operate as a fraud in law upon the purchaser.

7. Estoppel 🔑83(2), 98(1)

Where declarations of grantor concerning his boundary lines controlled grantee in purchase of the land, the grantor and those claiming under him are estopped to assert any boundary in opposition of the lines claimed by the grantee.

8. Estoppel 🔑98(1)

An estoppel operates not only on the parties to a land transaction but also on the privies including those who are privy by reason of contract.

Spurr & Brunner, Ukiah, for appellants.

Kasch & Cook, Ukiah, for respondents.

PEEK, Justice.

This is an appeal from an adverse judgment rendered in a quiet title action instituted by plaintiffs.

The situation out of which this litigation grew is as follows. In September 1939 one V. H. Warnock became the owner of certain lands in Mendocino County known as the Craig Ranch consisting of the N.E.¼ of the S.W.¼, and the N.W.¼ of the S.E.¼ of section 34, T. 12 N, R.16 W., M.D.M., except that portion of the N.W.¼ of the S.E.¼ lying to the north of a county road known as the Iverson Landing Road, which runs from the northwest corner to the southeast corner of said section, roughly bisecting it.

On September 11, 1939, Warnock and his wife executed a deed of trust on all of the land to the California Pacific Title & Trust Company, as trustee, to secure payment of a $1,312.38 note payable in six months after date. The note became due on March 11, 1940. No payments were ever made thereon.

Subsequently on March 11, 1940, Warnock sold to one Samuels a ten acre tract of said property. This tract, rectangular in shape, was to the south of and bordered on the Iverson Road. On the same day the trustee executed a partial release to said ten acres. On August 27, 1940, by an instrument in writing, Warnock agreed to sell "20 acres, more or less" to Mr. and Mrs. Thompson, defendants' predecessors. No description other than the designated acreage was set forth in said agreement. However the boundaries of the tract were pointed out to the Thompsons as being the Iverson Landing Road on the north, the Samuels property on the west and the southerly boundary of the northwest one-quarter on the south. Under the terms of said agreement of sale the property was to be surveyed and a description provided. Upon making this contract the Thompsons entered into possession of the property so described and immediately commenced construction of the house now contended to be upon plaintiffs' property. In addition they cut and cleared the brush and trees to a distance of 50 feet to the west of the house and built a driveway to the Iverson Landing Road. On May 20, 1941, and it is to be noted subsequently to the completion of the house, Warnock executed a deed to the Thompsons which deed described the land conveyed as being:

> "All that portion of the east half of the northwest quarter of the southeast quarter of Section 34, Township 12 North, Range 16 West, M.D.M. lying south of the Iverson Landing Yorkville Road, containing 20 acres more or less."

This description, due to a mistake of the surveyor, did not fully describe the property pointed out to the Thompsons and in particular the westerly portion thereof on which the house and other improvements were located. Only the most easterly five or six acres of the area was described, thereby omitting the portion on which the house was situated.

On June 9, 1941, the trustee, using the same description, executed a release from the deed of trust of the property so conveyed. Warnock testified that the area described by said description was intended to cover the area he had previously pointed out to the Thompsons, and that the area, so pointed out, was believed by him to be all of his remaining property east of the Samuels tract. The evidence relating to Warnock's agreement with the trustee, concerning the partial release was to the effect that no money was to be paid the trustee or beneficiary for the release "Because at that time I was building a cabin on down below, and we figured one would offset the value of the other."

On March 24, 1945, the Thompsons sold the property to the defendants herein, the Allens, who made further improvements and cleared the area west of the house to a distance of 100 feet.

On April 21, 1942 the trustee, to satisfy the defaulted note, sold the remaining property to Mr. and Mrs. Childress. The description was the same as that originally set forth in the deed from Craig to Warnock but with exceptions as to the property contained in the deeds to Samuels and the Thompsons. The Childress', on May 21, 1942, conveyed to one Boonstra who, on September 23, 1943, using the same description, conveyed the same to plaintiffs and appellants herein. None of these parties, including plaintiffs, believed they were purchasing any of the property now in dispute.

Taxes were assessed on the basis of the deed description, and an assessment for improvements was made. Payments in accordance with the assessments were made for five years, from 1942 to 1946 inclusive, first by the Thompsons and then by the Allens. The east half, south of the road, was unimproved, the only improvement on the entire area being the house here involved.

The trial court found that the Allens and their predecessors had complied with the requisites necessary to acquire title by adverse possession as to a portion of the land (later to be described) and awarded judgment for defendants in accordance with their cross-complaint. The court also found that plaintiffs were barred from maintaining their action by the provisions of Code of Civil Procedure, section 318.

[1] Appellants first contend the description of the land awarded by the judgment is indefinite and therefore the judgment must be reversed.

The relevant portion of the description contended to be void reads as follows:

> "Commencing at a point where a 3 x 3 redwood stake is set, which said stake is on the Southerly line of the said Northwest Quarter of the Southeast Quarter of said Section 34, midway between the Easterly and Westerly halves of said Northwest Quarter of the Southeast Quarter of said Section 34, * * *
>
> "Thence from said point of beginning running in a Northwesterly direction to a point 50 feet West of the most Westerly point of a certain dwelling known as the Delmer E. Allen home.
>
> "Thence in a Northeasterly direction to a point where a 3 x 3 redwood stake is set in the fenceline on the South boundary of the County Road, known as the Iversens Landing Road, which said point is North 00° 53′ 30″ East, 625.97 feet from the point of beginning; and thence running in a direct line to the point of beginning.
>
> "Intending hereby to describe a tract of land triangular in shape, upon which the aforesaid Allen dwelling is located * * *".

We are unable to agree with appellants in this contention. The location of the house is of course definite, as is its most westerly point. The description specifies the western apex of the triangle to be 50 feet west of the most westerly point of the house. Appellants' argument that the point so specified by this direction could be anywhere on the line marking that longitude is not convincing. The words used must be given a common sense interpretation. We think a reading of the description shows that "west" as there used meant "due west". It was not necessary to actually use the word "due" to sufficiently indicate the direction. The most northerly corner of the triangle is marked by a 3 x 3 redwood stake set on the south boundary of the Iverson Landing Road. The point of beginning, the most southerly corner of the triangle, can be located by a 3 x 3 redwood stake as well as by computation of the angle and distance from the stake set in the south boundary of the road. While the description may not be all the appellants desire it to be, it is legally sufficient since all three corners of the triangle can be located with certainty. See Newport v. Hatton, 195 Cal. 132, 156, 231 P. 987.

Appellants' remaining contentions are addressed to a demonstration that the judgment cannot stand on the theory on which it was rendered, to-wit, that respondents by virtue of adverse possession are entitled to the property awarded.

[2, 3] The judgment of a trial court "must be affirmed if the findings, supported by the evidence, are sufficient to warrant

the relief granted on any legal theory." Sears v. Rule, 27 Cal.2d 131, 140, 163 P.2d 443, 448; see also In re Estate of Raphael, 91 Cal.App.2d 931, 940, 206 P.2d 391; Heck v. Heck, 63 Cal.App.2d 470, 475, 147 P.2d 110; Rickards v. Noonan, 40 Cal.App.2d 266, 273, 104 P.2d 839; 2 Cal. Jur. 476. It is a further and well settled corollary rule that an appellate court must make every intendment in favor of the judgment and erroneous conclusions of law and unsupported or erroneous findings of fact will be disregarded as being harmless error if the judgment as rendered can be sustained on the supported and proper findings made by the trial court. Arnold v. Arnold, 76 Cal.App.2d 877, 880, 174 P.2d 674; Lange v. Waters, 156 Cal. 142, 103 P. 889; 2 Cal.Jur. 1028.

Since it is our conclusion that the judgment, as rendered, can be affirmed on theories other than adverse possession it becomes unnecessary to discuss appellants' other contentions, all of which are addressed to a consideration of the applicability of that theory.

[4] It is the statute rule in the state that the primary object of interpretation is to give effect to the mutual intention of the parties as it existed at the time of the agreement. Civil Code, sec. 1636. It is also the rule that "a contract should be interpreted most strongly against the party who caused the uncertainty to exist." Civil Code, sec. 1654. It is the further rule that it is the duty of the court to assume the positions of the parties and to consider the circumstances surrounding the execution of the conveyance and therefrom, if possible, gain the true intent of the parties. C.C.P., sec. 1860; Marlin v. Robinson, 123 Cal.App. 373, 11 P.2d 70. And in so determining the intent of the parties a court may look to the acts of the parties thereunder and to the practical construction placed upon it by them. Jones v. Wilterding, 100 Cal.App.2d 210, 223 P.2d 91.

[5] Viewing the evidence in light of rules as stated it is obvious that Warnock intended to sell all of the property owned by him lying east of the Samuels tract and that the boundaries he pointed out to the Thompsons were in conformity with this intention. The property is mountain property and at the time of the Thompsons' agreement no accurate description of the parcel was available. Consonant with these circumstances it was agreed the Thompsons should take possession and that subsequently, when an accurate description was available, a deed would be executed in accordance therewith and delivered to them. The Thompsons entered into possession, and within the boundaries of the property as pointed out to them, built a house and roadway to the Iverson Landing Road. Warnock hired an unlicensed surveyor to ascertain a proper description of the parcel for the deed. However, the description as platted by him was erroneous and did not include the property upon which the house was situated. The trustee had agreed with Warnock to release the property conveyed from the deed of trust. It was contemplated by Warnock and the trustee that the value of the property released would be offset by the value of a building Warnock was erecting on another part of the property. The erroneous description was provided the trustee and it without question executed its release on the basis of the description as provided and in accordance with said agreement. Lastly the court found that all of the parties, including the plaintiffs, at the time they purchased their interest, believed all of the land east of the Samuels tract was owned by the Thompsons and their successors, the Allens.

Thus the evidence conclusively shows that Warnock believed the description in question covered the property as pointed out to the Thompsons that the trustee had agreed to release whatever property was sold by Warnock and that the Thompsons, as well as all other interested parties, believed they (the Thompsons) were the owners of all of the erroneously-described 20 acres. Hence, by applying the principles of interpretation above enunciated to the undisputed facts it necessarily follows that the trustee's release must be interpreted as covering the property pointed out to the Thompsons by Warnock.

However, even if the above interpretation of the contract be incorrect, appellants' claim would still be without merit since under the facts as shown by the record they are estopped from asserting a claim to the land in question.

[6, 7] It is the well established rule that "the owner of land is presumed to know the boundaries and area of his land, and a purchaser thereof from him is warranted in relying upon the owner's representations as to the boundaries, whether designated by acres or dimensions; and if his representations concerning same are false, they operate as a fraud in law upon the purchaser * * *. So where the declarations of the grantor in relation to his boundary lines controlled the grantee in the purchase of the land, the grantor, and those claiming under him are estopped to assert any boundary in opposition to the lines claimed by the grantee." 4 Cal.Jur. p. 440.

Under this rule, if the contesting parties here were the grantor Warnock, and the Allens, the successors of his grantees, the grantor would be estopped to assert any boundary in opposition to that pointed out by him and which parcel all parties thought was truly described by the description of the deed.

However, here the contest is not between the grantor and his grantees or their successors. The plaintiffs (the Hays) are purchasers from the trustee, under a deed of trust which was placed on the property prior to the sale here involved.

[8] Ordinarily the purchasers from a trustee under such circumstances would be asserting an independent title and would not be subject to any estoppel which could be asserted against the grantor-trustor. However, an estoppel operates not only on the parties to a transaction but also their privies including those who are privy by reason of contract. 10 Cal.Jur. 652.

Here the trustee is shown to have agreed to, and in fact did, release the property so sold by Warnock. By virtue of the contract the trustee was placed in privity with Warnock and since plaintiffs are the successors of the trustee they also are in privity with Warnock and hence are estopped from asserting a boundary different from that pointed out by him to the Thompsons.

The judgment is affirmed.

VAN DYKE, J., and SCHOTTKY, Justice pro tem., concur.

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112 Cal.App.2d 775

WYLAND v. WYLAND.

Civ. 4529.

District Court of Appeal, Fourth District, California.

Aug. 19, 1952.

Proceeding by Dorothy L. Wyland against Charles Leo Wyland. On petition for writ of supersedeas to restrain the sale of certain real property pending defendant's appeal from the judgment, Raymond Thompson, J. The District Court of Appeal, Per Curiam, held that the petition would be denied in view of failure of appellant to comply with Code Civ.Proc. § 945, relating to undertaking on appeal concerning real property, and in view of appellant's failure to show a reason why a stay was not perfected in accordance therewith.

Writ denied.

Appeal and Error 🔑478

Where appellant did not comply with statute relating to undertaking on appeal concerning real property and showed no reason why a stay was not perfected in accordance therewith, petition for writ of supersedeas to restrain sale of certain property, pursuant to order of sale included in judgment, pending appeal from such judgment, would be denied. Code Civ. Proc. § 945.

◆

Rutan, Tucker, Howell & Tucker, Santa Ana, for appellant.

James E. Walker, Santa Ana, for respondent.

PER CURIAM.

This is a petition for a writ of *supersedeas* to restrain the sale of certain real property, pursuant to an order of sale included in a judgment, pending the appeal from that judgment.

The appellant having failed to comply with Section 945 of the Code of Civil Procedure, and no sufficient reason having been shown why a stay was not perfected in accordance therewith, the petition must be denied. Guardianship of Morro, 14 Cal.2d 134, 92 P.2d 1012.

The writ is denied and the order to show cause heretofore issued is discharged.

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112 Cal.App.2d 534

BARROWS et al. v. JACKSON.

Civ. 18717.

District Court of Appeal, Second District, Division 3, California.

Aug. 6, 1952.

Hearing Denied Oct. 2, 1952.

Action by Olive B. Barrows and others against Leola Jackson to recover damages for breach of a restrictive covenant against use or occupancy of realty by non-Caucasians. The Superior Court of Los Angeles County, Daniel N. Stevens, J., sustained defendant's demurrer to the complaint and from the adverse judgment which followed, named plaintiff and others appealed. The District Court of Appeal, Vallée, J., held that enforcement of such racial restrictive covenant in state court by action against covenantor to recover damages for breach of covenant would constitute state action denying to citizens equal protection of the laws in violation of Fourteenth Amendment.

Judgment affirmed.

1. Covenants 🔑1, 110

In absence of fraud or mistake, parties to written agreement that no part of their realty should be used or occupied by non-Caucasians and that if any of the restricted realty should be so used or occupied, the party who covenanted as to such realty and his successors would immediately become liable to those covenantors and their successors whose lots were not so occupied for damages resulting from such breach were conclusively bound as between themselves by their covenants, if such covenants were not contrary to public policy or violative of constitutional limitations, and liability for breach of covenant accrued when a lot subject to such covenant was used and occupied by non-Caucasians.

2. Covenants 🔑104

An action for breach of a covenant is an action on a contract.

3. Covenants 🔑104

The ordinary remedy for breach of a covenant is that the delinquent party must respond in damages and availability of other remedies does not preclude resort to an action for damages.

4. Pleading 🔑214(3)

Allegation that agreement provided that restriction thereby imposed on use and occupancy of realty should be a covenant running with the land was admitted by demurrer to complaint. Civ.Code, §§ 1461, 1468.

5. Covenants 🔑84

In action against a party to written agreement by which owners of various lots covenanted that they should not be used or occupied by non-Caucasians for breach of such covenant after conveyance of restricted lot by defendant, it was immaterial whether covenant was one running with the land, since if the covenant ran with the land, defendant, as an original covenantor, was not absolved thereby from the obligation of the covenant.

6. Constitutional Law 🔑215

A State may not by judicial process enforce private rights derived from contractual agreements of private individuals where to do so would result in infringement of civil liberties guaranteed by the United States Constitution.

7. Constitutional Law ⚷215

A restrictive covenant against use or occupancy of realty by non-Caucasians cannot be enforced in State Court by action by convenantees against covenantor to recover damages for breach of covenant, since such enforcement of covenant would constitute "state action" denying to citizens equal protection of the laws in violation of Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

See publication Words and Phrases, for other judicial constructions and definitions of "State Action".

8. Constitutional Law ⚷215

Racial restrictive covenants are valid, notwithstanding the unjust discrimination, so long as their purposes are achieved by voluntary adherence of the parties, since owner has the right to decline to permit any individual or class to use or occupy his land, but such covenants are constitutionally unenforceable by state action. U.S.C.A. Const. Amend. 14.

9. Constitutional Law ⚷215

Exercise of state power in any form constitutes "state action" within meaning of Fourteenth Amendment. U.S.C.A. Const. Amend. 14.

10. Constitutional Law ⚷215

No state sanction, direct or indirect, can constitutionally be imposed for the breach of a restrictive covenant if such sanction would result in the denial of any civil right guaranteed by the Constitution. U.S.C.A.Const. Amend. 14.

11. Constitutional Law ⚷215

Any recognition of a racial restrictive covenant in an action in a state court constitutes state action within meaning of Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

12. Constitutional Law ⚷305

Denial of access to state courts to enforce discriminatory racial restrictive covenants as to use or occupancy of land does not deprive covenantees of their property without due process of law, since no individual has the right to demand action by the State which results in denial of equal protection of the laws to other individuals. U.S.C.A.Const. Amend. 14.

John C. Miles and J. Wallace McKnight, Los Angeles, for appellants.

John W. Preston, Los Angeles, for Neighborly Endeavor, Inc., United Neighbors, Inc., United Homeowners, Inc., Vermont Square Neighbors, Inc., Harvard Neighbors Ass'n, Neighborhood Protective Ass'n, Inc., Steadfast Neighbors Committee, Angelus Mesa Neighbors Ass'n, Loyal Neighbors Ass'n, Citizens United, Inc., LaFayette Square Improvement Ass'n, Hancock Park Neighbors, Inc., The Park Community Ass'n, and Associated Neighbors, *amici curiae* on behalf of appellants.

Sims & Wallbert and Loren Miller, Los Angeles, for respondent.

Rosalind G. Bates, Los Angeles, for Women's International Club, *amicus curiae* on behalf of respondent.

George E. Bodle and James Landye, Los Angeles, for Los Angeles Central Labor Council, *amicus curiae* on behalf of respondent.

Basil Feinberg, Los Angeles, for Los Angeles International Ladies Garment Workers Union, *amicus curiae* on behalf of respondent.

Saburo Kido, Los Angeles, for Japanese American Citizens League, *amicus curiae* on behalf of respondent.

Fred Okrand, Los Angeles, for Greater Los Angeles C. I. O. Council, *amicus curiae* on behalf of respondent.

Everette Porter, Los Angeles, for National Ass'n for Advancement of Colored People, *amicus curiae* on behalf of respondent.

A. L. Wirin, and Abraham Gorenfeld, Los Angeles, for American Civil Liberties Union, Southern California Branch, *amicus curiae* on behalf of respondent.

David Ziskind, Los Angeles, for American Council on Human Rights; American Jewish Committee; Anti-Defamation League, B'nai B'rith; Eagle Rock Council for Civic Unity; Jewish Labor Committee;

Los Angeles Dist. Council, Jewish War Veterans, U.S.A.; Los Angeles Urban League; Pasadena Y. W. C. A.; Social Action Department, Congregational Conference of Southern California and Southwest; Santa Monica Y. W. C. A.; Southern California, B'nai B'rith Women; Southern Division, California Cooperative League; and The Christines, *amici curiae* on behalf of respondent.

VALLEÉ, Justice.

This appeal presents the question whether the equal protection clause of the Fourteenth Amendment of the Constitution of the United States forbids the maintenance in a state court of an action for damages for the alleged breach of a covenant prohibiting the use or occupancy of real property by non-Caucasians. Defendant's demurrer to the complaint was sustained without leave to amend. Plaintiffs appeal from the judgment which followed.

The facts alleged are these.

On October 21, 1944, three of the plaintiffs, the predecessor of the fourth, and the defendant, the owners of four parcels of realty in Los Angeles, entered into a written agreement by which each bound himself and his successors by a continuing covenant that no part of his realty "be used or occupied by any person or persons not wholly of the white or Caucasian race."

The agreement provided that the restriction should be incorporated in "all papers and transfers" of the lots, that the restriction "be a covenant running with the land," that it was for the benefit of all the lots; and that if any of the lots should be used or occupied by any person not wholly of the white or Caucasian race, then in that event the covenantor who covenanted as to that lot, and his successors, would immediately become liable to those covenantors and their successors whose lots were not so occupied for all damages which they may have suffered by reason of the breach. The agreement was recorded May 8, 1945.

On February 2, 1950, defendant and one Grace executed a grant deed, which was recorded, by which they conveyed one of the restricted lots to the Smallys. Defendant did not incorporate the restrictions in the deed nor make any reference therein to the agreement.

On September 3, 1950, defendant moved out of the house on the lot conveyed, and on September 4, 1950, persons not of the Caucasian race moved in and began to use and occupy the same. When defendant moved out of the house "she did so in order to permit persons known to her to be other than the Caucasian race to move into and occupy said house, and with the intention that persons not of the Caucasian race should move into and occupy said house." Defendant, in violation of said agreement, has permitted persons not wholly of the white or Caucasian race to occupy the property, and such occupancy is for residence. Damage, claimed depreciation in the value of plaintiffs' properties, is alleged.

Plaintiffs assert they are entitled to recover damages for breach of contract in two respects: 1) for failure of defendant to incorporate the restrictive agreement in her conveyance to the Smallys, and 2) as an original covenantor. Defendant counters 1) a cause of action is not stated for failure to incorporate the restrictive agreement in the conveyance because the Smallys took title with constructive notice of its terms; 2) a cause of action is not stated for permitting the use and occupancy of the realty by non-Caucasians because a covenantor is not liable for the subsequent breach of the covenant by a subsequent owner; and 3) a cause of action is not stated because of applicable provisions of the state and federal constitutions. Plaintiffs reply 1) a cause of action for failure to incorporate the restrictive agreement in the conveyance is stated because in any event they would be entitled to nominal damages under Civil Code section 1466; 2) a cause of action is stated because defendant made a valid agreement that something would not be done: when use and occupancy by a non-Caucasian occurred that which defendant agreed would not be done was done, for which defendant is liable in damages; and 3) enforcement of the agreement is not prohibited by any provision of the state or federal constitution.

We first consider whether a cause of action is stated for damages for breach of contract under common law principles.

[1] There is privity of contract between three of the plaintiffs and the defendant. Each was an original party to the covenant and contractually assumed its obligations. Each contracted concerning the use and occupancy of his land. Each bound himself that should his lot be used or occupied by non-Caucasians he would become liable to the others for whatever damage they may have suffered. As between themselves, in the absence of fraud or mistake, they are conclusively bound by their covenants if they are not contrary to public policy or violative of constitutional limitations.[1] When the lot as to which defendant covenanted was used and occupied by non-Caucasians liability accrued.

[2, 3] An action for breach of a covenant is an action on a contract. The ordinary remedy for the nonfulfillment of a covenant is that the delinquent party must respond in damages.[2] The fact that other remedies may be available to plaintiffs does not preclude their resort to an action for damages.[3]

Goldberg v. Nicola, 319 Pa. 183, 178 A. 809, 98 A.L.R. 774, relied on by defendant, is not analogous. There it was held that a covenantor of a benefit attached to land is not liable, after parting with his title, for a breach occasioned by possessors of the land subject to the covenant. The holding stemmed from the fact that there was no personal responsibility apart from privity of estate.

[4, 5] It is not essential that we determine whether the covenant is in fact one running with the land, as defendant argues, although the complaint alleges that the agreement provided that it was, and the fact is admitted by the demurrer.[4] If the covenant runs with the land, defendant, as an original covenantor, is not absolved thereby from the obligation of the covenant.[5]

We hold that apart from the constitutional issue the complaint states a cause of action for damages.

Since we so conclude, it is not necessary to decide whether a cause of action is stated for the failure of defendant to incorporate the restrictive agreement in her conveyance to the Smallys.[6] We pass to consideration of the issue of constitutional power.

The parties agree, as they must, that the covenant, as such, is constitutionally a valid agreement;[7] that the conveyance by defendants to the Smallys was valid;[8] and that title passed.

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[1] Los Angeles Terminal Land Co. v. Southern P. R. R. Co., 136 Cal. 36, 42, 68 P. 308.

[2] Joyce v. Krupp, 83 Cal.App. 391, 397–398, 257 P. 124; Borden v. Boyvin, 55 Cal.App.2d 432, 436, 130 P.2d 718; See, also, Pedro v. County of Humboldt, 217 Cal. 493, 19 P.2d 776; Knight v. Black, 19 Cal.App. 518, 522, 126 P. 512; Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 402, 152 P. 935; Pratt-Low Preserving Co. v. Evans, 55 Cal.App. 724, 731–732, 204 P. 241; Eason v. Buffaloe, 198 N.C. 520, 152 S.E. 496; Wyatt v. Adair, 215 Ala. 363, 110 So. 801; 21 C.J.S. Covenants, § 114, p. 982; 14 Am. Jur. 663, sec. 336; Clark, Covenants and Interests Running with Land, 2d ed., 172.

[3] Agreements such as here involved have heretofore been held to constitute a lawful exercise of the freedom to contract and as such to be enforceable by the courts. Cumings v. Hokr, 31 Cal.2d 844–845, 193 P.2d 742.

[4] See Civil Code sections 1461, 1468; Weller v. Brown, 160 Cal. 515, 518–519, 117 P. 517; Berryman v. Hotel Savoy Company, 160 Cal. 559, 117 P. 677, 37 L.R.A.,N.S., 5; Moe v. Gier, 116 Cal. App. 403, 2 P.2d 852; 7 Cal.Jur. 724, sec. 13.

[5] Pratt-Low Preserving Co. v. Evans, 55 Cal.App. 724, 728–729, 204 P. 241; see Reno, "Equitable Servitudes in Land," 28 Va.L.Rev. 951, 962; Burby, "Land Burdens in California," 4 So.Cal.L.Rev. 343, 354; Ming, "The Restrictive Covenant Cases," 16 Univ. Chicago L.Rev. 203, 209, footnote 21.

[6] See Wayt v. Patee, 205 Cal. 46, 49–53, 269 P. 660; Robertson v. Nichols, 92 Cal. App.2d 201, 206–207, 206 P.2d 898; Oliver v. Hewitt, 191 Va. 163, 60 S.E.2d 1, 2, 23 A.L.R.2d 516, Stanley v. Greenfield, 207 Ga. 390, 61 S.E.2d 818, 819, 21 A.L.R.2d 1256; Annotation 4 A.L.R.2d 1364, 1371.

[7] Annotation 14 A.L.R.2d 153.

[6] In 1948 the Supreme Court of the United States decided Shelley v. Kraemer (McGhee v. Sipes), 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441, and Hurd v. Hodge (Urciolo v. Hodge), 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187, generally referred to as the Restrictive Covenant Cases. The admonition of these cases is that a State may not by judicial process enforce private rights derived from consensual agreements of private individuals where to do so would result in the infringement of civil liberties guaranteed by the Constitution of the United States.

Long prior to the Restrictive Covenant Cases, Judge Erskine M. Ross of the United States Circuit Court, the donor of the American Bar Association's Ross Essay Prize, in Gandolfo v. Hartman, C.C.S.D. Cal.1892, 49 F. 181, 16 L.R.A. 277, was the first judicial voice to hold enforcement of a racial restrictive covenant prohibiting the use of real property by persons of a specified race invalid on constitutional grounds.[9, 10] Other than Gandolfo v. Hartman, supra, judicial enforcement of covenants which have for their purpose the exclusion of persons of a specified, or any one not of a designated, race from the use or occupancy of real property, was uniformly sustained over constitutional objections founded on the Fourteenth Amendment, including the equal protection clause and the due process clause.[11]

The restriction in the Shelley case[12] was embodied in an agreement signed by thirty property owners of a St. Louis neighborhood. The agreement declared that no part of the property shall be occupied by any person not of the Caucasian race, and specifically restricted its use against occupancy by Negroes and persons of the Mongolian race for fifty years. One of the parcels was conveyed to Shelley, a Negro. An owner of property covered by the restrictions brought suit. The relief sought and granted by the Missouri court was an injunction restraining Shelley from taking possession of the covenanted parcel and a decree divesting him of title and revesting the title in his immediate grantor. The restrictive agreement in McGhee v. Sipes provided that the property should not be used or occupied by any person or persons except those of the Caucasian race. Injunctive relief was granted by the Michigan court.

The Supreme Court of the United States in these cases held: 1) private agreements which have for their purpose the exclusion of persons of designated race or color from the use or occupancy of real property, standing alone, do not violate any rights guaranteed by the Fourteenth Amendment;[13] 2) the actions of state courts and judicial officers are actions by the States within the meaning of the Fourteenth Amendment; 3) in granting judicial enforcement of such private agreements the courts of Missouri and Michigan acted to deny the excluded races the equal protection of the laws, contrary to the Fourteenth Amendment; 4) denial of access to the courts to enforce such restrictive covenants does not deny equal protection of the laws to the parties to such agreements.[14]

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[8] Civil Code, secs. 711, 715; Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596, 9 A.L.R. 115.

[9, 10] Referring to the equal protection clause of the Fourteenth Amendment, Judge Ross said 49 F. at page 182: "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear."

[11] Annotation 3 A.L.R.2d 477.

[12] 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441.

[13] The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[14] The Court in part said, (334 U.S. 1, 4 et seq.) 68 S.Ct. 838:

"These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property.

* * * * * * *

"It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; 'simply that and nothing more.'

"It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, § 1978 of the Revised Statutes [8 U.S.C.A. § 42], derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides: "'All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.'

"This Court has given specific recognition to the same principle. Buchanan v. Warley, 1917, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, L.R.A.1918C, 210, Ann. Cas.1918A, 1201.

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"Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

"Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

"We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. Cf. Corrigan v. Buckley, supra [271 U.S. 323, 46 S.Ct. 521, 70 L. Ed. 969.]

"But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; nor, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment.

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"These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in

Hurd v. Hodge (Urciolo v. Hodge)[15] arose in the District of Columbia. The restrictive covenant provided that specified lots should never be rented, leased, sold, transferred, or conveyed to any Negro or colored person under a penalty of $2,000, a lien against the property. The defendants were Negro purchasers of some of the restrictive properties and a white person who had conveyed some of the properties to them and who owned other restricted lots. The lower court declared null and void the deeds to the Negro purchasers, enjoined the defendant white property owner from leasing, selling, or conveying the properties to any Negro or colored person,

> premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.
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> "The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court. The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.
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> "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear.
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> "Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. Marsh v. Alabama, 1946, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265.
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> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment." 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441.

D. O. McGovney, Professor of Law, University of California, in 1945, plotted the pattern for Shelley v. Kraemer in "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional," 33 Cal.L.Rev. 5.

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[15] 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187.

and enjoined the Negro defendants from leasing or conveying the properties and directing them to remove from the properties.[16] Among other things the Supreme Court stated that it had held in the Shelley case that the Fourteenth Amendment forbids discrimination whereby a colored man is deprived of the right to acquire property free from interference imposed by state courts in the enforcement of restrictive covenants, and "that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States".[17]

The precise question in the case at bar is narrowed to this: Does the maintenance of an action at law for damages by an original covenantee against an original covenantor for breach of a restrictive covenant which has for its purpose the exclusion of non-Caucasians from the use and occupancy of real property, constitute such enforcement of the covenant as to violate the equal protection clause of the Fourteenth Amendment?

Since the decisions in the Restrictive Covenant Cases, the question in the present case has arisen in Weiss v. Leaon, 1949, 359 Mo. 1054, 225 S.W.2d 127, Roberts v. Curtis, D.C.Dist.Col.1950, 93 F.Supp. 604, Correll v. Earley, Okl. 1951, 237 P.2d 1017, and Phillips v. Naff, 1952, 332 Mich. 389, 52 N.W.2d 158.[18]

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[16] "The problem of racial residence restrictions is not peculiar to Negroes, although constituting nearly a tenth of our citizenry they are the largest group affected. In the Pacific Coast states discriminatory restrictions usually proscribe all non-Caucasions, both citizens and aliens. In the Southwest it is common specifically to proscribe Mexicans and American citizens of Mexican descent, e. g. 'persons commonly called Mexicans.' A residential subdivision adjacent to Fresno, California, is covered by restrictive agreements 'that neither said premises, nor any part thereof, shall be used in any manner whatever or occupied by any Negro, Chinese, Japanese, Hindu, Armenian, Asiatic, or native of the Turkish Empire, or descendant of above named persons, provided however, that such a person may be employed by a resident upon said property as a servant for such resident.' Armenians and nearly all natives of the Turkish Empire are whites, or members of the Caucasian race. From a constitutional standpoint there seems to be no distinction between state enforcement of prejudice against all Negroes or all Chinese and state enforcement of prejudice against some subdivision of the white race, such as all Armenians or all Jews." (33 Cal.L.Rev., 15.)

[17] James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900, involved exclusion of Negroes by a union. The court, *inter alia*, said 25 Cal.2d at pages 739, 740, 155 P.2d at page 339: "The discriminatory practices involved in this case are, moreover, contrary to the public policy of the United States and this state. The United States Constitution has long prohibited governmental action discriminating against persons because of race or color. 5th, 14th, and 15th Amendments. * * * Although the constitutional provisions have been said to apply to state action rather than to private action, they nevertheless evidence a definite national policy against discrimination because of race or color." Yoshida v. Gelbert Improvement Co., 1946, 58 Pa.Dist. & Co. 321, 34 Del.Co. R. 443, and Re Wren, Ont.R. 778, 4 D.L.R. (1945) 674, held racial restrictive covenants void on the ground of public policy.

[18] In Clifton v. Puente, Tex.Civ.App., 1948, 218 S.W.2d 272, the restrictive covenant prohibited the sale or lease of the property to "persons of Mexican descent". Puente, a citizen of Mexican descent, acquired title. A covenantee sued to cancel the deed. Puente cross-complained for a decree quieting title. In holding for Puente the court said, 218 S.W.2d at page 274: "Without affirmative enforcement of the racial covenant involved, it would seem that the scheme of restriction applicable to the subdivision of which the property here involved is a part can not be effectively realized, should voluntary methods fail. * * * It is as much an enforcement of the covenant to deny to a person a legal right to which he would be entitled except for the covenant as it would be to expressly command by judicial order that the terms of the covenant be recognized and carried out. No valid distinction can be predicated upon the position of a party (alleged to be an ineligible grantee) as a plaintiff or as a defendant. Under the decision of the Supreme Court, above referred to, judicial recognition or enforcement of the racial covenant involved

Weiss v. Leaon[19] was an action to enforce a racial restrictive covenant by injunction or, in the alternative, to recover damages for its breach. The covenant, created by private agreement, was that none of the lots in the restricted area be sold to or occupied by Negroes. The court held that the action was properly dismissed insofar as it sought injunctive relief but that the petition stated a claim for damages. The court read the Shelley case as merely holding that specific performance of a racial restrictive covenant by judicial decree is a violation of the Fourteenth Amendment, and that it does not proscribe an action for damages for breach of such a covenant between parties under the agreement.[20]

In Correll v. Earley[21] the restrictive covenant was contained in an agreement between lot owners in one block in Oklahoma City. They covenanted that no owner should sell, lease, or give away any property in the block to any person of the Negro or African race. There were two causes of action: one to cancel deeds by two owners to an insolvent dummy and from the dummy to Negroes, the other for damages—alleged diminution in the value of the plaintiffs' lots because the conveyances were the consummation of a conspiracy to wilfully violate the covenant. The lower court sustained a general demurrer to the petition. On appeal it was held that the Restrictive Covenant Cases controlled so far as it was sought to cancel the deeds but that a cause of action for damages was stated. The court reasoned that the rule of the Restrictive Covenant Cases did not apply against the plaintiffs' right to collect damages if they had actually been damaged by the violation of a valid contract by the defendants as the consummation of a conspiracy to so violate it with the wilful intent to thereby damage the plaintiffs.[22]

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here by a state court is precluded by the 'equal protection of the laws' clause of the Fourteenth Amendment."

[19] 359 Mo. 1054, 225 S.W.2d 127.

[20] Referring to the Restrictive Covenant Cases the court stated 225 S.W.2d at page 130:

"Thus the Supreme Court holds that specific performance of a racial restrictive agreement by judicial decree is a violation of the Fourteenth Amendment although the agreement itself is constitutionally valid. The question whether the Fourteenth Amendment also forbids an action for damages for the breach of a restrictive agreement between parties under the agreement was not raised or discussed.

"Except for the constitutional issue advanced under Shelley v. Kraemer there is no question under the general law but that the remedy of damages for breach of the agreement would be available. * * *

"In the case at bar the restrictive covenant may not now be specifically enforced because Shelley v. Kraemer has held judicial enforcement violates the Fourteenth Amendment. * * *

"Since Shelley v. Kraemer also found the restrictive agreement itself, made by private parties, was valid as against the charge of unconstitutionality, it may follow that an action for its breach, rather than its enforcement, might lie. For the breach of a valid agreement there is ordinarily a remedy by way of damages. The fact that another remedy, specific performance, is ruled out because of constitutional reasons, need not necessarily affect the remedy by way of damages unless it, too, is unconstitutional under the circumstances.

"Under the facts of this case, we hold that according to the law as we now understand it, the trial court may hear and determine an action for damages for the breach of the restriction agreement in question between plaintiffs and defendants Leaon without violating any provision of the Federal or State Constitutions. We are of the opinion that an action for damages for the breach of a valid agreement need not be affected by the Fourteenth Amendment." 359 Mo. 1054, 225 S.W.2d 127.

[21] Okl., 237 P.2d 1017.

[22] The court, referring to the Restrictive Covenant Cases, said 237 P.2d at page 1021:

"The rule of these Federal decisions would support the trial court in part, but only in part. Those decisions follow the rule that the State may not discriminate against a defendant on account of his race. It was there held that if the State, through the court, should forbid conveyance of property to a party because of his race, with the application or use of the power of the State to compel

Roberts v. Curtis,[23] which arose in the District of Columbia, was an action for damages for breach of a restrictive covenant not to sell to Negroes. In dismissing the action the court, referring to the Shelley and Hurd cases, said: "The Supreme Court further held that it was contrary to the Fourteenth and Fifteenth Amendments to the Constitution and contrary to public policy to aid in the enforcement of such covenants by judicial proceedings. Although the actions involved in those cases were suits for injunctions, the ruling is broad enough to cover actions for damages

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obedience to the decree which would naturally result, that would amount to a discrimination by the State in violation of the Federal Constitution.

"But this is no rule against plaintiffs' right to collect damages if plaintiffs have actually been damaged by the violation of a valid contract, violated by defendants as the consummation of a conspiracy to so violate it, with the wilful intent to thereby damage these plaintiffs.

"This is a valid contract between the white citizens who made it. That is true under the rule of the Federal decisions above cited. They expressly so say. In Shelley v. Kraemer, supra, it was contended that such a restrictive agreement was invalid but the Supreme Court of the United States denied that contention, holding that the contract was valid, although power was withheld from the State courts to enforce it as against Negro purchasers. * * *

"Those of the defendants who are white citizens and were bound by this valid contract conspired together to violate the contract for the intended purpose of doing damage to plaintiffs and their property. The Negro defendants knowingly joined with them in the conspiracy for the same intended purpose. We are compelled to take this as true because it is specifically alleged by the plaintiffs and is admitted by the demurrers. * * *

"So we have this situation: the plaintiffs have a valid contract in protection of their home and property; the courts may not cancel the deed made to Negroes in violation of the contract because the application of the Federal rule deprives the courts of power to do so, or, in other words, the court must decline to cancel the deeds lest by so doing they conduct the State into an act of discrimination against its Negro citizen.

"But no such thought need deter the courts in the matter of mere compensatory damages, or punitive damages if wilful wrongdoing justifies such damages. That is to say, if the court requires a white owner of real estate to pay damages, which he intentionally and purposely caused, in direct violation of a valid written contract, of which he had knowledge and to which he was or became a party, that act or judgment by the court would not constitute any act of discrimination by the State against a Negro citizen. None of the defendants had any legal right to conspire to knowingly injure the value of the property of another citizen. * * *

"If the contract, despite its restrictive covenants, is valid, as held by the United States Supreme Court, and if the defendants conspire to violate it, with knowledge and intention that in so doing they will cause damage to the plaintiffs and they consummate the scheme and cause the intended damage, all of which is admitted by the demurrers, the defendants would be liable to plaintiffs for damages sustained.

"Under the Federal ruling in the cited cases defendant white owners could convey a legal title to the Negro purchasers and the Negro purchasers could legally purchase such properties. But since the restrictive contract was valid the white seller would act at his peril of being required to pay plaintiffs damages for breach of a valid contract between himself and other lot owners. Here it is charged that, in order to evade being required to pay damages for his breach, the original white owner, who might have been financially responsible, entered into a conspiracy to convey to one who was without financial responsibility, the latter to convey to the Negro purchaser. Under the demurrer we must assume this to be true. Thus it was intended to cheat and deprive plaintiff of his right to pursue a solvent seller on his claim of damages for breach of contract. This is one vice of the conspiracy. If the conspiracy was vicious, all parties participating therein are liable for any injury sustained by plaintiffs as a result of the conspiracy. All acts done in carrying out the conspiracy were extraneous to the mere sale of property to Negro purchasers, and extraneous to the performance or nonperformance of the restrictive contract.

"This action alleging the conspiracy is grounded in tort." Okl., 237 P.2d 1017, 1023.

[23] 93 F.Supp. 604.

as well. I construe the ruling of the Supreme Court as withholding any assistance by way of judicial action of any kind from the enforcement of such restrictive covenants."

Phillips v. Naff[24] was an action at law for damages for an alleged breach of a reciprocal racial restrictive covenant. The covenant, contained in a recorded agreement, restricted use and occupancy of the property to white persons of "pure Caucasian race," and provided it should run with the land. Defendant, a restricted lot owner, conveyed to Negroes and placed them in possession and occupancy. The plaintiffs were owners of other restricted lots. The trial court dismissed the action. Affirming, the Supreme Court of Michigan, quoting at length from Shelley v. Kraemer,[25] said 52 N.W.2d at page 161:

> "On behalf of appellants it is conceded that, in view of the decision in Shelley v. Kraemer, supra, they may not maintain an equitable suit for injunctive relief. They insist, however, that an action for damages under the factual situation set forth in the declaration is not one for the enforcement of the discrimination, and is not within the inhibition of the 14th amendment. We think that the statement in the language above quoted that State action is not involved so long as the purposes of agreements are effectuated by 'voluntary adherence' to their terms is significant. Plaintiffs' action for damages may not be regarded as involving individual conduct solely. The aid of the court is invoked on the theory that the agreement is valid as between the parties who signed it and their successors in title, and that the State acting through the courts will permit the recovery of damages for failure to observe it. In other words, plaintiffs assert the right to invoke State action within the meaning of the term as discussed in Shelley v. Kraemer, supra.
>
> "We are in accord with the view of of the trial judge that *liability to suits for damages for breach of a reciprocal racial restriction constitutes an indirect method of enforcement.* In the instant case it is obvious that if plaintiffs are entitled to recover damages the owners of other lots in the restricted area may do likewise. It is a reasonable assumption that the owner of a restricted lot having the opportunity and desiring to sell to a purchaser not of the Caucasian race would be reluctant to do so if plaintiffs' position is correct. It may be noted, also, that since the restrictive covenant runs with the land, defendants' grantees, who are, it appears, now in possession, hold the property subject thereto. The question naturally suggests itself, under plaintiffs' theory, as to the liability of the present owners for damages in the event that they convey the property to a grantee of their own race." (Italics added.)

The Supreme Court of Michigan declined to follow the Missouri Supreme Court, saying of Weiss v. Leaon:[26]

> "The decision of the Missouri court sustaining the count for damages must be regarded as supporting plaintiffs' theory in the case at bar. However, we are not in accord with such decision. As above suggested, if a sale of property subject to a reciprocal racial covenant cannot be made without rendering the grantor liable to suits for damages, such fact, it may be assumed, would operate to inhibit freedom of purchase by those against whom the discrimination is directed, and also to place a burden on the right of an owner to sell to a purchaser of his own selection. We think the reasons on which the decision of the United States Supreme Court in Shelley v. Kraemer, supra, was based operate in bar of an indirect method of enforcement, and are sufficiently broad in scope as to cover the rights of those affected in the instant controversy.

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[24] 332 Mich. 389, 52 N.W.2d 158.

[25] 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441.

[26] 359 Mo. 1054, 225 S.W.2d 127.

> The 14th amendment, as construed, prevents the maintenance of the action for damages instituted by plaintiffs." [27]

We are in accord with the Supreme Court of Michigan. We think the Supreme Courts of Missouri and Oklahoma misread the Restrictive Covenant Cases. The Missouri court in Weiss v. Leaon [28] confused "enforcement" with "specific enforcement." It interpreted the holding of Shelley in the narrowest possible light when it said the Supreme Court intended to foreclose only one means—specific performance—of judicial action in support of racial restrictive covenants, while leaving available an action for damages for breach of such covenants. The Oklahoma case, Correll v. Earley,[29] perhaps may be distinguished on the ground that it was a tort action for damages resulting from a wilful, malicious conspiracy. Language in the opinion cannot be reconciled with the Shelley case.

[7] An analysis of the opinion in the Shelley case points to but one conclusion, i. e., the Fourteenth Amendment forbids the maintenance of an action for damages for breach of a racial restrictive covenant. The question in that case did not relate to the nature of the relief sought but, as stated by the Court, related to the "validity of court enforcement" of such covenants. The question was "whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color".[30] In holding that it did, the Court pointed out that restrictions on the right of occupancy, if imposed by state statute or local ordinance, could not be squared with the requirements of the Fourteenth Amendment; and if created by private agreement, they likewise could not be squared with the requirements of the Amendment where the purposes of the agreement are secured by judicial enforcement by state courts, since judicial enforcement is action of the State for the purposes of the Amendment. The Court declared that the "Amendment erects no shield against merely private conduct, however discriminatory or wrongful", and

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[27] Since Shelley, the courts of this state have uniformly held that state court injunctive enforcement of a private racial restrictive covenant as to occupancy of land is state action which denies persons of the excluded race their right to equal protection of the laws, and therefore violates the Fourteenth Amendment. Cumings v. Hokr, 31 Cal.2d 844, 193 P.2d 742; In re Laws, 31 Cal.2d 846, 193 P.2d 744; Cassell v. Hickerson, 31 Cal.2d 869, 193 P.2d 743; Davis v. Carter, 31 Cal.2d 870, 193 P.2d 744; Lippold v. Johnson, 32 Cal.2d 892, 197 P.2d 161; Back v. Young, 32 Cal.2d 892, 197 P.2d 161; Thompson v. Clarke, 32 Cal. 2d 892, 197 P.2d 161; Merriweather v. Fleming, 32 Cal.2d 892, 893, 197 P.2d 161; Mayer v. Robinson, 32 Cal.2d 892, 893, 197 P.2d 161; Pearce v. Crocker, 32 Cal.2d 892, 893, 197 P.2d 161; Cavett v. Butler, 32 Cal.2d 892, 894, 197 P.2d 161; Clayton v. Wilkins, 32 Cal.2d 895, 197 P. 2d 162; Morin v. Crane, 32 Cal.2d 896, 197 P.2d 162; Coleman v. Stewart, 33 Cal.2d 703, 204 P.2d 7; Matthews v. Andrade, 87 Cal.App.2d 906, 198 P.2d 66; Claremont Imp. Club v. Buckingham, 89 Cal. App.2d 32, 200 P.2d 47; In Morin v. Crane, supra [32 Cal.2d 896, 197 P.2d 163] the court said: "[W]e do not reach the question as to whether any tenable cause of action for relief or recovery other than specific enforcement of the racial restrictions is, or could be, stated."

[28] 359 Mo. 1054, 225 S.W.2d 127.

[29] Okl., 237 P.2d 1017.

[30] "One of the great purposes of the Fourteenth Amendment was to lift the Negro from his slavery to a plane of perfect equality of civil rights with all other persons and to remove from his enjoyment of them all obstructions based on race or color. Among the absolute civil rights to be protected from discriminatory action by the state are the rights to inherit, purchase, lease, sell, hold and convey real and personal property. Not only has the Civil Rights Act defined these basic rights so that there can be no doubt of them, but in its declaration that all citizens should enjoy them equally it has expressed a condition regarded as essential by the framers of the Fourteenth Amendment. It seems clear, therefore, that state action of any kind which prevents this equality by denying to citizens of the United States the equal protection of its laws is forbidden and nullified by this amendment." 24 N.Y. Univ.L.Q.Rev., 230–231; see Ex parte Virginia, 100 U.S. 339, 344, 25 L.Ed. 676.

said 334 U.S. 1, 68 S.Ct. 842, 92 L.Ed. at page 1180:

> "*We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.* [Citation.] [31]
>
> "But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements." (Italics added.)

[8] The unmistakable implication from the italicized statement is that unless adherence is voluntary the purposes of the covenant cannot be effectuated.[32] One does not voluntarily refrain from doing an act when by doing the act one may be subjected to an action for damages and one's property be taken by execution. It was pointed out that the Civil Rights Cases [33] declared that the Fourteenth Amendment makes void "state action of every kind" which is inconsistent with the guarantees therein contained.

[9] The opinion in the Shelley case contains this very pertinent statement 334 U.S. 1, 68 S.Ct. 845, 92 L.Ed. at page 1184:

> "Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms."

And in 334 U.S. 1, 68 S.Ct. 846, 92 L.Ed. at page 1185:

> "Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."

The Court in the Shelley case did not go part of the way; it went all of the way. The thrust of the decision is aimed at prohibition of judicial participation in the maintenance of racial residential segregation. It erected a broad barrier to segregation by judicial decree. The holding that judicial enforcement of racial restrictive covenants is prohibited carries meaning only if that prohibition extends to enforcement, whether it is sought in equity or at law. Shelley holds not that enforcement of the covenant is against principles of equity, but that judicial enforcement of racial restrictive covenants denies equal protection of the laws. We know of no precedent for the proposition that when specific performance of a contract is forbidden because such a decree is unconstitutional, an alternative remedy for damages may be granted. Each necessarily calls upon the courts for action; each is, therefore, equally state action and equally within the proscription of the Fourteenth Amendment.

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[31] The same statement was made in the Hurd case and in each instance was preceded by the word "we."

[32] Racial restrictive covenants are valid so long as their purposes are achieved by voluntary adherence of the parties irrespective of the unjust discrimination; for it is the right of every property owner to decline to permit the use and occupancy to any individual or class. Annotation 14 A.L.R.2d 153. The covenant is constitutionally valid but unenforceable. Valid but unenforceable agreements are not unknown to the law. They exist in cases affected by the statute of frauds (lack of writing), the statute of limitations (undue time), and in cases of unconscionable bargains.

[33] In the Civil Rights Cases, 109 U.S. 3, 11, 3 S.Ct. 18, 21, 27 L.Ed. 835, Justice Bradley stated that the Amendment: "* * * nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws."

The Fourteenth Amendment does not proscribe individual action; but when, as here, the aid of a court is sought to compel one of the parties to the restrictive covenant to abide by its terms by subjecting him to an action for damages because of use or occupancy of the property by non-Caucasians—it is no longer a matter of individual action: it is one of state participation in the maintenance of racial residential segregation. Racial discrimination is inherent in the covenant; its purpose and impact is to prevent the use or occupancy of real property by non-Caucasians, to segregate non-Caucasians, "'simply that and nothing more.'"[34] The basic pattern of racial discrimination is as much the same in an action for damages as it is in a suit in equity. The maintenance of an action for damages against an original covenantor would aid and encourage the discrimination, not by preventing a non-Caucasian from using or occupying the property, but by holding a covenantor liable in damages upon the happening of that contingency, a liability which would not be incurred if the property were used or occupied by a Caucasian.

[10] The doctrine of the Shelley case, as we read it, means that no state sanction, direct or indirect, can constitutionally be imposed for the breach of a restrictive covenant if such sanction would result in the denial of any civil right guaranteed by the Constitution. Of the civil rights conferred, none is clearer and few more vital than the right to buy a home and live in it. Distinction between direct and indirect state action is tenuous. The enforcement of a covenant by an action for damages furnishes a prepotent motive to prevent use or occupancy of property by non-Caucasians; that is, the indemnification of other property owners when a non-Caucasian uses or occupies the property. The coercive device of retribution in the form of damages is as effective as the coercive effect of injunctive relief, although not as immediate. In addition to the likelihood of being subjected to a money judgment, the vexation and expense of a lawsuit enhances the coercion. There can be no doubt that the threat to a covenantor of liability in damages, with consequent execution and sale, for disregarding a racial restrictive covenant, would operate as a deterrent to the breaching of its terms; and, in the words of the Supreme Court of Michigan, "would operate to inhibit freedom of purchase by those against whom the discrimination is directed". When a court undertakes to buttress that threat by lending its power to give effect to the covenant, the court is facilitating the discriminatory purpose of the covenant and extending the "full panoply of state power"[35] to its practical effectiveness.[36]

[11] The fact that the non-Caucasian is not a party to the action, and that an award of damages operates against the covenantor directly rather than directly against the non-Caucasian, does not affect the result.[37] In an action at law for damages the rights and interest of the particular non-Caucasian would be secure and unaffected by any judgment rendered. However, enforcement of the covenant would effectively deny non-Caucasian citizens

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[34] Shelley v. Kraemer, 334 U.S. 1, 10, 68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441.

[35] Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441.

[36] See "Discrimination in Ownership and Occupancy of Property since Shelley v. Kraemer," U.C.L.A.Intramural Law Rev. June, 1952.

[37] See, Kemp v. Rubin, 298 N.Y. 590, 81 N.E.2d 325; Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, L.R.A. 1918C, 210, Ann.Cas.1918A, 1201.

equality in the enjoyment of property rights because property owners in restricted areas are deterred from permitting use or occupancy by non-Caucasians lest they be personally liable for damages. No person has the right, nor does the State have the power, to require the enforcement of a covenant which will result in the denial to any individual of the equal protection of the laws. Any recognition of a racial restrictive covenant in an action in a state court constitutes prohibited state action.

The contention that an action for damages against an original covenantor is to be distinguished from a suit in equity because in the former the defendant, by his covenant, consents to suit whereas in the latter he does not consent, is ingenious but faulty. An individual cannot consent to state court action the purpose and effect of which is to aid in discrimination based solely on race, to entrench segregation, and thus deny to a class of citizens the equal protection of the laws. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect; it will not promote in one form that which it declares wrong in another. The argument loses sight of the fact that Shelley holds that if such covenants of private individuals require recourse to the courts to make them effective, the Fourteenth Amendment precludes such aid.

[12] The denial of access to the courts does not deprive plaintiffs of their property without due process of law. The Constitution itself deprives them of the use of the courts when their purpose is the enforcement of their discriminatory covenant. "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals."[38]

In the light of the Restrictive Covenant Cases it is the duty of the courts of this State to refrain from exerting judicial power to give legal sanction and effect to racial restrictive covenants in an action at law for damages. The demurrer was properly sustained.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; SHENK, EDMONDS, and SCHAUER, JJ., dissenting.

BARRETT v. CITY OF CLAREMONT.*

Civ. 19075.

District Court of Appeal, Second District,
Division 3, California.

Aug. 7, 1952.

Hearing Granted Sept. 25, 1952.

Action by Mary E. Barrett, a pedestrian, against the City of Claremont for injuries sustained when plaintiff tripped and fell because of an alleged defective sidewalk expansion joint. The Superior Court, Los Angeles County, Victor R. Hansen, J., entered judgment on verdict for plaintiff, and defendant appealed. The District Court of Appeal, Vallée, J., held, inter alia, that whether the condition constituted a defective or dangerous condition and whether the city had knowledge or notice of the defective or dangerous character of the condition were questions for the jury.

Affirmed.

1. Municipal Corporations 🔑768(1)

No hard and fast rule can be laid down as to character or extent of condition in sidewalk which will constitute a defective or dangerous condition for which liability of municipality will ensue, but each case must stand on its own particular facts. Government Code, §§ 53050–53056.

2. Municipal Corporations 🔑821(6, 15)

Where filler between slabs of sidewalk extended about half an inch above surface of sidewalk and was softened by the sun so that there was an accumulation of the asphaltic, tarry, sticky substance along entire width of sidewalk, whether the condition constituted a defective or dangerous condition, and whether city had knowledge or notice of the defective or dangerous character of the condition were questions of fact for jury in action by pedestrian for injuries sustained when she fell because of such condition. Government Code, §§ 53050–53056.

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[38] Shelley v. Kraemer, 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161, 3 A.L.R.2d 441.

* Subsequent opinion 256 P.2d 977.

3. Municipal Corporations ⚷818(8)

In action by pedestrian against city for injuries sustained when she tripped and fell because of alleged defective condition of sidewalk expansion joint alleged fact that no accidents had occurred at other expansion joints was immaterial and inadmissible without further showing that conditions were substantially similiar. Government Code, §§ 53050–53056.

4. Trial ⚷48

Where evidence is offered as a whole and part of it is inadmissible, the whole is properly rejected.

5. Municipal Corporations ⚷818(9)

In action by pedestrian against city for injuries sustained when pedestrian fell because of alleged defective sidewalk expansion joint, exclusion of city records showing absence of prior accidents at expansion joint at which pedestrian was injured was proper where the records were inseparable and would also show absence of accidents at all other expansion joints in the city. Government Code, §§ 53050–53056.

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Moss, Lyon & Dunn, Sidney A. Moss, and Henry F. Walker, Los Angeles, for appellant.

Knight, Gitelson, Ashton & Hagenbaugh, Los Angeles, for respondent.

VALLEE, Justice.

Appeal by defendant city from a judgment for plaintiff entered on a verdict in an action for damages for personal injuries under the Public Liability Act of 1923.[1]

In 1938 the city of Claremont constructed a sidewalk on Yale Street. Expansion joints, about one-half inch in width, were left between the slabs of concrete running across the width of the sidewalk in which a filler of asphaltic, tarry material was placed. The expansion joints and the filler act as a cushion between the concrete slabs. Standard practice in inserting the filler material is to pour it into the joint to a point at least one-quarter or one-half an inch below the surface of the concrete. The filler in the expansion joint involved here was flush with the sidewalk at the time of installation. On June 18, 1948, the filler material in one of the expansion joints protruded one-half inch above the surface of the sidewalk, was four or five inches wide along most of its length, and extended the width of the sidewalk. The asphaltic, tarry filler absorbs the rays of the sun, and on the day of the accident the temperature of the material was in excess of 160 degrees. At that temperature it becomes soft and sticky. The summer heat expands the concrete, squeezing the filler up. It does not become fluid enough to go back into the joint, so its tendency is always to keep working out.

On June 18, 1948, about 3:00 p. m., plaintiff, while walking along the sidewalk, caught her toe in the soft and sticky filler material and fell. The Superintendent of Streets of Claremont, who had charge of the repair of sidewalks, testified he knew the condition of the sidewalk from about 1940 and that the filler material at the expansion joint at which the accident occurred had been in substantially the same condition from that time to the day of the accident. It appears from photographs in evidence that the filler material in other expansion joints in the vicinity of the one where the accident occurred did not protrude above the surface of the sidewalk.

The Public Liability Act of 1923 provides that a municipality shall be liable for injuries to persons resulting from the dangerous or defective condition of public streets in all cases where the officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition, or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such defective or dangerous condition.

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[1] 2 Deering's Gen.Laws, Act 5619, now Gov.Code sections 53050–53056.

The assignments or error are: 1) the evidence fails to establish any dangerous or defective condition, and 2) the court erred in sustaining plaintiff's objection to evidence offered by defendant that the city records disclose no claim had ever been filed because of injuries sustained by any person other than plaintiff at this particular expansion joint, and that no report of a claimed defective condition at this joint had ever been made. The argument is that we must hold as a matter of law that the condition of the filler material was a minor or trivial defect, which precludes recovery. The contention cannot be sustained.

Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725, 726, held that a crack in one of the panels of a sidewalk which caused one block to tilt up so that there was a difference in elevation "at the break of not more, and possibly less, than an inch and a half", was a minor or trivial defect. Whiting v. National City, 9 Cal.2d 163, 69 P.2d 990, held that a defect which consisted of a difference in elevation of about three-quarters of an inch in a sidewalk was a minor or trivial defect. Balmer v. City of Beverly Hills, 22 Cal.App.2d 529, 71 P.2d 854, held that an elevation of one inch between one portion of a sidewalk and an adjoining portion was a minor or trivial defect. Robson v. Union Pacific R. R. Co., 70 Cal.App.2d 759, 161 P.2d 821, held that a depression two inches in diameter, one-quarter inch deep, and about one inch wide at its deepest point in a tile block was a minor or trivial defect. Claremont presses these cases on us in support of its contention that the defect in the sidewalk which caused plaintiff to fall was a minor or trivial one as a matter of law, and that, therefore, plaintiff cannot recover.

There are many decisions holding that defects of a similar character were not minor or trivial. Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643, 644, held that a depression in the apron of a sidewalk "between 18 inches and 2 feet long, and as wide as her foot and an inch to an inch and one-half deep" was not a minor or trivial defect. Barrett v. City of Sacramento, 128 Cal.App. 708, 18 P.2d 356, held that a broken area in a sidewalk about twelve inches across and about three-eighths of an inch deep was not a minor or trivial defect. Ackers v. City of Los Angeles, 40 Cal.App.2d 50, 104 P.2d 399, held that a depression in a sidewalk "about twelve inches long, about three inches wide and about two inches deep" was not a minor or trivial defect. Balkwill v. City of Stockton, 50 Cal.App.2d 661, 123 P.2d 596, held that a hole in a concrete sidewalk four and five-eighths inches long, two inches wide and one-half inch deep was not a minor or trivial defect. In Sheldon v. City of Los Angeles, 55 Cal.App.2d 690, 131 P.2d 874, it was held that an elevation from a maximum of one and one-half inches at one end to one-third of an inch at about the middle to nothing at the other end, caused by the settling of a sidewalk, was not a minor or trivial defect. Owen v. City of Los Angeles, 82 Cal.App.2d 933, 187 P.2d 860, 862, held that a hole in the pavement near the curb "from two to three and one third inches deep, about four to six inches wide, and from nine to eleven inches in length" was not a minor or trivial defect. In Warren v. City of Los Angeles, 91 Cal.App.2d 678, 205 P.2d 719, 720, the plaintiff "stepped on a fan shaped wet spot about 2 feet wide and 3 feet long, the narrow end of which was toward the curb. This wet spot consisted of grease and water. The heel of his shoe came in contact with it and he slipped and fell on his side with the result that he suffered personal injuries. For two or three months prior to and at the time of the accident there was a hole in the street, approximately 10 inches by 10 inches and 2 inches deep containing water and oil. The wet spot on the sidewalk upon which plaintiff fell was caused by automobiles passing over the hole in the street and causing the fluid collected therein to splash onto the sidewalk." The defect in the street was held not to be a minor or trivial one.

[1] These cases point up the fact that no hard and fast rule can be laid down as to the character or extent of a condition in a sidewalk which will constitute a defective or dangerous condition for which liability will ensue, but each case must stand on its own particular facts. Fackrell v. City of San Diego, 26 Cal.2d 196, 206, 157 P.2d 625, 158 A.L.R. 773; Ackers v. City of Los Angeles, 40 Cal.App.2d 50, 52, 104 P.2d 399. In the Fackrell case the court declared, 26 Cal.2d at page 206, 157 P.2d at page 630, "Whether a given set of circumstances creates a dangerous or defective condition is primarily a question of fact." In Owen v. City of Los Angeles, 82 Cal. App.2d 933, at page 938, 187 P.2d 860 at page 863, we said: "The question, on appeal, whether a condition is defective or dangerous is one which calls for the application of the rule that where there is room for difference of opinion among reasonable minds, the question is one of fact."

[2] In the present case there was not only an elevation of one-half an inch above the surface of the sidewalk, but, in addition, an accumulation of the asphaltic, tarry, sticky substance along the entire width of the sidewalk which, to the knowledge of Claremont, had existed for a number of years, and which sticky substance stuck to the toe of plaintiff's shoe as she was walking along and caused her to be thrown "flat." The cases relied on by Claremont are not applicable to the facts of the present case. In Louie v. Hagstrom's Food Stores, 81 Cal.App.2d 601, 184 P.2d 708, the plaintiff slipped on an egg-shaped puddle of thick, slippery, sticky syrup, which was about six to eight inches in size, and fell to the concrete floor. The question of negligence was held to be a question of fact and liability was imposed. In the case at bar different conclusions may reasonably be drawn regarding the defective or dangerous condition of the sidewalk. Whether the condition constituted a defective or dangerous condition, and whether Claremont had knowledge or notice of the defective or dangerous character of the condition, were therefore questions of fact for the jury and not of law. Warren v. City of Los Angeles, 91 Cal.App.2d 678, 680, 205 P.2d 719.

The court did not err in sustaining plaintiff's objection to Claremont's offer of proof. The evidence offered was not only that the records of Claremont would disclose that no claim had ever been filed because of injuries sustained at the expansion joint at which plaintiff was injured and would show that no report of a claimed defective condition at this joint had ever been made, but the offer also included, as an inseparable part thereof, that Claremont's records "would not reveal any evidence of any report having been made of an accident occurring in any of the expansion joints in the city streets in Claremont between 1940 and 1948," except the claim of plaintiff. The evidence was offered on the question whether Claremont "ever had actual notice of any other claims on any of these joints." Counsel for Claremont admitted below that "Claremont, had notice that the tarry substance [at the point where the accident occurred] extended approximately one-quarter inch to one-half inch above the surface of the sidewalk."

[3–5] It is doubtful whether evidence of the absence of prior accidents at the point where the accident in question occurred, is admissible, Murphy v. County of Lake, 106 Cal.App.2d 61, 65, 234 P.2d 712, a point we need not decide. The fact, if it be a fact, that accidents had not occurred at other expansion joints, was immaterial and inadmissible without a further showing that the conditions were substantially similar. Murphy v. County of Lake, supra, 106 Cal. App.2d 65, 234 P.2d 712. It is well settled that when evidence is offered as a whole and part of it is inadmissible, the whole is properly rejected. Bostwick v. Mahoney, 73 Cal. 238, 14 P. 832; People v. Hogan, 11 Cal.App. 599, 603, 105 P. 938. Since the offer to prove the absence of prior accidents at the expansion joint at which plaintiff was injured was integrated with and a part of the offer to prove the absence of accidents at all other expansion joints in Claremont, the entire offer was properly rejected.

No ground for reversal is shown.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

112 Cal.App.2d 399

RIPLING v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 19079.

District Court of Appeal, Second District, Division 3, California.

July 24, 1952.

As Corrected Aug. 5, 1952.

Rehearing Denied Aug. 11, 1952.

Hearing Denied Sept. 18, 1952.

Mildred Ripling, also known as Mrs. William J. Ripling, and William J. Ripling petitioned for a writ of prohibition to prohibit the Superior Court of the State of California, in and for the County of Los Angeles, Robert H. Scott, J., from proceeding without a jury in a case brought against the Riplings in that court. The District Court of Appeal, Shinn, P. J., held that the action was one at law.

Petition granted.

1. Jury 🔑10

The California Constitution preserves to litigants the right to jury trial as it existed at common law in 1850; and it is a right secured to all and inviolate forever in cases in which it is exercised in administration of justice according to course of common law, as that law is understood in several states of the union. Const. art. 1, § 7.

2. Jury 🔑13(3)

If gist of action as framed by pleadings is such that issues raised would have been triable on law side before 1850, trial by jury is matter of right. Const. art. 1, § 7.

3. Jury 🔑13(1)

Even if case involves equitable principles, trial by jury is preserved if case is one where common-law courts could and would have granted relief. Const. art. 1, § 7.

4. Jury 🔑12(1), 31(1)

Legislature may not, directly or in guise of procedural change or changes in remedy, deprive litigant of jury in case formerly triable at law, and likewise a litigant may not, by pleading legal conclusions, sterilize right to jury trial, as question is determined from consideration of all facts of case. Const. art. 1, § 7.

5. Trusts 🔑359(3)

While equity usually takes cognizance of trust matters, if trustee is under duty to pay money immediately and unconditionally to beneficiary, beneficiary can maintain action at law against trustee to enforce payment.

6. Trusts 🔑359(2, 3)

Enforcement of trust in equity has in contemplation terms, conduct, and management of trust, settlement of trustee's accounts, compensation to trustee, order of payment over, and his discharge from his trusteeship, but law courts have concurrent jurisdiction of a passive trust of money to be paid over at request of beneficiary, since there is no need for exercise of equity jurisdiction.

7. Action 🔑22

Where courts of law and equity have concurrent jurisdiction, right of election exists, and mere existence of remedy in equity cannot operate to defeat right to proceed at law.

8. Jury 🔑13(1)

It is only where issues to be tried are exclusively equitable in nature that suitor is deprived of right to jury trial, and those issues that are legal in nature are triable to a jury.

9. Action 🔑22

Where none of extraordinary powers of court of equity are required in order to give plaintiff relief that he seeks, and court of law can afford complete relief, action is one at law.

10. Jury 🔑14(2)

Plaintiff who, in suit against defendant claimed to be trustee, sought judgment for money presently due and obtained attachment upon claim based upon express contract for money had and received thereby made election to proceed at law; and defendant in such action was therefore entitled to jury trial notwithstanding allegations that defendant had received money in trust and for safe-keeping and that plaintiff was uncertain as to amount received, where terms of alleged trust and duties of trustee were not in dispute and case presented simple question as to whether trust money was still held by the trustee, and where court of law could grant plaintiff complete relief as effectively as equity.

◆

Bernard B. Cohen, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, Los Angeles, for respondent Superior Court.

Richard Norton, San Francisco, Cantillon & Glover and McGinley & Hanson, Los Angeles, for real party in interest.

SHINN, Presiding Justice.

Mildred Ripling and William J. Ripling seek a peremptory writ prohibiting respondent court from proceeding without a jury in the case of Norton v. Ripling (L.A.Super. Ct. No. 556274). It is not questioned that prohibition is a proper remedy.

On February 25, 1949, Richard Norton, as guardian of the estate of Thomas J. Norton, incompetent, filed an action against Mildred Ripling, sister of Thomas. (Thomas died in 1950 and Richard now appears as administrator.) The complaint was in two counts, the first pleading facts, the second a common count for money had and received. In substance the first count alleged that between January 1942 and January 1945 Thomas J. Norton had paid over and delivered to defendant "for safekeeping" $21,849.65; that defendant "orally promised and agreed to hold said moneys in safekeeping for plaintiff"; that defendant paid $4,172.88 from the sum for plaintiff's use; that the guardian had made a demand for the balance but defendant refused to pay. Prayer was for judgment of $17,676.77, costs and general relief. Amended complaints were successively filed in April 1949, May 1949, August 1951 and September 1951. In some of these (including the fifth) defendant William Ripling, husband of Mildred, was joined. The last complaint omitted the common count, elaborated the "safekeeping" allegations to ones of trust, and added allegations on information and belief that additional sums had been entrusted to defendants. The prayer of this complaint was for money, accounting and further relief. The answer to the fifth complaint admits receipt of $20,097.65, denies receipt of additional sums, and affirmatively alleges repayment to Thomas J. Norton of all sums entrusted.

After filing the first complaint in February 1949, plaintiff attached real property and two bank accounts belonging to defendants. Later the property was sold and there remains under attachment one bank account with a balance of $1,106.12, one bank account with a balance of $10,000 and a trust deed note for $13,500. In the affidavit for attachment plaintiff stated defendants are indebted to him upon an express contract for the direct payment of money "to wit money had and received."

In June 1949 the cause was set for trial on the jury calendar *at plaintiff's request* but later went off calendar by stipulation. In September 1951, defendant filed a request for trial and demanded a jury trial. Plaintiff later filed a memorandum for setting on the nonjury calendar, and the case was set on the jury calendar. Before trial, the court granted plaintiff's motion for trial by the court and granted a continuance. On defendant's application an alternative writ issued from this court.

[1–4] It is fundamental that the California Constitution preserves to litigants the right to jury trial as it existed at common law in 1850. Calif.Const., art. I, sec. 7; Calif.Const.1849, art. I, sec. 3; People v. One 1941 Chevrolet Coupe, 37 Cal.2d 283, 231 P.2d 832; Farrell v. City of Ontario, 39 Cal.App. 351, 356, 178 P. 740. "It is a right 'secured to all,' and 'inviolate forever,' in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several States of the Union." Field, C. J., in Koppikus v. State Capitol Commissioners, 16 Cal. 248, 254. If the "gist of the action" as framed by the pleadings is such that the issues raised would have been triable on the law side before 1850, a trial by jury is a matter of right. Grossblatt v. Wright, 108 Cal.App. 2d 475, 483, 239 P.2d 19. As thus presented, the question is an historical one. Although the common law forms of action are abolished and Law and Equity are united in one forum, the problem of right to a jury trial must still be approached in the context of 1850 common law pleading. Thus, if the gist of the action is like common law debt, a jury trial must be granted when demanded. Grossblatt v. Wright, supra. And, even though the case involves equitable principles if it is one where the common law courts could and would grant relief, trial by jury is preserved. Farrell v. City of Ontario, supra, 39 Cal.App. 351, 178 P. 740; Mortimer v. Loynes, 74 Cal. App.2d 160, 168, 168 P.2d 481. The legislature may not, directly, or in the guise of procedural changes or changes in remedy, deprive a litigant of a jury in a case formerly triable at law. People v. Kelly, 203 Cal. 128, 133, 263 P. 226. People v. One 1941 Chevrolet Coupe, supra, 37 Cal.2d 283, 299, 231 P.2d 832. Likewise, a litigant may not by pleading legal conclusions sterilize the right to a jury trial as this question is determined from a consideration of "all the *facts* of the case". Hutchason v. Marks, 54 Cal.App.2d 113, 128 P.2d 573, 576. Thus the question presented here is: On the basis of the facts alleged in the fifth amended complaint and answer thereto, and the issues joined, is the case one which would have been triable at law before 1850?

Stripped of legal conclusions and reduced to ultimate facts the fifth complaint alleges that Mildred Ripling orally agreed to receive money given her by her brother Thomas J. Norton and to hold the funds until directed by him to pay them to him or for his benefit. It further alleges a demand for return of the remaining funds and refusal by Mildred Ripling to pay. The answer admits all of this except the refusal to pay, alleging that full payment had been made. There is a further controversy as to the amount turned over to Mildred. It thus appears there is one issue in the case, namely, whether all the funds Mildred received under the oral agreement were used for the benefit of Thomas J. Norton or returned to him. The prayer is for accounting, money judgment and declaration of a constructive trust in money.

The real party in interest insists, and the respondent court agreed, that this is an action to enforce a trust and thus would have been tried solely in equity prior to 1850. Petitioner insists the action is one for money and triable by the common law courts. On analysis of the pleadings and the issues framed we agree with petitioner.

[5] A fundamental error in the position of plaintiff results from a failure to note the historical background of the remedies applicable to the type of relationship alleged to exist between defendant Mildred Ripling and Thomas Norton. Plaintiff has assumed that since it is in the nature of a trust relationship only courts of equity would enforce the obligation of the trustee. While it is true that usually only equity took cognizance of trust matters, there exists one class of cases founded on the old common law action of account which antedated the chancellor and which were triable either in law or equity. "The idea underlying the action of account was that the defendant was entrusted with property as a fiduciary * * * for which he was under an obligation to account." 1 Scott on Trusts 82. "If A gave money to B to be kept and returned to A, A could bring an action of account against B." Id. p. 85. "As the action of account became obsolete and the actions of debt and *indebitatus assumpsit* were stretched to occupy at least a part of the field occupied by the action of account, the court of chancery began to take jurisdiction * * *. Today it may be said, therefore, that a trust is enforcible only in equity, except where the action of account lay at common law; and that where account lay the jurisdiction of

equity is concurrent with that of the common-law courts which allow an action of debt or *indebitatus assumpsit* or the modern code equivalent of these actions." Id. p. 84. As presently restated the guiding principle is that "[i]f the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment." Rest., Trusts, § 198(1); see also Scott on Trusts, § 198.1.

Although there is some confusion in the English cases and texts, it appears that they support the position taken by Professor Scott and the Restatement of Trusts. Sutton says of the old action of account: "Though this action lay at common law, we need only mention it to say that it is rarely met with in more modern times, owing to the substitution of other remedies for it. In the simpler cases such an action as assumpsit for money had and received was found to be sufficient, while in the more complicated cases the tendency was to proceed in Chancery, owing to the powers of that court to enforce discovery and the like, which the Courts of Common Law did not possess." Sutton, Personal Actions at Common Law, p. 46. A typical case involving this action is Godfrey v. Saunders, (1770) 3 Wils.K.B. 73, 94, 95 Eng.Rep. 940, 952. In that case plaintiff consigned coral beads to defendant in the East Indies which were to be sold and diamonds returned in payment. Defendant had sold the beads but had not remitted the diamonds, and plaintiff brought an action of account. The court held account would lie. Modernly this would be an action to enforce a constructive trust, one thought usually to lie only in equity. But, since the diamonds were the equivalent of money, the action would be one for money the trustee was immediately to pay over and the case is within Scott's statement. A somewhat narrower view than that expressed by Scott and Sutton is found in 33 Halsbury's Laws of England (2d Ed.) where it is said at page 305: "A breach of trust in itself is merely a violation of an equitable obligation; the remedy for it, therefore, lies in equity only and must be sought in a court of equitable jurisdiction." Citing Co. Litt. 2726; Sturt v. Mellish, (1743) 2 Atk. 610, 612, 26 Eng. Rep. 765; Allen v. Imlett and Nicholls, (1817) Holt 641, 171 Eng.Rep. 370. But in a footnote to the above statement it is said (p. 306): "But an action for money had and received lies against a trustee on an admission that a balance belonging to the beneficiary is in his hands." Citing Roper v. Holland, (1835) 3 AD. & E. 99, 111 Eng.Rep. 351; Cummins v. Cummins, (1845) 3 Jo. & Lat. 64. Three cases serve to clarify the principle and point out some of the confusion: Sturt v. Mellish, supra; Roper v. Holland, supra; and Foley v. Hill, (1848) II H.L.C. 28, 9 Eng.Rep. 1002. In the Sturt case, which involved a constructive trust, the Chancellor refused to refer the matter to a master for an accounting and said (p. 612): "* * * a trust is where there is such a confidence between parties that no action at law will lie, but is merely a case for the consideration of this court (but Lord Hobart, it seems, was of opinion, that an action would lie against a trustee at common law. 1 Eq.Ab. 384, (D.) 1, note) * * *." In Roper v. Holland, supra, it was held that assumpsit would lie against a trustee for money as to a sum currently due to plaintiff as beneficiary of the trust. In Foley v. Hill, supra, funds of the plaintiff had been placed with defendant, who was a private banker, interest to be given and the sums to be paid over on request. The Lord Chancellor affirmed the lower court's dismissal of the bill for an accounting saying that where the account was simple equity would not take jurisdiction. Furthermore, in 1 Halsbury's Laws of England 53 (2d Ed.) it is said that "'*special assumpsits*' lay * * * to account * * * for money * * *." From the foregoing it appears that the law courts would entertain an action against a trustee where he had a duty immediately to pay over money to the beneficiary.

Many cases in the United States indicate that § 198 of the Restatement of Trusts correctly states the course of the common law as that law is understood in the several States of the Union. Carl Byoir & Associates v. Tsune-Chi Yu, 2 Cir., 1940, 112 F.2d 885, 886; Newlin v. Newlin, 1944, 114 Ind.

App. 574, 52 N.E.2d 503, 505; Cavanagh v. O'Connor, 1920, 189 Iowa 171, 176 N.W. 881; Capraro v. Propati, 1940, 127 N.J.Eq. 419, 13 A.2d 318, 321; Conner v. Fisher, 1934, 169 Okl. 197, 36 P.2d 501; Dieter v. Scott, 1939, 110 Vt. 376, 9 A.2d 95, 100. The Restatement of Trusts rule is also supported by California authorities. It was recognized but held not applicable to the facts (there was no immediate duty to pay over money) in Lane v. Whitaker, 50 Cal. App.2d 327, 331, 123 P.2d 53. In Austin v. Wilcoxson, 149 Cal. 24, 26, 84 P. 417, it was held that an action similar to that at bar was one at law, not in equity, and no special findings were required.

In Conner v. Fisher, supra, 36 P.2d 501, the court said: "This is an action at law in the nature of the common-law action of account; the plaintiff alleging that the defendant who operated the property involved as trustee failed to account to the plaintiff, the beneficiary, for the proper income of the property. The petition prays for judgment in the approximate sum of $15,000. The trust had already been determined, and the property sold; nothing remaining to be done except make a final settlement, upon which the parties could not agree. * * * This is a suit for the recovery of money, and is properly a jury case. * * *"

In Austin v. Wilcoxson, supra, 149 Cal. 24, 84 P. 417, plaintiff alleged one of her granduncles transferred $75,000 in trust for her to another granduncle, the sum to be paid to plaintiff on the trustee's death. The suit was brought against the executor of the trustee's estate and plaintiff contended that as it was an action to enforce a trust and in equity specific findings should have been made. In denying this contention, holding it was a law action, the court said, 149 Cal. at page 26, 84 P. at page 417: "We think, however, that plaintiff misconceives the legal effect of her complaint. It is not an action to declare and enforce a trust. She sues at law to recover moneys which she alleges have come into the hands of the defendant and which upon her demand he has refused to turn over to her. Her action may indifferently be called one in trover, in *assumpit,* or for money had and received. It is true that to make out her title to the money she alleges that it was given by one of her granduncles to another granduncle in trust for her, but the allegation as to this defendant's connection with the fund is simply that he 'took possession of it' and refuses after demand to pay it over. The same allegation would be good against a thief who had actually stolen the money, and assuredly it cannot be said that a demand made upon one whom it is alleged has wrongfully taken and wrongfully holds money constitutes an equitable action to enforce an express trust. The enforcement of a trust in equity has in contemplation the terms, conduct, and management of the trust, the settlement of the trustee's accounts, compensation to the trustee, the order of payment over and his discharge from his trusteeship. None of these matters are here in contemplation. * * * Equity will, of course, enforce a trust against the executor of the deceased trustee (Walkerly v. Bacon's Executors, 85 Cal. 137, 24 P. 638; McGrath v. Carroll, Executor, 110 Cal. 79, 42 P. 466; Byrne v. Byrne, Adm'r, 113 Cal. 294, 45 P. 536), but such is not the action here brought."

The question of a jury trial in a suit against a trustee who fails to deliver the trust fund as required was also raised in Dettenborn v. Hartford-Nat. Bank & Trust Co., 1936, 121 Conn. 388, 185 A. 82. At page 84 of 185 A. the court said: "An action by a beneficiary claiming damages from a trustee for his breach of duty in refusing to pay or deliver the trust fund * * * is one at law, triable by jury * * *."

[6] On the basis of the foregoing analysis of the law applicable to the present case it appears that it would have been triable to a law court and there is thus a right to a jury trial. Plaintiff, however, cites four California cases which he contends conclusively establish the proposition that there is no right to a jury trial in cases like the present. Lane v. Whitaker, 50 Cal. App.2d 327, 123 P.2d 53; O'Dea v. Hibernia Savings & Loan Soc., 119 Cal.App. 622, 7 P.2d 318; Cauhape v. Security Savings Bank, 127 Cal. 197, 59 P. 589; and Wool-

sey v. Woolsey, 121 Cal.App. 576, 9 P.2d 605. It is significant that none of these cases discussed the possible application of the old common law action of account and none involved a situation where the alleged trustee admitted the funds were held for the use of plaintiff or plaintiff's predecessors in interest; all were thus actions to declare a trust and clearly cognizable only in equity. Our own case is not for the declaration of a trust, existence of which the defendant admits, but presents the simple question whether trust money is still held by the trustee. Under the issues the balance, if any, is admittedly payable to plaintiff. The distinguishing feature between suits against the trustee cognizable only in equity and those which may be brought at law is, as stated in the Austin case, 149 Cal. at page 26, 84 P. at page 418, that "[t]he enforcement of a trust in equity has in contemplation the terms, conduct, and management of the trust, the settlement of the trustee's accounts, compensation to the trustee, the order of payment over and his discharge from his trusteeship. None of these matters are here in contemplation." The same is true of the present case and of any passive trust of money to be paid over at the request of the beneficiary. The common law courts took jurisdiction of cases of this type in which there was no need for the exercise of equity jurisdiction.

[7, 8] Although the present action is one which could be brought at law, a question arises whether it could also be brought in equity and deprive defendant of a jury trial. That there may be concurrent jurisdiction is well settled, and in such cases a right of election exists. The converse of the situation before us has frequently been considered and it has been said "[t]here is a difference of opinion on the question whether, where the beneficiary of a trust can maintain an action at law against the trustee and the remedy at law is an adequate remedy, it is an exclusive remedy and the beneficiary cannot maintain at his option a suit in equity against the trustee. In some cases it has been held that the remedy at law is exclusive. But the better opinion is that the beneficiary can maintain a bill in equity if he chooses." Scott on Trusts, sec. 198.3; 171 A.L.R. 429; see, e. g. Ramsey v. Ramsey, 351 Pa. 413, 41 A.2d 559, 171 A.L.R. 425, and People v. Houghtaling, 7 Cal. 348. Both the Ramsey and Houghtaling cases involved trusts of money (the first express, the other constructive) and were factually similar to the present case. In both of these cases and in the cases cited by Scott, supra, and in the annotation 171 A.L.R. 429 it was held that a bill in equity could be maintained despite the fact an action at law would have been an adequate remedy. The fact that trial by jury is jealously preserved as a matter of right dictates that the mere existence of a remedy in equity cannot operate to defeat a right to proceed at law. It is only where the issues to be tried are exclusively equitable in nature that a suitor is deprived of the right to a jury trial. Those that are legal in nature are triable to a jury. Connell v. Bowes, 19 Cal.2d 870, 123 P.2d 456; Hutchason v. Marks, supra, 54 Cal.App.2d 113, 128 P.2d 573; Bartholomew v. Bartholomew, 56 Cal.App.2d 216, 234, 132 P.2d 297; Farrell v. City of Ontario, supra, 39 Cal. App. 351, 178 P. 740.

[9, 10] It is not open to question that jury trial was a matter of right if the action is at law, even if it could have been brought in equity. Allegations that Mildred Ripling received the money "in trust" and "for safekeeping" do not change the essential nature of the action nor does the allegation that plaintiff is uncertain as to the amount thus received. At one stage of the proceedings plaintiff obtained an attachment upon a claim based upon express contract and for money had and received. At another stage he objected to a jury trial upon the ground that he is seeking to have the court declare a trust in his favor. We hold that he has elected to proceed at law. A judgment is sought for money presently due; the terms of the alleged trust and the duties of Mildred Ripling are not in dispute; an attachment is outstanding, and a court of law can grant plaintiff complete relief as effectively as equity. Applicable here is the principle stated in Mortimer v. Loynes, 74 Cal.App.2d 160, 168, 168 P.2d

481, 486. "None of the extraordinary powers of a court of equity are required in order to give plaintiff the relief that he seeks. A court of law can afford complete relief. It is thus apparent that this action is one at law."

The issues presented by the pleadings are triable at law, and to a jury, pursuant to the demand of petitioners.

Let a peremptory writ issue.

WOOD and VALLÉE, JJ., concur.

112 Cal.App.2d 658

VENTIMIGLIA et al. v. HODGEN.

Civ. 14872.

District Court of Appeal, First District,
Division 2, California.
Aug. 13, 1952.

Action by Anthony Ventimiglia, a minor, by Rose Ventimiglia, his guardian ad litem, John Ventimiglia, and Rose Ventimiglia against Elmer L. Hodgen for injuries to the minor plaintiff, for damages claimed by Rose Ventimiglia for medical and nursing expenses for the minor's care, and for damages claimed by John Ventimiglia to his automobile allegedly caused by defendant's negligence. Defendant cross-complained against plaintiff John Ventimiglia for damage to defendant's automobile. The Superior Court, Santa Clara County, Leonard R. Avilla, J., awarded $15,000 for minor's personal injuries, awarded plaintiff Rose Ventimiglia $390 for medical and nursing care; and denied plaintiff John Ventimiglia's damages for his automobile and dismissed defendant's cross-complaint. Defendant appealed from order denying motion for new trial. The District Court of Appeal, Goodell, J., held that evidence sustained trial court's finding that defendant was negligent and that defendant's negligence was a proximate cause of the collision.

Affirmed.

1. Appeal and Error 🔑995

Evidence which indicates an apparent miscarriage of justice will be scrutinized more carefully on appeal.

2. Appeal and Error 🔑995

Evidence relating to declarations or oral admissions of a party will be reviewed with caution on appeal.

3. Appeal and Error 🔑1012(1)

Weight of the evidence in the absence of jury is for the trial court.

4. Automobiles 🔑244(11, 36)

In action by guardian ad litem for injuries sustained by minor passenger in father's automobile which struck the right rear corner of defendant's automobile in intersection as defendant was making a left turn across father's lane of traffic, evidence sustained trial court's finding that defendant was negligent in making improper left turn and that such negligence was the proximate cause of the collision.

5. Negligence 🔑93(14)

Negligence of the driver of an automobile is not imputable to his guest passenger.

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Schofield, Hanson & Sholars, San Francisco (Wendell Davis, Los Angeles, of counsel), for appellant.

James F. Boccardo, San Jose (David S. Lull, San Jose, of counsel), for respondent.

GOODELL, Justice.

In this action, tried without a jury, respondent Anthony Ventimiglia, a boy of 9, was awarded $15,000 for personal injuries, and his mother was awarded $390 for his medical and nursing care and treatment. A new trial was denied and this appeal was taken.

On Sunday, February 15, 1948 about 7 p. m. a Plymouth automobile owned and driven by John Ventimiglia, and a Mercury automobile owned and driven by appellant Hodgen, collided at the intersection of West San Carlos Street and Bird Avenue in San Jose. Anthony was riding in the front seat of the Plymouth with his brother John, who was then 18, while Leonard, another brother, aged 11, rode in the back seat. Appellant and his wife live in Canada and were in San Jose visiting Mr. and Mrs. Angus MacInnis. Mrs. MacInnis is a sister of Mrs. Hodgen. The two couples had driven out that afternoon to call on friends and were returning. Mr. MacInnis was in the front seat beside appellant and Mrs. MacInnis was in the back seat on Mrs. Hodgen's right.

San Carlos Street is a through highway, 40 feet wide, with arterial stop signs directed to traffic entering and crossing it. It runs in a general easterly and westerly direction. Bird Avenue is 40 feet wide and runs in a general northerly and southerly direction. The evening was clear, visibility good, and the streets were dry; it was dark and the headlights of both cars were on. The intersection is within a 25-mile zone.

Just before the collision appellant's Mercury was traveling westerly on San Carlos, about to make a left turn into Bird Avenue and proceed southerly thereon, and the Plymouth was traveling easterly on San Carlos. A DeSoto car driven by Harold Stern and headed northerly on Bird Avenue had stopped at the intersection and was awaiting an opening to cross; it was about 8 feet out from the easterly curb of Bird.

Appellant's Mercury was pretty well into its left turn when the Plymouth, coming from the west, hit it on its right side toward its rear, shoving it against the left front fender of the Stern DeSoto. The impact was within the southwest quadrant of the intersection. A 16-foot skid mark made by the Plymouth led into the point of impact.

Anthony was seriously injured and Mrs. MacInnis also was injured.

Anthony, through his mother as guardian ad litem, sued for his injuries; in a second count his mother sued for medical and nursing expenses for the boy's care, and in a third count John Ventimiglia sued for damage to his Plymouth. To each count the defendant pleaded contributory negligence, assumption of risk and unavoidable accident. Defendant with his answer cross-complained against John for damage to his Mercury.

The court found that defendant was negligent and that as a proximate result the collision occurred between his car and that in which Anthony was a guest. It found that neither Anthony nor his mother was guilty of contributory negligence and that neither had assumed any risk. It also found that John was negligent and that his negligence "also proximately contributed to the happening of the accident, and to the damage to his automobile", and accordingly denied him any recovery and concluded that defendant Hodgen "have judgment against plaintiff John Ventimiglia as to that cause of action." Appellant was denied a recovery on his cross-complaint against John because of his own negligence.

The three occupants of the Plymouth—John, its driver, and Anthony and Leonard his guests—and the four occupants of Hodgen's Mercury all testified. Stern, the driver of the DeSoto stopped at the corner, who "saw the whole thing", also testified (for the defense) and the testimony of these eight witnesses presents many conflicts as might be expected in a case of this kind.

Appellant at once concedes that there are conflicts in the evidence, but contends that they are merely *in words*; that underlying the testimony of John Ventimiglia "were motives of guilt and self-interest" and that the case presents "a situation where the court could apply the principles laid down in the case of Herbert v. Lankershim, 9 Cal.2d 409 [71 P.2d 220] * * *." There 9 Cal.2d at page 472, 71 P.2d at page 251, it was said that in determining whether there is substantial evidence to support the plaintiff's case " ' "the credulity of courts is not to be deemed commensurate with the facility or vehemence with which a witness swears." ' "

Again, appellant presents the question "Is John's evidence worthy of belief?" Thus this court is asked to take over the functions of the trial court in weighing and evaluating the testimony, and in passing upon the credibility of the witnesses.

Four cases are cited by appellant which cite approvingly Herbert v. Lankershim, but none of them convinces us that the rule which appellant invokes has any bearing on the present controversy.

The first is DeYoung v. DeYoung, Cal.App., 159 P.2d 102, 105, an action by a wife for separate maintenance, wherein the trial court denied her any relief. The husband had earlier obtained a divorce in Mexico. The district court of appeal reversed the judgment, holding *inter alia* that the husband had "perpetrated a gross fraud upon his wife and upon the court in Juarez by not furnishing her address to counsel and the court there", and that his testimony to the contrary created no conflict since it consisted of "mere words". Citing Herbert v. Lankershim. The Supreme Court granted a hearing and affirmed the judgment, saying, 27 Cal.2d 521, 525, 165 P.2d 457, 459: "Defendant herein testified that he gave plaintiff's name and address to the attorney who handled the Mexican divorce proceeding; and the Chihuahua decree, a duly authenticated copy of which was introduced, recites that publication of summons had been made and that 'all the legal requirements have been complied with.' This evidence was ample to support the trial court's finding that 'due and proper notice' had been given [citations]." After further discussion the court said, 27 Cal.2d at page 526, 165 P.2d at page 459: "* * * the probative value of the evidence was a matter for the determination of the trial court. The power of an appellate court ends with respect to the facts when it determines that there is substantial evidence which supports the trial court's findings. Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3; Stromerson v. Averill, 22 Cal.2d 808, 141 P.2d 732; Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478."

In the second case, namely, Gosselin v. Hawkins, 95 Cal.App.2d 857, 860, 214 P.2d 110, 112, the Lankershim case is cited only in support of the familiar rule (for which scores of authorities might have been cited) that there must be substantial evidence to support the jury's finding. In that case it was held that there was such evidence.

The third case is In re Guardianship of Sturges, 30 Cal.App.2d 477, 496, 497, 86 P.2d 905, 914, an appeal from an order removing a guardian. In reversing, the court held that there was no substantial evidence to support the order, citing Lankershim.

The fourth case is Citron v. Fields, 30 Cal.App.2d 51, 62, 63, 85 P.2d 534, 540, an action for a physician's fee on a case of bronchial pneumonia. The judgment for $12,000 was reversed as exorbitant, the court holding (on the authority of Lankershim) that much of the testimony on the plaintiff's side was "mere swearing".

[1–3] This court in Ferrari v. Mambretti, 58 Cal.App.2d 318, 322, 323, 136 P.2d 326, 328, had occasion to consider the Lankershim case, for it was there invoked, as it is here, in support of the claim that certain testimony was inherently incredible. This court said: "We do not understand that the Lankershim case made a new rule in appeals involving the question of the sufficiency of the evidence. Where a miscarriage of justice is apparent the evidence may be scrutinized more carefully, and when the evidence relates to declarations or oral admissions of a party, it will be received 'with caution' as required by section 2061, subd. 4 of the Code of Civil Procedure. It is true that the court quoted with approval from an early English case holding that in the proceedings of this kind the evidence of the oral admissions must be 'satisfactory' and 'convincing.' The use of these words has been frequently criticized in our decisions, and we do not understand that, in the Lankershim case, the supreme court was departing from the rule that the weight of the evidence, and particularly the credibility of the witnesses, was each a matter for the trial court or jury." A petition for hearing was denied.

[4, 5] We see no reason to change or modify our statement in that case, in any respect. It is applicable to the present situation. This record presents no miscarriage of justice. The trial court on conflicting testimony found that the drivers of both cars were negligent.

Finally, while on the subject of Herbert v. Lankershim, there is the case of Taylor v. Wright, 69 Cal.App.2d 371, 387, 159 P.2d 980, 988, where *inter alia* the court in denying a rehearing said: "The briefs of appellants and this petition cite the frequently relied upon but seldom followed case of

Herbert v. Lankershim * * * and ask us to disregard conflicts in the evidence. This we cannot and should not do." A hearing was denied by the Supreme Court.

Without detailing all the testimony in this record of about 200 pages, it is sufficient to say that there was a conflict as to the Plymouth's speed. John Ventimiglia testified that it was 25 to 30 miles per hour and that he slowed down to a virtual stop just before the impact; he told the police officer he was going 30. Appellant, on the other hand said it was 50; Stern, sitting in his car at the corner, put it at 45 and said that John did not slow down at all. Appellant testified that he gave the arm signal for a left turn 50 to 100 feet before reaching the intersection; Stern testified that appellant gave the left-turn signal; John said he saw no arm signal, which, under the authorities, creates a conflict. Appellant testified that when he commenced to turn, John's car was 150 feet away; Stern said it was about 250 feet away; John testified that he was between 30 and 40 feet away when the Mercury commenced to turn and Leonard placed the distance at about 40 feet. Appellant testified that before starting to turn he stopped or paused to let two cars traveling easterly ahead of the Plymouth clear the crossing; Stern also testified as to the two other cars; John testified that there were no cars ahead of him. Stern testified that appellant made a gradual turn, "a very perfect left-hand turn", but later said 'He could cut a close corner." John testified that appellant was traveling at about 15 miles when he made the turn and that he "turned rather sharply" before coming to the center of the intersection. Further, that in the impact the Mercury "pushed me over a couple of feet, dragged with me". Photographs in evidence show that the grille on the Plymouth's radiator was twisted to the right, out of line, and the right front bumper flattened against the tire. One of the principal questions in the case was whether appellant, who testified the Plymouth was traveling at 50 while he in the Mercury was practically stopped, was warranted in starting to turn in the path of the oncoming Plymouth. (See § 551 Veh.Code).

The trial judge summed up the testimony in the following opinion which he filed:

> "In this action the physical facts as presented to the Court indicate negligent conduct on the part of each of the drivers of the automobiles involved. The damage done to each car and their respective positions, as shown by the photographs offered, together with the testimony of the police officers all tend to show that driver Hodgen attempted to 'cut a close corner,' as the witness Stern put it, in turning left at the intersection and that driver Ventimiglia was either driving at too great a rate of speed under the circumstances, and was thus unable to properly control his car, or was inattentive in his approach to the intersection until too late to control his car. Section 551 of the Vehicle Code places a heavy responsibility on the driver of the car intending to make the left turn to judge when the approaching vehicle is 'so close thereto as to constitute an immediate hazard'. The testimony of the witness Stern, while apparently very honest and disinterested, does not clearly coincide with the physical facts and the officer's testimony * * *."

The only question on this appeal is whether there is any subtantial evidence to support the finding that appellant was negligent and that his negligence was one of the proximate causes of the collision. That there is such evidence is, in our opinion, beyond question. The negligence of John Ventimiglia was likewise found by the court and is not now in controversy. Such negligence, however, was not imputable to Anthony, a guest in John's car, Edwards v. Freeman, 34 Cal.2d 589, 212 P.2d 883, and no such contention is made herein.

There is no conflict between the court's written opinion and the findings. They are perfectly consistent.

The judgment is affirmed.

NOURSE, P. J., and JONES, J. pro tem., concur.

112 Cal.App.2d 764

PEOPLE v. HEROD.

Cr. 850.

District Court of Appeal, Fourth District,
California.
Aug. 18, 1952.

Petition for writ of error coram nobis by prisoner who pleaded guilty to robbery and grand theft and, after admitting six prior felony convictions set forth in information, was sentenced to imprisonment as habitual criminal. The Superior Court, Fresno County, Edward L. Kellas, J., entered order denying the writ, and prisoner appealed. The District Court of Appeal, Mussell, J., held that whether prisoner lacked effective aid of counsel could not be determined in a coram nobis proceeding.

Order affirmed.

1. Criminal Law ⟹997

Whether a defendant lacked effective aid of counsel cannot be determined in coram nobis proceedings.

2. Criminal Law ⟹1202(2)

Where defendant admitted prior felony convictions in open court, District Attorney had no burden of proof as to such convictions. Penal Code, § 644(b).

3. Criminal Law ⟹1202(4)

When a defendant admits prior conviction, there is no requirement that the prosecution produce evidence of the nature of the convictions. Penal Code, § 644(b).

4. Criminal Law ⟹997

Where defendant admitted in open court that, as alleged in amended information, he had been previously convicted four times for burglary and twice for grand theft, with result that upon conviction, he was imprisoned as an habitual criminal, question whether prior convictions, alleged to have been committed in Texas, were felonies in California, was determined by such admission and was not open to review in proceedings for writ of error coram nobis.

5. Criminal Law ⟹997

Writ of error coram nobis will not lie where remedy sought thereunder could have been raised by motion for new trial or by appeal from judgment, but was not so sought by the defendant.

6. Criminal Law ⟹997

A showing of diligence is a prerequisite to availability of relief by writ of error coram nobis.

7. Criminal Law ⟹997

Where judgment of conviction was entered August 31, 1945 and defendant filed petition for writ of error coram nobis on December 26, 1951, writ would not be granted in absence of a reasonable explanation for such unreasonable delay.

◆

Stanton M. Levy, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

In August, 1945, defendant pleaded guilty to Robbery and Grand Theft as charged in an Amended Information filed in the Superior Court of Fresno County. He admitted six prior felony convictions set forth in the Information and was sentenced to the State's prison as an habitual criminal. On December 28, 1951, defendant filed a Petition for a Writ of Error Coram Nobis in the Superior Court above named and now appeals from the order denying the writ.

In his "Specifications of Error", which is a part of his petition, defendant alleged that the "judgment-commitment" of the Superior Court was erroneous because facts were withheld from the court; that he was denied a fair trial "on the merits of his case by extrinsic causes"; that if some existing facts had been brought to the attention of the court by competent counsel, the rendition of the erroneous judgment would have been prevented; that the facts of his case were not legally verified; that the alleged prior convictions were not properly authenticated; that he was denied due process of law by trick and device and extrinsic fraud; and that the proceedings leading up to his conviction were in violation of the Fourteenth Amendment of the Constitution of the United States.

This appeal is based on two contentions: (1) That defendant was deprived of satisfactory legal representation; and (2) That the District Attorney failed to carry his burden of proof as to the prior felony convictions.

[1] Defendant's contention that he was deprived of satisfactory legal representation is not borne out by the record before us, and even if it were, it is well settled that lack of effective aid of counsel cannot be determined in coram nobis proceedings. People v. James, 99 Cal.App.2d 476, 479, 222 P.2d 117; People v. Krout, 90 Cal.App.2d 205, 208, 202 P.2d 635; In re Sprague, 37 Cal.2d 110, 115, 230 P.2d 633; People v. Watkins, 92 Cal.App.2d 375, 376, 206 P.2d 1118.

[2–4] The contention that the District Attorney failed to carry his burden of proof as to the prior felony convictions likewise cannot be determined in these proceedings. There is no such burden of proof when, as here, the defendant admitted the convictions in open court. People v. Stone, 69 Cal.App.2d 533, 536, 159 P.2d 701; In re Gilliam, 26 Cal.2d 860, 866, 161 P.2d 793. When a defendant admits prior convictions there is no requirement that the prosecution produce evidence of the nature of the convictions. People v. McConnell, 86 Cal.App.2d 578, 195 P.2d 34. The question whether the prior convictions alleged to have been committed in Texas were felonies in California was determined by defendant's admission in court and is not open to review in these proceedings. People v. McVicker, 37 Cal.App.2d 470, 473, 99 P.2d 1110; People v. Harincar, 49 Cal.App.2d 594, 596, 121 P.2d 751. Moreover, four of the prior convictions alleged in the Amended Information were for Burglary and the other two for Grand Theft. These are among those mentioned in section 644(b) of the Penal Code upon which one may be adjudicated an habitual criminal.

[5–7] The matters here presented could have been raised by motion for a new trial or appeal from the judgment and since these remedies were not sought by the defendant, a Writ of Error Coram Nobis will not lie. People v. Dunlop, 102 Cal.App.2d 314, 317, 227 P.2d 281. Furthermore, a showing of diligence is a prerequisite to availability of relief by Writ of Error Coram Nobis. People v. Shorts, 32 Cal.2d 502, 512, 197 P.2d 330; People v. Harincar, supra, 49 Cal.App.2d at page 695, 121 P.2d 751. In the instant case the judgment of conviction was entered on August 31, 1945, and the petition herein was filed on December 26, 1951. No reasonable explanation for this unreasonable delay is advanced by the defendant.

The order is affirmed.

BARNARD, P. J., concurs.

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112 Cal.App.2d 767

PEOPLE v. DEVENY.

Cr. 917.

District Court of Appeal, Fourth District, California.
Aug. 18, 1952.

Defendant was convicted of robbery. The Superior Court of San Bernardino County, Martin J. Coughlin, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Mussell, J., held that defendant had waived his right to be represented by counsel at trial.

Judgment affirmed.

1. Criminal Law 🔑1035(3)

In prosecution for robbery, where defendant, in his opening statement, said that he and fellow defendant were supposed to be notorious killers and that was why they had certain boots on, but objection thereto or motion thereon was not made by the defendant at the trial, his objection that failure to free him from bonds and shackles during trial constituted prejudicial error would not be considered upon appeal. Code Civ.Proc. § 1963, subd. 15.

2. Criminal Law ⚿1186(4)

In prosecution for robbery, evidence of guilt was so clear and convincing that claimed error in failure to remove bonds and shackles from defendant during trial did not result in miscarriage of justice. Code Civ.Proc. § 1963, subd. 15; Const. art. 6, § 4½.

3. Criminal Law ⚿641(1)

In prosecution for robbery, where counsel was appointed for defendant at time information was filed and at time of arraignment, but this counsel withdrew, and defendant, upon inquiry by court whether another lawyer should be appointed, stated that he and his codefendants had had enough lawyers, defendant waived his right to be represented by counsel.

◆

Richard M. Anderson, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant, with one Leonard Cruz, was charged in an Information with the crime of Robbery. It was also charged that Cruz was armed with a deadly weapon and that he had been previously convicted of first degree Burglary. Appellant Deveny was charged with three previous felony convictions: Violation of the Dyer and Mann Acts, Forgery and Escape from State Prison. Appellant denied the first prior conviction and admitted the other two. A jury trial resulted in a conviction of both defendants and they were sentenced to the State Prison. Deveny appeals from the judgment of conviction and contends that the trial court committed reversible error in not freeing him from bonds and shackles and in not providing him with counsel. It is not contended that the evidence was insufficient to sustain the verdict and judgment.

Statement of Facts.

At about 8:30 a. m., June 8, 1951, appellant and Cruz entered the Valentine Furniture Store in San Bernardino. They asked for a portable radio and were being waited upon by Mr. Alton, the manager of the store, when defendant Cruz, who was armed with a gun, advised Alton "This is a stick up. Open the register up." Alton complied and appellant then took between $20 and $30 from the register. Cruz and Deveny then pulled the telephone from the wall and broke the wires and Cruz said to Alton "You stay right there or I will put a forty-five right through you." The defendants then ran out of the store to their parked automobile and drove away. A few minutes later they were arrested by police officers and taken to the store where they were identified as the men who had committed the robbery.

Mrs. Sullivan, a witness called by the prosecution, testified that the day before the robbery she was hitchhiking into Los Angeles when she was picked up by the defendants; that she came to San Bernardino with them, arriving at about 3:00 a. m. the following morning; that she was in the defendants' car when it was stopped in the front of the furniture store; that she was instructed to lie down in the back seat of the car while the defendants entered the store; that they said they were going to "heist the joint"; that she saw a .45 automatic in the automobile and that after they left the store Cruz asked Deveny "how much they'd gotten".

The defendants declined to accept the aid of counsel at the trial and no evidence was presented by them or either of them.

[1, 2] It is first argued that the trial court committed prejudicial error in failing, upon objection, to free appellant from bonds and shackles worn by him during the course of the trial. This argument is without merit. The only evidence in the record relative to bonds or shackles is the opening statement of appellant in which he said "We are supposed to be notorious killers—that's why we've got these boots on * * *", and the remarks of appel-

lant's co-defendant made at the time the jury was being empaneled, as follows:

> "Mr. Cruz: It's unconstitutional, your Honor. The same goes for these shackles. Better make this court right while you're at it.
>
> "The Court: Are you making an objection to some proceeding, sir?
>
> "Mr. Cruz: Objection? The whole thing's unconstitutional.
>
> "The Court: What are you objecting to?
>
> "Mr. Cruz: For the last six months we've been kept in jail.
>
> "The Court: That's not an objection. Overruled.
>
> "Mr. Cruz: No challenge."

It may be inferred from the foregoing statements that appellant was wearing some sort of unusual boots, the exact nature of which is undisclosed by the record. It does not appear that the appellant objected to wearing the "boots" or that they interfered with the conduct of his defense in any way.

Appellant, in support of his position, cites People v. Harrington, 42 Cal. 165. In that case the reviewing court reversed the judgment of convicton of robbery where the trial court refused *on motion* of the appellants to direct that manacles which were upon their limbs be removed while they were in court on trial. He also cites State v. Kring, 64 Mo. 591 and Blair v. Commonwealth, 171 Ky. 319, 188 S.W. 390. In these cases it also appears that the appellant had objected and asked the court to order the manacles removed.

In People v. Kimball, 5 Cal.2d 608, 611, 55 P.2d 483, the court recognized the rule that ordinarily a defendant should not be manacled or unduly restrained when in court. The court also recognized the rule that such restraint is proper when necessary for the detention of a defendant. Section 688 of the Penal Code provides that a person charged with a public offense cannot be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge. Since no objection was made by the appellant to wearing the so-called "boots", no evidence was introduced showing their necessity or lack of necessity under the circumstances. In this connection, it may be noted that one of the two prior felony convictions which the appellant admitted was Escape from State Prison. It is to be presumed that official duty is regularly performed. (C. C.P. Sec. 1963, sub. 15.) Moreover, since no objection or motion was made by the appellant at the trial, the objection cannot be considered upon appeal. 8 Cal.Jur. 506, Sec. 520; People v. Horowitz, 70 Cal. App.2d 675, 698, 161 P.2d 833. In any event, the evidence of the appellant's guilt in the instant case is so clear and convincing that the error complained of has not resulted in a miscarriage of justice. Art. VI, Sec. 4½, Calif.Const.

[3] Appellant next contends that the court erred in failing to provide him with counsel at the trial. The record shows that counsel was appointed for the appellant at the time the Information was filed and at the time of his arraignment. This counsel withdrew and on December 21, 1951, the court inquired if the appellant and his co-defendant desired the court to appoint a lawyer to represent them. The appellant said "We have had enough lawyers." It thus appears that the appellant, in no uncertain terms, declined the services of an attorney to represent him at the trial. The right to be represented by counsel is a right which may be waived and as was said in In re Jingles, 27 Cal. 2d 496, 498, 165 P.2d 12, 14:

> "If, therefore, under the facts as determined from the evidence, there was a valid waiver by petitioner of his right to be represented by counsel, it is of no moment that he 'was not represented by, nor did he have the assistance of, counsel.'"

And as was said in People v. O'Neill, 78 Cal.App.2d 888, 891, 179 P.2d 10, 12:

> "A defendant cannot urge as a ground for reversal that the trial court failed to appoint suitable counsel to represent him where prior to the trial he appeared before the court and without apparent good reason termi-

> nated the services of the public defender who had been acting as his counsel and when the case was called for trial stated that he was ready to proceed."

Under the circumstances here presented, there was no error in failing to provide the appellant with counsel.

The judgment is affirmed.

BARNARD, P. J., concurs.

112 Cal.App.2d 634

In re COCHEMS' ESTATE.

COCHEMS et al. v. COCHEMS et al.

Civ. 18919.

District Court of Appeal, Second District, Division 1, California.

Aug. 11, 1952.

Proceeding in the matter of the estate of Annie Cochems, deceased, on the petition of Paul Charles Cochems, and others, against Walter Anthony Cochems and another to determine whether petitioners were pretermitted heirs. The Superior Court, Los Angeles County, John Gee Clark, J., rendered judgment for contestants and petitioners appealed. The District Court of Appeal, Drapeau, J., held that by the language of her will the testatrix evidenced an intent to exclude the petitioners.

Affirmed.

Doran, J., dissented.

See also, 242 P.2d 56.

1. Descent and Distribution 🔑47(2)
Wills 🔑506(4)

The term "heirs" may describe children and issue of deceased children and if the language of a will discloses an intention not to provide for "heirs" other than designated devisees and legatees, the conclusion is that those other than designated devisees and legatees were disinherited by design and not because testator was oblivious of their existence. Probate Code, § 90.

2. Descent and Distribution 🔑47(2)

Question whether a testatrix intended to disinherit her grandchildren was required to be determined from language of the will itself, without resort to extrinsic evidence.

3. Descent and Distribution 🔑47(2)

Where testatrix bequeathed her estate to six named surviving children and made no mention of her predeceased son nor of his three surviving children, testatrix excluded the grandchildren, in view of provision that anyone attempting to take any of the estate other than through the will should get one dollar and no more and provision that on death of any of her named children his or her share would go to others of that class.

Nathan Kates and Gerald B. Tannen, San Fernando, for appellants.

C. C. Dillavou, Los Angeles, for respondents.

DRAPEAU, Justice.

Annie Cochems died testate on August 28, 1950 leaving six children surviving her. One son, Paul Leopold Cochems, predeceased her.

By her last will duly admitted to probate herein, she bequeathed her estate to the six surviving children, naming them. No mention was made of her predeceased son, nor of his three living children: Paul Charles Cochems, Mary Martha Cochems and Josephine Crosier.

These three grandchildren of testatrix filed their petition to determine heirship claiming one-seventh of the estate as pretermitted heirs under section 90, Probate Code, to-wit:

> "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child * * * and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on

> them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate."

The coexecutors of the last will of decedent filed their objections. Upon hearing, the trial court found that testatrix intentionally omitted to provide for petitioners. And that she made a conditional provision in the sum of $1 to each of them under the following clause of her will:

> "I hereby generally and specifically disinherit each, any and all persons whomsoever claiming to be or who may be lawfully determined to be my heirs at law, except as otherwise mentioned in this Will, and if any such persons or such heirs, or any devisees under this Will, or their successors in interest, or any other person who, if I died intestate, would be entitled or shall lawfully or indirectly, singly or in conjunction with other persons, seek to establish or assert any claims to my estate or any part thereof, excepting under this Will, or atta*ch* (sic.), oppose or seek to set aside the probate of this Will, or to impair, invalidate or set aside its provisions, or to have the same or any part thereof, or any devise or devises, or trust herein limited, declared void or diminished, or to defeat or change any part of the testamentary plan of this Will, or settle or compromise directly or indirectly either in or out of court, with any contestants of this Will, or shall consent to, acquiesce in or fail to contest such proceedings, or shall endeavor to secure or take any part of my estate in any manner other than through or under this Will, then in any or all of the above mentioned cases and events, I hereby give and bequeath to such persons or person the sum of One Dollar ($1.00) and no more, in lieu of any other share or interest in my estate and all the rest of the interest, share or property which would otherwise have gone to such person or persons by devise or inheritance, or which they may be entitled to take under any provision of law, shall go, and I hereby give, devise and bequeath the same, in fee simple, share and share alike, to such each and all of my devisees and legatees mentioned in this Will, as shall not have made, joined, assisted, consented or acquiesced in such proceedings, or settled or compromised, directly or indirectly, either in or out of court, with any contestants of this Will; and if all of said devisees and legatees, or their successors in interest, shall join, assist, consent or acquiesce in such proceedings, or so settle or compromise with any such contestants, I hereby give, devise and bequeath in fee, the whole of my estate to my next heirs at law, excluding said devisees, legatees, their successors in interest, and such contestants, according to the laws of succession then in force in the State of California, anything to the contrary in this Will notwithstanding."

From the judgment which followed, the grandchildren appeal. They contend that the quoted disinheritance clause in the will does not indicate that testatrix intended to omit them nor does it show that she had them in mind when she executed her will.

In support of their contention, appellants cite Estate of Price, 56 Cal.App.2d 335, 336, 132 P.2d 485, 486, where it was held that grandchildren were not shown by will to have been intentionally omitted. There testatrix devised her property to two living sons without mentioning the children of a predeceased son. But an exclusion clause in the will read as follows:

> "'I purposely refrain from leaving anything by this my last will and testament to any other person or persons, and in the event that any other person or persons shall either directly or indirectly contest this my last will and testament I give to any *such person or persons* contesting said will the sum of $1 and no more, hereby declaring that I have only at this date two surviving children, to wit: my said two

sons above named.'" (Emphasis added.)

[1] However, it is settled that the term "heirs" precisely "describes children and the issue of deceased children, and if the language of the will discloses an intention not to provide for 'heirs' other than the designated devisees and legatees, the necessary conclusion is that the claimant was disinherited by design and not because the testator was oblivious of his existence. That the testator had the claimant in mind and intentionally failed to provide for him is held to be evidenced by language which refers to the exclusion of 'heirs' or 'relatives' or which expresses a gift of a nominal sum to any person who shall claim to be one of the testator's 'heirs'." 26 Cal. Jur. 926, section 239, citing Estate of Hassell, 168 Cal. 287, 142 P. 838; Estate of Lindsay, 176 Cal. 238, 240, 168 P. 113; Estate of Minear, 180 Cal. 239, 180 P. 535; Estate of Trickett, 197 Cal. 20, 239 P. 406; Estate of Lombard, 16 Cal.App.2d 526, 60 P.2d 1000.

[2] It is equally well settled that the question as to whether testatrix intended to disinherit her grandchildren must be determined from the language of the will itself, without resort to extrinsic evidence. 26 Cal.Jur. 924, section 237; Estate of Garraud, 35 Cal. 336; In re Salmon, 107 Cal. 614, 40 P. 1030; Estate of Trickett, 197 Cal. 20, 239 P. 406; Estate of Allmaras, 24 Cal.App.2d 457, 461, 75 P.2d 557.

In addition to the disinheritance clause hereinbefore quoted, the instant will contains other language from which an inference arises that testatrix intended to omit her grandchildren from participating in her estate. This language provides that in the event that any one of her named sons or daughters predecease testatrix, then his or her share shall go equally to the survivors of that class.

[3] As stated in Estate of Trickett, supra, 197 Cal. 20, 25, 239 P. 406, 409: "The general scheme of the will and the intent of the testator, as manifested by the language of the will, compel the conclusion that the testator failed to provide for appellants, not because he was oblivious of their existence but, rather, because he did not desire them to share in his estate."

This court is of the opinion that the language of the instant will clearly shows an intention to exclude appellant grandchildren from participating in testatrix' estate. However, we are not unmindful of the view expressed by the trial judge in his memorandum opinion that "these general clauses of contests or disinheritances or inheritances do not in fact constitute evidence that omitted children or grandchildren were intentionally omitted, but that quite the contrary is true, for had they not been forgotten, they would generally have been referred to at least by a class * * *."

The judgment is affirmed.

WHITE, P. J., concurs.

DORAN, J., dissents.

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112 Cal.App.2d 771

SONBERGH v. MacQUARRIE.

Civ. 18965.

District Court of Appeal, Second District, Division 1, California.

Aug. 19, 1952.

Hearing Denied Oct. 16, 1952.

Action began on August 9, 1951 by Gilbert Sonbergh against Haven MacQuarrie for injuries allegedly sustained as result of assault and battery upon plaintiff by defendant on September 25, 1948. Defendant interposed a general demurrer and moved for judgment on pleadings on ground that action was barred by statute of limitations. The Superior Court, County of Los Angeles, Julius V. Patrosso, J., ordered the demurrer off the calendar and granted the motion, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that in absence of fraud, concealment or duress on part of defendant which prevented plaintiff from ascertaining that he suffered injuries at the hands of defendant, the 2 year statute of limitations upon actions for assault and battery was not tolled merely because plaintiff did not discover any actual damages as result of the alleged assault and battery until shortly before bringing suit.

Judgment affirmed.

1. Limitation of Actions ⚷95(1)

Mere ignorance, not induced by fraud, of the existence of facts constituting a cause of action on the part of a plaintiff does not prevent the running of a statute of limitations.

2. Limitation of Actions ⚷43

Where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.

3. Limitation of Actions ⚷95(1)

In absence of fraud, concealment or duress on part of defendant which prevented plaintiff from ascertaining that he suffered injury from an alleged assault and battery, the two-year statute of limitations on actions for assault and battery was not tolled merely because plaintiff did not discover any actual harm until shortly before he brought suit. Code Civ.Proc. § 340, subd. 3.

◆

Lawrence William Steinberg, Beverly Hills, for appellant.

Jerome J. Mayo, Los Angeles, for respondent.

DRAPEAU, Justice.

By his complaint of August 9, 1951, plaintiff sought recovery of damages for severe personal injuries which he alleged he sustained as result of an assault and battery made upon him on September 25, 1948, by defendant.

The latter interposed a general demurrer and moved for a judgment on the pleadings, on the ground that the action was barred by the statute of limitations, i. e., section 340(3) Code of Civil Procedure.

The demurrer was ordered off calendar and the motion was granted. From the judgment which followed, plaintiff appeals.

The complaint alleges that plaintiff was struck by defendant on September 28, 1948; that such striking was without cause or provocation. That plaintiff was unaware at the time of the assault that any substantial injuries had resulted; that he took all reasonable precautions to ascertain if he had been injured, including visits to physicians and X-rays and other tests recommended by them. It is also alleged that plaintiff could not have learned of the extent of his injuries prior to April, 1951, when it first became possible to make a diagnosis that plaintiff had "organic brain and nervous injuries" proximately caused by the assault.

It is further alleged that, as a result of such injuries, plaintiff has suffered dizziness, general malaise, numbness and tremors. His sense of balance is adversely affected, his freedom of motion is curtailed and he has to walk with a cane. He has suffered loss of speech, loss of muscular control, and has sustained injuries to his brain, nerves and tissues of his head, to his central nervous system as well as to other parts of his body. He suffers great pain; is unable to work; requires and will continue to require medical care.

The question involved herein is stated by respondent as follows: "In a battery case where the injuries flowing from the battery were immediately not substantial, but later became so, are the provisions of section 340, subdivision 3, Code of Civil Procedure * * * tolled until the *seriousness* of the injuries is discovered." (Emphasis included.)

The statute, above referred to, requires that an action for assault, battery, or for injury to or for the death of one caused by the wrongful act or neglect of another shall be commenced within one year. Here the complaint was not filed until two years and ten months after the alleged assault.

Appellant urges that since, in the exercise of due diligence, he was not able to determine the cause or source of his ill health until a few months before he filed his complaint, his action was filed in time. In support of this position, he cites those causes of action in which the statutes of limitations run from time of discovery of the injury, to-wit: warranty, malpractice and workmen's compensation cases. This exception to the general rule rests upon the theory that ignorance or concealment which is the result of defendant's conduct rather than the negligence of plaintiff, tolls the running of the statute until discovery of the injury. 34 Am.Jur. 186, sec. 230, Limitation of Actions.

[1] And in Scafidi v. Western Loan & Building Co., 72 Cal.App.2d 550, 566, 165 P.2d 260, 269, the following appears: "Our courts have repeatedy affirmed that mere ignorance, not induced by fraud, of the existence of the facts constituting a cause of action on the part of a plaintiff does not prevent the running of the statute of limitations. (Lightner Mining Co. v. Lane, 161 Cal. 689, 696, 120 P. 771, Ann.Cas.1913C, 1093; Rose v. Dunk-Harbison Co., 7 Cal. App.2d 502, 505, 46 P.2d 242; Medley v. Hill, 104 Cal.App. 309, 311, 285 P. 891; 37 C.J. sec. 350, p. 969; and that 'mere ignorance of the facts, * * * without some valid excuse for ignorance, was of no consequence.' Dennis v. Bint, 122 Cal. 39, 44, 54 P. 378, 380, 68 Am.St.Rep. 17 (citing authority)."

"The right to maintain an action arises immediately upon the commission of the wrong complained of, and the statute runs from that time, and not from the date of damage caused by the wrong. Thus a cause of action in tort arises when the wrongful act is committed, although all the damages occasioned by the act were not sustained at that time, and even though the fact that a tort was committed was not known until the right of recovery was barred." 16 Cal. Jur. 491, sec. 94, Limitation of Actions.

Again in Rest. Torts, sec. 899(c) it is stated: "An assault is complete when anticipation of harm occurs. A battery or a cause of action for negligently harming a person or a thing is complete upon physical contact even though there is no observable damage at the time of contact."

[2] Likewise it is said in 34 Am.Jur. 126, sec. 160, Limitation of Actions: "As a general rule, where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date. The act itself is regarded as the ground of the action, and is not legally severable from its consequences. It is from then that the statute begins to run and not from the time of the damage or discovery of the injury."

[3] Appellant has not pleaded fraud, concealment or duress on the part of respondent which prevented him from ascertaining that he suffered injury at the hands of said respondent.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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112 Cal.App.2d 668

PEOPLE v. JENSEN.

Cr. 4789.

District Court of Appeal, Second District, Division 1, California.

Aug. 14, 1952.

An accused was convicted in the Superior Court of Los Angeles County, Philip H. Richards, J., of possession of fire arms in violation of the Dangerous Weapons Control Law, and of grand theft and of violating vehicle code, and charge of prior conviction of a felony was found to be true, and he appealed. The District Court of Appeal, Doran, J., held that defendant was not entitled to raise objection that there was no proof before trial court in respect to allegations that defendant had theretofore been duly and legally convicted of felony since defendant had not made such objection in trial court.

Judgment affirmed.

1. Criminal Law ⚷1202(7)

Where defendant charged with committing several crimes and with prior conviction of felony did not object in trial court that there was no proof in respect to allegation that defendant had theretofore been convicted of felony, defendant could not raise such objection when defendant appealed after being found guilty of crimes charged and after charge of prior conviction of felony was found to be true.

2. Weapons ⚷17(4)

Evidence justified conviction for possession of firearms in violation of Dangerous Weapons Control Law. Gen.Laws, Act 1970.

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was charged by information with the violation of the Dangerous Weapons Control Law of 1923, Gen.Laws, Act 1970, and in a separate information appellant was jointly charged with one Howard Jensen in two counts. In count one defendants were accused of Grand Theft, and in count two with a violation of section 503 of the Vehicle Code. It was further alleged that each defendant had been previously convicted of a felony.

The cause was submitted by stipulation on the transcript of the preliminary examination, a jury having been duly waived.

The defendant was adjudged guilty and the charge of prior conviction was found to be true.

The appeal is from the judgment in both cases.

It is contended on appeal that the "verdicts" in both cases are against the evidence and the law.

[1] Appellant argues, "It is respectfully contended that there was no proof before the trial court in respect to the allegation that the appellant had theretofore been duly and legally convicted of a felony, to-wit: The crime of violation of Section 408, title 18 of U.S.C.A.". In this connection appellant relies on People v. Foster, 3 Cal.App. 2d 35, 39 P.2d 271. But as pointed out by respondent, "It is submitted that the appellant is in no position to raise this particular objection at this time for he did not make any such objection in the trial court, and the case of People v. Foster upon which he relies was sufficiently distinguished in the case of People v. Houston, 88 Cal.App. 2d 11, 198 P.2d 53." The record in evidence, in the absence of objection, was sufficient.

[2] As to the contention with regard to the sufficiency of the evidence as to the possession of the firearm, that was a question for the trial court to determine. A review of the record reveals that there is substantial evidence, both direct and circumstantial, to support the judgment in this regard.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

39 Cal.2d 388

SCOTT v. BURKE.

GERRY v. BURKE.

L. A. 22274, 22275.

Supreme Court of California.
Aug. 1, 1952.

Rehearing Denied Aug. 28, 1952.

Action by Daniel Scott and by Samuel Gerry against Herman Burke for injuries from automobile accident, which occurred when plaintiffs-passengers were asleep, and about the circumstances of which defendant-driver had suffered loss of memory. The Superior Court, Los Angeles County, Allen W. Ashburn, J., entered judgment on verdict for defendant, and plaintiffs appealed. The Supreme Court, Schauer, J., held that instruction which allowed jury to consider both the inference of negligence which arose from doctrine of res ipsa loquitur and the inference of due care which arose from facts that defendant had suffered loss of memory concerning circumstances of evidence and that he produced no evidence irreconcilable with such inference, was proper.

Judgments affirmed.

Traynor and Edmunds, JJ., dissented.

Prior opinion, 239 P.2d 14.

1. Negligence 🔑138(2)

Where testimony respecting alleged negligent act of a decedent necessarily must be produced by witnesses other than deceased, an instruction that deceased is presumed to have exercised ordinary care is proper except if facts proved by uncontradicted testimony produced by the party seeking to invoke the presumption, under circumstances which do not indicate that such testimony is product of mistake or inadvertence, are wholly irreconcilable with the presumption, in which case presumption is dispelled and disappears.

2. Negligence 🔑121(1)

One who by reason of loss of memory is unable to testify concerning his conduct at and immediately before the time of an accident allegedly resulting from his negligence is entitled to invoke presumption that he exercised ordinary care, subject to exception that presumption will disappear if he produces uncontradicted testimony, under circumstances which do not indicate that such is product of mistake or inadvertence, which is wholly irreconcilable with the presumption.

3. Negligence 🔑121(1)

The disputable presumption of due care which may be invoked in favor of defendant, in negligence suit involving defendant who died before trial or who lost memory concerning his conduct at and immediately before time of alleged negligent acts, is by statute declared to be evidence, and is sufficient to support verdict of jury unless dispelled by irreconcilable facts proved by party invoking it, and may outweigh positive evidence against it. Code Civ.Proc. §§ 1957, 1961, 1963, subds. 1, 4.

4. Evidence 🔑53, 595

Inferences and presumptions are evidence and are to be weighed by the jury with other evidence before it. Code Civ. Proc. § 1957.

5. Evidence 🔑595

Neither a disputable presumption nor an inference is as a matter of law entitled to be accorded greater weight by the trier of the facts than is the other. Code Civ. Proc. §§ 1958, 1959.

6. Evidence 🔑595

An "inference" is nothing more or less than a pertinent deduction drawn from circumstantial evidence, that is, from evidence which is circumstantial as to the fact deduced.

See publication Words and Phrases, for other judicial constructions and definitions of "Inference".

7. Evidence 🔑587

Circumstantial evidence, from which inferences are drawn, may outweigh, in convincing force, both the strongest of disputable presumptions, and direct evidence as well.

8. Negligence 🔑121(2)

The doctrine of res ipsa loquitur raises an inference of negligence and not a presumption.

9. Evidence 🔑595

It is for the trier of fact to determine under the circumstances of each case whether to give greater weight to an inference than to a disputable presumption which conflicts therewith, or vice versa.

10. Evidence ⚷89

When a presumption is controverted by other evidence, whether direct or indirect, an issue of fact is raised which it is the duty of the court to determine as in other cases.

11. Appeal and Error ⚷1010(1)

The conclusion of the trial court with regard to an issue of fact raised when a presumption is controverted by other evidence, whether direct or indirect, is conclusive upon an appellate court unless it is manifestly without sufficient support in the evidence.

12. Automobiles ⚷245(24)

In suit by automobile passengers who were asleep when automobile left highway against driver who suffered loss of memory concerning circumstances of accident, it was for jury in light of all the circumstances of the case and evidence before them, to determine whether greater weight should be given to res ipsa loquitur inference, or to presumptions of innocence and due care which conflicted with such inference.

13. Negligence ⚷136(6)

Under appropriate circumstances, both res ipsa loquitur inference and the disputable presumptions of innocence and due care are elements tending toward proof to be considered by trier of fact, and it is function of trier of fact to determine in light of all evidence in case, including the opposing inferences and presumptions, whether proof preponderates in favor of one party and against another or is evenly balanced, and thereupon to resolve issues in accordance with rules relating to burden of proof.

14. Automobiles ⚷242(1), 245(24)

In suit by automobile passengers who were asleep when automobile left highway against driver of automobile who suffered loss of memory concerning circumstances of accident, evidence gave rise to permissible inference that driver was confronted with some sudden emergency and was diligently endeavoring to cope with it, which, if drawn by jury, would be part of the evidence to be weighed by it along with inference of negligence under res ipsa loquitur doctrine, and with other evidence, both direct and indirect, presented by the parties.

15. Negligence ⚷121(2)

One of the theories underlying the doctrine of res ipsa loquitur is that a defendant in charge of an instrumentality which causes injury either knows cause of accident or has best opportunity of ascertaining it and plaintiff, having no such knowledge, is compelled to allege negligence in general terms and to rely upon proof of happening of the accident in order to establish it.

16. Negligence ⚷121(1, 2)

Where defendant whose negligence allegedly caused injuries offers evidence of his lack of memory and consequent lack of knowledge and of opportunity to explain cause of accident, he should not be deprived of presumption of due care, merely because plaintiff relies on res ipsa loquitur doctrine.

17. Automobiles ⚷244(20)

In action by automobile passengers who were asleep when automobile left highway against driver who suffered loss of memory concerning circumstances of accident, presumptions of driver's due care and innocence constituted sufficient evidence to support verdict in his favor.

18. Automobiles ⚷246(57)

In action, by automobile passengers who were asleep when automobile left highway, against driver who suffered loss of memory concerning circumstances of accident, but in which evidence of tire marks revealed that driver had swerved on his side of highway and had repeatedly applied brakes, tending to show that he was confronted with sudden emergency, instruction on unavoidable accident properly submitted to jury the law applicable upon this tenable view of the evidence.

◆

Knight, Gitelson & Ashton, Robert R. Ashton, Samuel A. Rosenthal and Leonard

G. Ratner, all of Los Angeles, for appellant Scott.

Mark F. Jones, Los Angeles, and W. L. Engelhardt, Los Angeles, for appellant Gerry.

Parker, Stanbury, Reese & McGee and Raymond G. Stanbury, Los Angeles, for respondent.

Campbell, Hayes & Custer, San Jose, and W. R. Dunn, San Francisco, amici curiæ.

SCHAUER, Justice.

These two actions for personal injuries arising out of the same automobile accident were consolidated for trial, judgments on jury verdicts were entered in defendant's favor, and plaintiffs appeal. We have concluded that, contrary to plaintiffs' contention, the jury were properly instructed and the judgments must be affirmed.[1]

The uncontradicted evidence, insofar as material to these appeals, is as follows: At 9 o'clock p. m. on May 23, 1948, defendant, the two plaintiffs, and three other men left Guaymas, Mexico, in a 1947 Cadillac sedan belonging to plaintiff Gerry. The car, less than a year old, had gone only 11,000 or 12,000 miles and was in excellant mechanical condition with good brakes and good tires with lifeguard innertubes. The party had gone to Guaymas on a fishing trip, and had been sharing the driving. Defendant drove from Guaymas to Hermosillo, a distance of about 87 miles. Another member of the party was at the wheel during the four hour drive from Hermosillo to Nogales, on the border, where they arrived about 4:45 o'clock a. m. on May 24; defendant slept during this time. At Nogales defendant took over the driving again and proceeded north toward Tucson, Arizona; the other members of the party fell asleep and remained sleeping until after the accident occurred. About an hour after the group left Nogales the automobile, still driven by defendant, traveled diagonally across the left half of the highway and off of an embankment on the left side. "Skid marks" (according to the transcript, but from the context probably meaning *tire marks*), broken and recurrent as if the brakes had been repeatedly applied, released and reapplied, extended for a distance of 78 feet across the highway at an angle to the point where the car went over the embankment. At the site of the accident the highway was straight, level, and dry; it was daylight at the time and visibility was good although there was "a little haze." After leaving the highway the car traveled 114 feet to the edge of an arroyo, where there was a sloping bank of approximately 28 feet, at which point the wheel marks stopped for about 25 feet. The wheel marks then continued for 35 feet up the other side of the arroyo where the car came to a stop. It was badly wrecked and the parties injured.

A police officer reached the scene about 6:45 o'clock a. m., and after an investigation interviewed defendant at a hospital between 8 and 9 o'clock the same morning. The officer testified that defendant stated that he did not know his speed at the time of the accident, that he had previously been traveling at a reasonable and prudent speed, and that "I evidently went to sleep. I don't know what happened until I woke up at the hospital."

Defendant testified that he had no recollection whatsoever of the accident and could not explain why it occurred; that his first recollection thereafter was of opening his eyes behind the wheel, and the last recollection he had of any event prior thereto was of his driving of the car between Nogales and Tucson; that there was very little traffic on the road when he took the wheel at Nogales; that he did not remember applying the brakes or of being interviewed by the police officer; that he did remember being taken to the hospital and arriving there; that his highest speed was 60 miles per hour; that in his best opinion he did not fall asleep prior to the accident; that he had previously driven the automobile and was familiar with it. Defendant was rendered temporarily unconscious by the accident, and suffered a concussion of the brain and injuries to his head. Medical testimony was introduced to the effect that one who is knocked unconscious by a blow on the head may suffer a retrograde amnesia by which his memory of events immediately preceding his unconsciousness may be obliterated for a period of from a few seconds to a number of hours, and that under such circumstances the injured person would be unable to recall any of the events which happened during the period blocked out of his memory by such amnesia.

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[1] It should be noted that the accident occurred in the State of Arizona, and that defendant makes no contention that Arizona has a "guest statute" (see Central Copper Co. v. Klefisch (1928), 34 Ariz. 230, 270 P. 629), or that the California "guest statute" is applicable (see Loranger v. Nadeau (1932), 215 Cal. 362, 10 P.2d 63, 84 A.L.R. 1264).

Because the other persons in the car were sleeping, they were unable to testify as to the cause of the accident, but plaintiffs offered no criticism of defendant's driving while they were awake.

Upon this evidence the court instructed the jury on the *res ipsa loquitur* doctrine,[2] and also instructed that if the jury believed that defendant as a result of the shock of the accident was unable to remember and testify as to his own conduct or other facts of the accident then a presumption arose that he "was obeying the law and was exercising ordinary care and doing such acts as an ordinarily prudent person would have done in the same circumstances." (See Code Civ.Proc. § 1963, subds. 1, 4.) The court further instructed that "these instructions direct your attention to two conflicting rebuttable presumptions relating to the conduct of the defendant (one) that he exercised due care at the time of the accident which presumption arises in the event that you find that as a result thereof he is unable to remember the facts pertaining to the same, and (two) that he was negligent if you find that he was driving on the wrong side of the road, or that he permitted the automobile to leave the road in question entirely, or that he fell asleep at the wheel. If you find the facts to exist which give rise to these presumptions, then these conflicting presumptions constitute evidence, the effect of which is to be determined by you, not by the court; they are to be weighed and considered by you in the light of and in connection with all of the other evidence, and you are to give to them, and each of them, such weight as you deem proper;" and that "In determining what caused the accident you are entitled to take into consideration the evidence of the physical facts and to draw reasonable inferences therefrom."

Plaintiffs contend that inasmuch as the *res ipsa loquitur* doctrine is applicable (and defendant does not dispute this; see Druzanich v. Criley (1942), 19 Cal.2d 439, 444, 122 P.2d 53) the court erred to their prejudice in instructing the jury as to the presumption of due care, and that the judgments must therefore be reversed.

[1–3] It is settled law that where alleged negligent acts and conduct of a decedent are at issue before the court and the "testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, * * * an instruction that the deceased is presumed to have exercised ordinary care for his own concerns is * * * proper" except that if the fact proved by uncontradicted testimony produced by the party seeking to invoke the presumption, "under circumstances which afford no indication that the testimony is the product of mistake or inadvertence * * * is wholly irreconcilable with the presumption * * * the latter is dispelled and disappears from the case." (Westberg v. Willde (1939), 14 Cal.2d 360, 365, 367, 94 P.2d 590; see also Mar Shee v. Maryland Assurance Corp. (1922), 190 Cal. 1, 9, 210 P. 269; Smellie v. Southern Pacific Co. (1931), 212 Cal. 540, 560–561, 299 P. 529; Rogers v. Interstate Transit Co. (1931), 212 Cal. 36, 39, 297 P. 884; Mundy v. Marshall (1937), 8 Cal.2d 294, 296, 65 P. 2d 65.) One who by reason of loss of memory is unable to testify concerning his conduct at and immediately before the time of the accident is entitled to invoke the same presumption, subject to the same exception. (Scott v. Sheedy (1940), 39 Cal.App.2d 96, 101, 102 P.2d 575; Roselle v. Beach (1942), 51 Cal.App.2d 579, 583, 125 P.2d 77; Eastman v. Atchison T. & S. F. Ry. Co. (1942), 51 Cal.App.2d 653, 667, 125 P.2d 564; Fietz v. Hubbard (1943), 59 Cal.App.2d 124, 131, 138 P.2d 315; McNear v. Pacific Greyhound Lines (1944), 63 Cal.App.2d 11, 15, 146 P.2d 34; Simon v. City and County of San Francisco (1947), 79 Cal.App.2d 590, 598, 180 P.2d 393; Duvall v. T. W. A. (1950), 98 Cal.App.2d 106, 110, 219 P.2d 463; Russell v. Andersen (1951), 101 Cal. App.2d 684, 226 P.2d 350. This disputable presumption is by statute declared to be evidence (Code Civ.Proc., § 1957; see also §§ 1961, 1963(1)(4)), and is sufficient to support a verdict of a jury unless dispelled by the "irreconcilable" fact proved by the party relying on it. (Westberg v. Willde (1939), supra, 14 Cal.2d 360, 365, 94 P.2d 590, and cases there cited; Chakmakjian v. Lowe (1949), 33 Cal.2d 308, 313, 201 P.2d 801.) It may outweigh positive evidence adduced against it. (Smellie v. Southern Pacific Co. (1931), supra, 212 Cal. 540, 549, 299 P. 529, and cases there cited; cf. Speck v. Sarver (1942), 20 Cal.2d 585, 588, 128 P. 2d 16.)

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[2] The instruction reads as follows: "From the happening of the accident involved in this case there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on his part."

Plaintiffs argue, however, that it is likewise settled in California by a series of decisions that where, as here, defendant offers testimony which if believed by the jury would entitle defendant to benefit by the presumption of due care, it is nevertheless reversible error to so instruct the jury in a case in which plaintiff is entitled to benefit by the *res ipsa loquitur* inference.

In Smith v. Hollander (1927), 85 Cal.App. 535, 259 P. 958, defendant's automobile ran onto the sidewalk and struck plaintiff, a pedestrian. It was held that the court correctly instructed the jury on the *res ipsa loquitur* doctrine, and that (85 Cal.App. at page 540, 259 P. 958) "Where it was proper to instruct on this doctrine it was proper for the court to refuse defendant's requested instructions * * * upon the presumption of defendant's freedom from negligence." No authority is cited for the last-quoted statement. It appears from the opinion in which such statement is made that the defendant driver herself there testified as to the events leading up to the accident; hence, the presumption of due care would have been unavailable to her regardless of whether *res ipsa loquitur* applied, and, upon the facts of the case, the ruling was correct.

In Ellis v. Jewett (1937), 18 Cal.App.2d 629, 634–637, 64 P.2d 432, defendants appealed from an order granting plaintiff a new trial on the ground of error in the instructions. The court had instructed on the *res ipsa loquitur* doctrine, and had also told the jury that "There is a presumption in law that * * * [defendant] was free from fault in driving the automobile, and *this is a presumption which continues throughout the entire case, and must be considered by you in deciding the issues involved in the case.* No presumption of negligence on the part of * * * [defendant] arises from the mere happening of the accident * * *." The court on appeal held that the *res ipsa loquitur* instruction had been proper and further held, without citation of authority, that the instruction on presumption of freedom from fault was therefore erroneous and prejudicial. Under the circumstances of that case we may assume that the ruling is correct but that does not mean that the principle must as a matter of law inevitably be applicable in all *res ipsa loquitur* situations regardless of other pertinent circumstances. In the cited opinion it does not appear that defendant driver did not himself testify as to the events leading up to the accident; moreover, the positive instruction that there was a presumption of freedom from fault and that it "continues throughout the entire case," obviously states a proposition much more strongly and positively phrased in favor of defendant than does the instruction given in the instant case, to the effect that the due care presumption arose only if the jury believed that defendant was unable to remember and testify concerning the accident.

In Moeller v. Market St. Ry. Co. (1938), 27 Cal.App.2d 562, 567, 81 P.2d 475, a streetcar started while plaintiff, a passenger, was alighting. Judgment was entered on a verdict in plaintiff's favor, and on appeal by defendant it was held, in reliance on Smith v. Hollander (1927), supra, 85 Cal.App. 535, 259 P. 958, that "An instruction that the law presumes that the carmen used the requisite care and acted as reasonably prudent persons was properly refused as the doctrine of *res ipsa loquitur* raised an inference of negligence." In this case also, however, both the conductor and the motorman of the streetcar testified concerning the accident, and there was therefore no basis for reliance by defendants on the due care presumption regardless of the application of the *res ipsa loquitur* doctrine.

In Waite v. Pacific Gas & Elec. Co. (1942), 56 Cal.App.2d 191, 132 P.2d 311, plaintiff was injured by a fall resulting from a sudden jerk of the streetcar on which she was a passenger. The car was operated by only one man, who died prior to the trial. No witness to the accident other than plaintiff was produced. On defendant's appeal from a judgment for plaintiff, following a jury trial, it was held that the jury was correctly instructed on the *res ipsa loquitur* doctrine, and that therefore (in reliance upon Smith v. Hollander (1927), supra, and Moeller v. Market St. Ry. Co. (1938), supra) defendant was not entitled to instructions on the presumption of due care. The court comments (56 Cal.App.2d at page 202, 132 P.2d 311), "The application of the doctrine of res ipsa loquitur raises an inference of negligence against the defendant. It would be contradictory * * * also to instruct the jury there is a presumption the defendant acted with due care."

In Pezzoni v. City and County of S. F. (1950), 101 Cal.App.2d 123, 124, 225 P.2d 14, plaintiff, a streetcar passenger, was injured when the car "stopped with a sudden jerk." The jury found for defendants, and the trial court granted a new trial "on the ground of errors of law occurring at the trial." The jury had been instructed on both *res ipsa loquitur* and the due care presumption. On appeal by defendant the court commented that "The jury was thus faced with the metaphysical responsibility of weighing a presumption of care against an inference of negligence. The courts have held that in a res ipsa case it is not proper to give an instruction on the presumption of care. [Citing the Smith, Moeller, and Waite cases, supra.]" The holding was that because instructions had been given on both *res ipsa loquitur* and the presumption of due care, as well as because of other errors in the instructions, the trial court had acted within its discretion in granting the new trial. In this cited case, again, there is no suggestion that defendant claimed the existence of facts (death or loss of memory on the part of the operators of the streetcar) which would entitle it to the instruction as to the presumption of due care.

Assuming that the above cited and discussed decisions of the District Court of Appeal actually set forth the view contended for by the plaintiffs,[3] which would deny to a party in a civil action (whether plaintiff or defendant) against whom the *res ipsa loquitur* inference is applicable the benefit of the presumptions of due care and of innocence, where an otherwise acceptable basis for those presumptions has been established, we nevertheless conclude that sound considerations of law, logic and justice unite with impelling force against our acceptance and perpetuation of that view.

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[3] Waite v. Pacific Gas & Elec. Co. (1942), supra, 56 Cal.App.2d 191, 132 P.2d 311, appears to be the only one which upon its facts squarely presents the basis for the holding.

[4–7] In California both inferences and presumptions are by statute declared to be evidence (Code Civ.Proc., § 1957), and are weighed by the jury with the other evidence before it. Of the two, neither a presumption (disputable)[4] nor an inference is as a matter of law entitled to be accorded greater weight by the trier of facts than is the other. Any suggestion that a disputable presumption, merely as such, has greater weight than an inference is an erroneous concept. Thus, while an inference is defined in section 1958 of the Code of Civil Procedure as "a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect," and a presumption is declared to be "a deduction which the law expressly directs to be made from particular facts" (Code Civ.Proc. § 1959), there is no provision of law which requires that a disputable presumption must be accorded greater weight than the reason of the fact trier suggests should be given to an opposing inference. Actually, an inference is nothing more nor less than a pertinent deduction drawn from circumstantial evidence; i. e., from evidence which is circumstantial as to the fact deduced. And circumstantial evidence may outweigh, in convincing force, both the strongest of disputable presumptions (sometimes said to be the presumption of innocence; see discussion and cases cited in 8 Cal.Jur. pp. 190–192, §§ 265–266; and p. 279, § 339; pp. 290–291, § 346; p. 593, § 584; 10 Cal.Jur. 754, 762–764; People v. Shorts (1948), 32 Cal.2d 502, 507, 197 P.2d 330) and direct evidence as well (Gray v. Southern Pacific Co. (1944), 23 Cal.2d 632, 641, 145 P.2d 561; see 10 Cal.Jur. 1157–1158, and cases there cited).

[8–13] The *res ipsa loquitur* doctrine raises "an inference of negligence, not a presumption." (Anderson v. I. M. Jameson Corp. (1936), 7 Cal.2d 60, 66, 59 P.2d 962.) However, just as either an inference or a presumption may outweigh positive evidence adduced against it by the opposing party, so may either outweigh the other; i. e., it is for the trier of fact to determine under the circumstances of each case whether to give greater weight to an inference than to a disputable presumption which conflicts therewith, or vice versa. Although disputable presumptions have sometimes been characterized as "the weakest and least satisfactory character of evidence" nevertheless, as hereinabove indicated, "When [a presumption is] controverted by other evidence, whether direct or indirect, an issue of fact is raised which it is the duty of the court to determine as in other cases, and its conclusion is conclusive upon an appellate court unless it is manifestly without sufficient support in the evidence (Fanning v. Green [1909], 156 Cal. 279 [282], 104 P. 308)." (Simonton v. Los Angeles T. & S. Bank (1928), 205 Cal. 252, 258, 270 P. 672; see also Smellie v. Southern Pacific Co. (1931), supra, 212 Cal. 540, 549, 299 P. 529, and cases there cited.) Thus, it may be stated as a legal concept that it was for the jury, in the light of all the circumstances of the case in evidence before them, to determine whether greater weight should be given to the *res ipsa loquitur* inference or to the presumptions of innocence and due care which conflicted with such inference. More accurately what that legal concept means—and exactly what its application in the instant case[5] means—is this: That under appropriate circumstances, such as appear in this case, both the *res ipsa loquitur* inference and the disputable presumptions of innocence and due care are elements tending towards proof to be considered by the trier of facts; and that it is the function of the trier of facts to determine in the light of all the evidence in the case, including the opposing inferences and presumptions, whether the proof preponderates in favor of one party and against another, or is evenly balanced, and thereupon to resolve the issues in accordance with the rules relating to the burden of proof.

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[4] Section 1961 of the Code of Civil Procedure provides that "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the jury are bound to find according to the presumption."

[5] Inasmuch as the two cases disposed of by this opinion were consolidated for trial and for argument on appeal they are sometimes referred to herein as a single case.

Plaintiffs, in further argument against the availability of the innocence-due care presumptions in any case wherein a party is entitled to the *res ipsa loquitur* inference, cite Druzanich v. Criley (1942), supra, 19 Cal.2d 439, 444, 122 P.2d 53, and similar cases. From Druzanich they quote in part as follows: "The application of the doctrine [of *res ipsa loquitur*] does not give a plaintiff an absolute right to a judgment in every case. [Citations.] It does not shift the burden of proof, and when the defendant produces evidence to rebut the inference of negligence, it is ordinarily a question of fact whether the inference has been dispelled. [Citations.] However, the trier of fact cannot arbitrarily disregard the inference. As stated in Ales v. Ryan [1936], 8 Cal.2d 82, 99 [64 P.2d 409]: 'The rule is well settled by a multitude of decisions of the appellate courts of this state to the effect that the inference of negligence which is created by the rule *res ipsa loquitur* is in itself evidence which may not be disregarded by the jury and which in the absence of any other evidence as to negligence, necessitates a verdict in favor of the plaintiff. It is incumbent on the defendant to rebut the *prima facie* case so created by showing that he used the care required of him under the circumstances. The burden is cast upon the defendant to meet or overcome the *prima facie* case made against him.'" Judgment for the defendant was reversed. In reaching its conclusion the court pointed out that defendant herself gave testimony which indicated a lack of due care on her part and completely failed to rebut the inference of negligence. By contrast, defendant in the instant case offered testimony which, if believed by the jury, entitled him to an instruction on the due care and innocence presumptions and to have such presumptions weighed by the jury together with the other evidence in the case. Clearly, the Druzanich case (and the same is true as to the similar cited cases) is not authority to the contrary.

[14] Neither does reason suggest a contrary holding. That a portion of the evidence may consist of the inference of negligence which arises under the *res ipsa loquitur* doctrine would not seem to present an insurmountable obstacle to the jury in reaching its verdict. Although the allegedly negligent party against whom the res ipsa inference arises may by reason of death or loss of memory be himself unable to explain his acts and conduct, it will rarely if ever occur that other evidence of pertinent circumstances such as events occurring before the accident, as well as of conditions as they are found to exist thereafter, will not be available for presentation to and consideration by the jury. Thus, in the present case, it was shown that the automobile was in good condition, that the defendant was a competent driver, was familiar with the car, had been driving carefully and had had several hours rest and sleep shortly before the accident; furthermore, the physical evidence indicates that defendant driver while on his own side of the road applied his brakes and swerved, and thereafter repeatedly released and reapplied the brakes, thus giving rise to a permissible inference that he was confronted with some sudden emergency and was diligently endeavoring to cope with it; such inference, if drawn by the jury, would be a part of the evidence to be by it weighed with the other evidence, both direct and indirect, presented by the parties.

[15, 16] It is also to be noted that juries are frequently confronted with the necessity of deciding as to the truth or falsity of directly conflicting stories related by the witnesses before them, yet it would scarcely be suggested that the production by one party of positive testimony in his own favor would preclude his opponent from relying upon contradictory testimony, merely because the jury might find difficulty in weighing the evidence and reaching a verdict.

Moreover, one of the theories underlying the doctrine of *res ipsa loquitur*, and a factor in determining whether it should be available in a case such as this, is the proposition that "a defendant in charge of an instrumentality which causes injury either knows the cause of the accident or has the best opportunity of ascertaining it, and the plaintiff, having no such knowledge, is compelled to allege negligence in general terms and to rely upon proof of the happening of the accident in order to establish it. [Citations.]" (See Leet v. Union Pac. R. R. Co. (1944), 25 Cal.2d 605, 619, 155 P.2d 42, 158 A.L.R. 1008; Anderson v. I. M. Jameson Corp. (1936), supra, 7 Cal.2d 60, 64, 59 P.2d 962, the latter quoting from Kenney v. Antonetti (1931), 211 Cal. 336, 339, 295 P. 341.) Where, as here, defendant offers evidence of his lack of memory and consequent lack of knowledge and of opportunity to explain the cause of the accident, it would appear unfair to deprive him of the presumption of due care merely because plaintiff relies on the *res ipsa loquitur* doctrine. The contrary holding in Waite v. Pacific Gas & Elec. Co. (1942), supra, 56 Cal.App.2d 191, 132 P.2d 311, and inconsistent implications in Smith v. Hollander (1927), supra, 85 Cal.App. 535, 259 P. 958; Ellis v. Jewett (1937), supra, 18 Cal.App.2d 629, 634–637, 64 P.2d 432; Moeller v. Market St. Ry. Co. (1938), supra, 27 Cal.App.2d 562, 567, 81 P.2d 475; and Pezzoni v. City & County of S. F. (1950), supra, 101 Cal.App.2d 123, 225 P.2d 14, are disapproved.

[17] Plaintiffs' further contention that the evidence fails to support the verdicts is untenable, since the presumptions of due care and of innocence, as noted hereinabove, constitute sufficient evidence to support the verdicts.

[18] Finally, plaintiffs urge that it was error to give defendant's requested instruction on unavoidable accident. However, "* * * the so-called defense of inevitable accident is nothing more than a denial by defendant of negligence or a contention that his negligence, if any, was not the proximate cause of the injury." (Parker v. Womack (1951), 37 Cal.2d 116, 120–121, 230 P.2d 823, quoting from Polk v. City of Los Angeles (1945), 26 Cal.2d 519, 542–543, 159 P.2d 931.) Defendant does deny negligence in the present case, evidence was produced tending to show that he was confronted with a sudden emergency which caused him to apply his brakes and swerve off the highway, and the instruction complained of properly submitted to the jury the law applicable upon this tenable view of the evidence.

For the reasons above stated the judgments are affirmed.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

TRAYNOR, Justice.

I dissent.

The facts and issues in these cases are simple and could easily have been presented to the jury in an intelligible manner. The record aptly illustrates how much confusion and prejudice can result when presumptions and inferences are regarded as evidence and a presumption is invoked against the party who already has the burden of proving that the presumed fact does not exist. See dissenting opinion in Speck v. Sarver, 20 Cal.2d 585, 590, 128 P.2d 16.

The automobile in which plaintiffs were riding veered from the right to the left side of the highway and crashed into the bank of a ravine. Plaintiffs were asleep at the time, and defendant driver testified that he had no memory of the occurrence. The automobile was in excellent condition before the accident, and skid marks indicated that the brakes were applied while it was still on the right side of the highway.

To recover judgment it was incumbent upon plaintiffs to prove that the accident resulted from defendant's negligence in operating the vehicle. To discharge this burden plaintiffs were entitled to rely upon the inference of negligence arising under the doctrine of res ipsa loquitur based on the fact that properly driven automobiles do not ordinarily leave the highway. Druzanich v. Criley, 19 Cal.2d 439, 445, 122 P.2d 53.

"An inference is a conclusion as to the existence of a material fact that a jury may properly draw from the existence of certain primary facts." Blank v. Coffin, 20 Cal.2d

457, 460, 126 P.2d 868, 870. Unless the facts are such that only one inference may reasonably be drawn therefrom, it is ordinarily for the jury to determine in a particular case what inference, if any, should be drawn. Code Civ.Proc. § 1958; Blank v. Coffin, supra, 20 Cal.2d at page 461, 126 P.2d 868. If the doctrine of res ipsa loquitur is to be treated as one dealing with no more than a certain type of circumstantial evidence, the inference arising thereunder should be treated like any other, and even in the absence of evidence to the contrary, the jury should be compelled to draw it only if reasonable minds could not differ.

If, however, the facts are peculiarly within the knowledge of one of the parties, or a special relationship exists between them, there may be reason to require of defendant an explanation if he is to escape judgment against him. "Thus, when bailed goods are lost or destroyed, it is reasonable to require the bailee to prove that the loss was not owing to his negligence. George v. Bekins Van & Storage Co., 33 Cal.2d 834, 839–841, 205 P.2d 1037. Again, when a carrier has undertaken to carry a passenger safely it is reasonable to enforce that duty by requiring the carrier to explain an accident. (See, Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183, 185.) The relationship between an unconscious patient and those who have undertaken to treat him may also be one that justifies placing the burden of proof on the attendants if they are to escape liability for an unusual injury inflicted while the patient is unconscious." Raber v. Tumin, 36 Cal.2d 654, 664, 226 P.2d 574, 580, dissent. Since in the ordinary case where an automobile leaves the highway, the driver will be the person best able to explain why the accident happened, it is not unfair to give the res ipsa loquitur inference arising under such circumstances the additional procedural effect accorded to a presumption and direct the jury to find defendant negligent if he fails to make any explanation. See, Druzanich v. Criley, 19 Cal.2d 439, 445, 122 P.2d 53; Ybarra v. Spangard, 25 Cal.2d 486, 490, 154 P.2d 687, 162 A.L.R. 1258; Dierman v. Providence Hospital, 31 Cal.2d 290, 295, 188 P.2d 12.

In the present case, however, defendant introduced evidence that he was in no better position than plaintiffs to explain the accident. If the jury should believe this evidence, it would be unfair to give to the inference arising under the doctrine of res ipsa loquitur the procedural effect of a presumption, for the only justification for so doing would have disappeared from the case. On the other hand, the fact that defendant through no fault of his own may be unable to explain the accident in no way weakens whatever probative value the evidence of the happening of the accident and the surrounding circumstances may have. The jury should still be at liberty to draw the inference of negligence if it sees fit.

Accordingly, the jury should have been instructed to find defendant liable if it concluded that he had the ability to explain the accident and failed to do so. It should also have been instructed that if it found that defendant had no memory of the accident because of amnesia, it should base its verdict solely on the evidence presented and find defendant liable only if it concluded that the accident was more probably than not the result of negligence on his part. Under such instructions the mental processes involved in reaching a verdict would not have been difficult. If the jury disbelieved defendant's evidence that he was suffering from amnesia, his liability would be established. If it believed that evidence, it would then have to decide only whether or not to draw the inference from the occurrence of the accident and the surrounding circumstances that defendant was negligent. If it could not decide whether or not to draw that inference it would find for defendant because of plaintiffs' failure to discharge their burden of proof.

Instead the jury was presented with a hopelessly confusing task. After instructing the jury on the doctrine of res ipsa loquitur and the presumption of due care the court stated: "These instructions direct your attention to two conflicting rebuttable presumptions relating to the conduct of the defendant (one) that he exercised due care at the time of the accident which presumption arises in the event that you find that as a result thereof he is unable to remember the facts pertaining to the same, and (two) that he was negligent if you find that he was driving on the wrong side of the road, or that he permitted the automobile to leave the road in question entirely, or that he fell asleep at the wheel. If you find the facts to exist which give rise to these presumptions, then these conflicting presumptions constitute evidence, the effect of which is to be determined by you, not by the court; they are to be weighed and considered by you in the light of and in connection with all of the other evidence, and you are to give to them, and each of them, such weight as you deem proper."

How could the jury understand this instruction in which new evidence is spontaneously generated? By what mental process could it weigh these rules of law or logic against the facts upon which it was told they were based? The jury might conceivably make some sense out of the part of the instruction that the presumption of negligence was evidence. That presumption or inference has a logical basis. The jury could understand that a presumption or inference of negligence might be drawn from the fact that the automobile left the highway. It might divine, from the instruction that this presumption constituted evidence that it should weigh, that the court was conveying only the idea that in its deliberations the jury should keep in mind that some of the evidence would support an inference of negligence, and that in arriving at a conclusion it should consider that inference as a definite possibility.

When the jury turned to a consideration of the presumption of due care, however, it would find it impossible to apply any such reasoning as it might have applied to the presumption of negligence. Here it would see that there was no rational relationship between defendant's amnesia and his due care. The proposition that defendant had amnesia does not lead to the conclusion that he exercised due care. Accordingly, the jury could not assume that when the court described the presumptions as evidence, it intended only to call the jury's attention to the various logical inferences it might draw from the evidence. It could assume only that it must consider two new items of conflicting evidence whose nature it could not understand.

How then would it weigh this substituted evidence? These presumptions were not witnesses whose demeanor might be observed. The facts upon which they were based were not in conflict, so the jury could not look to them to determine which presumption was superior. It might in desperation conclude that the two presumptions cancelled each other, leaving neither evidence of negligence from the occurrence of the accident nor evidence of defendant's due care. Its mind now a blank, the jury would remember the instruction that the burden of proof was upon plaintiffs and, accordingly, return a verdict for defendant. Herein lies the vice of instructing the jury that a presumption exists that operates against the party having the burden of proof, and that the presumption constitutes evidence.

Upon plaintiffs rested the burden of proving that it was more probable than not that the accident was caused by defendant's negligence. That burden was enlarged by the instruction that there was a presumption of due care and that the presumption was evidence. Plaintiffs were thus placed under the burden, not only of proving by a preponderance of the evidence that defendant was negligent, but also of somehow dispelling additional "evidence" that the jury could not rationally evaluate. This additional burden was placed upon plaintiffs solely because defendant was unable to remember what happened. It is true that any disparity between the parties with respect to their sources of information may justify placing the burden of proof on one rather than the other or creating a presumption in favor of the party with the burden of proof. Thus if the burden had been upon defendant to prove that he was not negligent, his inability to present evidence because of his amnesia might justify a presumption in his favor that he was exercising due care. Similarly, in jurisdictions where the burden is upon the plaintiff to prove that he was not guilty of contributory negligence, it is not unfair to create a presumption in his favor, if he is dead or otherwise unable to testify. In this case, however, defendant received all the procedural protection to which he was entitled when the burden of proof was placed upon plaintiffs. There is no general rule of law that the quantum of proof required of the party bearing the burden of proof increases beyond the usual preponderance of probabilities because his opponent happens to be ignorant of the facts. Even if one assumed the wisdom of such a rule, its operation should be explained to the jury in an intelligible manner. The jury should be instructed, not that there is a presumption that is evidence, but that because of defendant's inability to testify they should demand of plaintiffs a higher degree of proof. But should plaintiffs be required to prove their case by clear and convincing evidence or even beyond a reasonable doubt? Clearly, no such burden could in justice be imposed upon plaintiffs in this case. They were in no better position than defendant was to explain the accident. There was no danger that they might fabricate testimony that defendant would be helpless to refute. The evidence with respect to the accident was found only in the physical facts. Plaintiffs were entitled to have the jury consider those facts and then decide, unhampered by any presumption against them, whether it was more probable than not that defendant's negligence caused the accident. The evidence of defendant's amnesia was of course properly in the case. If believed, it served to prevent a directed verdict for plaintiffs on the basis of res ipsa loquitur. By showing why defendant could not explain the accident, it prevented the jury from inferring from his silence that if he spoke he would confess his case.

I would reverse the judgments.

EDMONDS, J., concurs.

CARTER, Justice.

I dissent.

While I agree, generally, with the views expressed in the majority opinion with respect to the law applicable to inferences and presumptions, it was error, in my opinion, to give an instruction on unavoidable accident. My views with respect to instructions of this character are set forth in my dissent in Parker v. Womack, 37 Cal.2d 123, 230 P.2d 827. Anyone familiar with the trial of personal injury cases can appreciate the prejudicial effect of such an instruction in a case of this type, and I would, therefore, reverse the judgment on this ground.

Rehearing denied; EDMONDS, CARTER and TRAYNOR, JJ., dissenting.

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39 Cal.2d 462

LEIPERT et al. v. HONOLD et al.

L. A. 21850.

Supreme Court of California, in Bank.

Aug. 13, 1952.

Denny Leipert, a minor, by and through Charles J. Leipert, his guardian ad litem, and Charles J. Leipert, brought an action against Bernard M. Honold and George B. Honold, doing business as Honold Bros. Mortuary, and Woodrow John Honold, for injuries sustained by the minor plaintiff in automobile collision, and for medical expenses. The Superior Court, Orange County, Franklin G. West, J., rendered a judgment for plaintiffs and granted minor plaintiff a new trial on issue of damages, and defendants appealed. The Supreme Court, Traynor, J., held that record established that inadequate verdict awarded to minor plaintiff was result of compromise and that granting minor plaintiff a new trial limited to issue of damages would be unjust to defendants.

Order reversed and judgment affirmed.

Carter, J., dissented.

For prior opinion see 240 P.2d 288.

1. Appeal and Error 🔑1178(6)

New Trial 🔑9

A trial or appellate court may order a new trial on fewer than all the issues. Code Civ.Proc. §§ 657, 662.

2. New Trial 🔑9

The purpose of limited retrials is to expedite administration of justice by avoiding costly repetition. Code Civ.Proc. §§ 657, 662.

3. New Trial ⚷9

Limited retrials should be granted only if it is clear that no injustice will result. Code Civ.Proc. §§ 657, 662.

4. New Trial ⚷9

Whether to grant a limited new trial rests in discretion of trial judge. Code Civ.Proc. §§ 657, 662.

5. Appeal and Error ⚷933(1)

It is presumed that in passing upon plaintiff's motion for a limited retrial trial judge has weighed evidence and possibility of prejudice to defendant and his decision will not be reversed on appeal unless an abuse of discretion is shown. Code Civ. Proc. §§ 657, 662.

6. New Trial ⚷9

An abuse of trial court's discretion to grant a new trial of injury action limited to issue of damages is shown when damages are inadequate, record discloses that issue of liability is close, and other circumstances indicate that verdict was probably result of prejudice, sympathy, or compromise or that for some other reason liability issue has not actually been determined. Code Civ.Proc. §§ 657, 662.

7. New Trial ⚷9

Record established that inadequate $1200 verdict awarded to plaintiff who was injured when automobile in which plaintiff was riding at night got out of control and crossed to wrong side of highway and was struck by oncoming automobile, was result of compromise, and that granting plaintiff a new trial limited to issue of damages would be unjust to defendants. Code Civ.Proc. §§ 657, 662.

8. Appeal and Error ⚷1075

Where defendants appealed from judgment in action for injuries but limited arguments to appeal from order granting plaintiff a limited new trial, and sought reversal of judgment only if necessary to preclude limited new trial, and defendants and plaintiffs stated desire for judgment to stand if order was reversed, which it was, and plaintiff did not appeal from judgment and did not move for new trial if limited new trial should be denied, parties waived rights to reversal of judgment and judgment would be affirmed. Code Civ. Proc. §§ 657, 662.

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Forgy, Reinhaus & Forgy, Arthur M. Bradley and S. M. Reinhaus, Santa Ana, for appellants.

Harvey, Rimel & Johnston and Fred D. Johnston, Santa Ana, for respondents.

TRAYNOR, Justice.

On March 13, 1948, at about 11 P.M., two automobiles loaded with teen-age children were travelling west along U. S. Highway 101 near Newport Beach. The one in front was driven by Clifton Edwards. The other one, in which plaintiff Denny Leipert, 15, was riding, was driven by Phillip Duff, 18, whose parents owned it. It was a dark night, and it had sprinkled about an hour and a half before the accident. A defect in the steering apparatus caused Duff to lose control of the car, so that it swerved to the left across the highway. It was struck by a car driven in the opposite direction by defendant Woodrow John Honold. Plaintiff Denny Leipert and one other occupant of the Duff car were injured; the other five children, including the driver, were killed. Honold and his only passenger, Eleanor Brady, who is now his wife, were injured.

Denny brought this action through Charles J. Leipert, his father and guardian ad litem, alleging negligence on the part of Woodrow John Honold. Denny's father also sued on his own behalf for reimbursement of medical expenses. Bernard M. Honold and George B. Honold, doing business as Honold Brothers Mortuary, were joined as defendants; they owned the car driven by Woodrow John Honold and had consented to his using it on this occasion. The case was consolidated for trial with four wrongful death actions brought against the same defendants by the parents of the children who were killed.

The evidence was sharply conflicting. Denny testified that the Duff car was travelling about 40 miles per hour; that the driver said there was something wrong with the steering apparatus; that shortly thereafter "the wheels started acting funny, they started shimmying;" that "the car jerked across the road, and we came to a stop;" that "Our front wheels were away off the road and we were just about off the road;" that the driver "put on the brakes quick;" that the driver "opened his door and put one foot out and looked over the top of the hood of the car;" that the driver "got out and then got back in again, and then he said, 'Some of you kids get out of the car,' so he was going to try and back it up on the side of the road and see what was wrong, and he told me to 'get out' and I got the door open about six inches and I guess that's when it happened;" and that he was knocked unconscious. He testified that he estimated that the Duff car had stopped about 13 seconds before it was struck. In answer to the question how he arrived at this figure he replied: "Well, I went down to the scene of the accident and I had somebody get behind me with a watch, and I went through the actions that the car did when it stopped, and what we did, and then I told the person in back of me, 'That was about when the car hit,' and it was about thirteen seconds." He testified that just before the Duff car got out of control, the Edwards car was from 20 to 35 yards ahead; that the brakes were not applied when the car started shimmying; that as it went across the highway "it didn't skid, it just tipped and was making a squealing sound;" that "it sounded like when you go around a corner too fast with a car, it will sort of squeal." He testified that he did not see the Honold car before the collision.

Defendant Woodrow John Honold testified that he first saw the Edwards and Duff cars when they were about 200 to 250 yards away; that he passed the first car and at the same moment the other car swung over; that it first came across at an angle and then sharply turned across the road; that he was 100 to 125 feet away from it when it started across; that its lights flashed in his eyes; that it was moving rapidly; that he was traveling from 40 to 50 miles an hour; that as the Duff car turned in front of him he tightened his grip on the wheel and turned to the right; that he did not put on his brakes; and that the other car was moving when the two cars collided.

The only other eye-witness to the accident was Jim Oakes, a boy who was riding in the rear seat of the Edwards car. He testified that he looked back and saw the Honold car hit the Duff car; that "the Duff car was at right angles with the road, as I looked back, I just got a glimpse of the lights of the Honold car on it, and then they hit and it kind of lifted the car up;" and that when he looked back the Edwards car was about 900 feet from the point of collision. No one in the Edwards car heard the collision.

A sergeant of the Newport Beach Police Department and an officer of the California Highway Patrol testified that at no point in the vicinity of either car were there any skid marks.

Lieutenant Smith, a traffic officer, was called as an expert by plaintiffs. On direct examination he was asked if he had formed an opinion as to whether or not the Duff car "was moving at the moment of impact." He replied that he had, but defendants' objection to his giving his opinion was sustained. He gave his opinion that the Honold car was traveling in excess of 45 miles an hour, but defendants' objection to his giving his opinion as to the "minimum or maxium" speed of the Duff car was sustained. He gave his opinion on cross-examination that a car traveling 40 to 50 miles an hour under road conditions like those in the present case, could not be stopped within a hundred feet without the application of brakes.

The jury returned verdicts in favor of the plaintiffs in all five actions. In the Leipert case, Denny was awarded damages of $500 against all three defendants jointly and, in addition, $700 against Woodrow John Honold alone; Denny's father was awarded $1,000 against all three defendants jointly.

Defendants' motion for a new trial was denied. The Leiperts' motion for a new trial on the issue of damages only was granted as to Denny and denied as to his father. The trial court's order stated that "the said motion for a new trial is granted upon the ground of insufficiency of the evidence to justify the verdict in that the amount awarded by the jury is not in conformity with the evidence adduced at the trial and is inadequate though not so far inadequate as to indicate passion or prejudice." Defendants have appealed from the judgment and from the order granting Denny a partial new trial. No appeals were taken in the other four actions.

[1] The power of a trial or appellate court to order a new trial on fewer than all the issues is generally recognized, see 66 C.J.S., New Trial, § 11, page 87; 39 Am. Jur., New Trial, § 21, p. 44; 98 A.L.R. 941, and is authorized by statute in this state. (Code Civ.Proc. §§ 657, 662.)

[2, 3] The purpose of limited retrials is to expedite the administration of justice by avoiding costly repetition. Such retrials should be granted, however, only if it is clear that no injustice will result. Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 499, 51 S.Ct. 513, 75 L.Ed. 1188; see 66 C.J.S., New Trial, § 11, page 88. Some courts have expressed reluctance to limit new trials in negligence cases, suggesting that only rarely is such a step proper. Simmons v. Fish, 210 Mass. 563, 570, 97 N.E. 102; Murray v. Krenz, 94 Conn. 503, 508, 109 A. 859. Even in California, where new trials limited to the issue of damages have frequently been approved in personal injury and wrongful death actions, it has been held that a request for such a trial should be considered with the utmost caution. Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 11, 175 P. 26, 177 P. 845; Bencich v. Market Street Ry., 20 Cal. App.2d 518, 528, 67 P.2d 398, and that any doubts should be resolved in favor of granting a complete new trial. Keogh v. Maulding, 52 Cal.App.2d 17, 21, 125 P.2d 858.

[4, 5] The decision on limiting the new trial appropriately rests in the discretion of the trial judge. It is presumed that in passing upon the motion he has weighed the evidence and the possibility of prejudice to the defendant. His decision will not be reversed on appeal unless an abuse of discretion is shown. Tumelty v. Peerless Stages, 96 Cal.App. 530, 532, 274 P. 430; Amore v. Di Resta, 125 Cal.App. 410, 413, 13 P.2d 986; Sanford v. Wilcox, 13 Cal. App.2d 193, 194, 56 P.2d 548; Tripcevich v. Compton, 25 Cal.App.2d 188, 191, 77 P.2d 286; Hoffart v. Southern Pacific Co., 33 Cal.App.2d 591, 602, 92 P.2d 436; Cox v. Tyrone Power Enterprises, Inc., 49 Cal. App.2d 383, 390, 121 P.2d 829; Adams v. Hildebrand, 51 Cal.App.2d 117, 118, 124 P.2d 80; Hughes v. Schwartz, 51 Cal.App. 2d 362, 364–365, 124 P.2d 886; Tornell v. Munson, 80 Cal.App.2d 123, 124, 181 P.2d 112.

[6] Such an abuse is shown when the damages are inadequate, the record discloses that the issue of liability is close, and other circumstances indicate that the verdict was probably the result of prejudice, sympathy, or compromise or that for some other reason the liability issue has not actually been determined.

There can be no doubt that the damages awarded plaintiff Denny Leipert were inadequate. Forty or fifty stitches were required to close the lacerations of his scalp and forehead, which will remain partially scarred. His pelvis was broken in two places; one fracture was complete. There was a definite shock of the brain and nervous system controlling the eyes. He also suffered a rupture of the bladder, which necessitated an abdominal operation that left a considerable amount of scar tissue in and around the bladder. He was confined in the hospital for about three weeks and was then removed to his home, where he remained in bed another six or seven weeks. Several weeks after he returned home he suffered a low-grade bladder infection, which was probably a result of his injuries. Approximately five months elapsed from the date of the accident before he was able to go about his usual activities.

It is also readily apparent from the record that the issue of liability was very close. The Duff car and the Honold car were approaching each other on a curved-four-lane highway on a dark night. When the Duff car got out of control and crossed to the wrong side, the driver of the other car was confronted with a situation demanding rapid reactions. Whether the Duff car was moving into the path of the other car when it was struck or whether it had stopped long enough before it was struck to enable a reasonably careful operator of the other car to avoid a collision was the crucial question in the case. The testimony that the Duff car was stopped for 13 seconds before it was struck was that of a 15-year-old boy who was knocked unconscious at the time and who was later timed in going "through the actions that the car did when it stopped and what we did." The testimony of Jim Oakes, the boy in the Edwards car, also presented the jury with a close question of fact. Plaintiff contends "If the Edwards automobile was traveling at 40 miles per hour it was covering 58.7 feet per second and if immediately before the steering mechanism of the Duff automobile broke, the two vehicles were only a few car lengths apart, approximately 15 seconds would have elapsed between the time when the Edwards automobile passed the point where the collision subsequently occurred and arrived at the point from which Jim Oakes saw the collision occur." Defendants argue that this contention does not take into consideration the speed of the Duff car, the fact that the plaintiff testified that "there were no brakes on in the Duff car" or the fact that there were no skid marks in the vicinity of either car. They conclude that if plaintiffs' "version of the collision were true the Duff car coasted without the application of brakes and came to a stop by the loss of momentum. This would mean that the Duff car starting at the speed of at least forty miles per hour gradually lost momentum and came to a stop. The difficulty with the calculations is that they consider only the Edwards car. It is impossible to accept the conclusion that, without the application of brakes or skidmarks on the highway, the Duff car, which had been travelling at least 40 miles per hour, suddenly stopped and remained stopped for at least thirteen seconds, while the Edwards car travelled nine hundred feet west."

The record shows that the jury had great difficulty with these questions and indicates that its verdict was probably the result of a compromise.

The jury went out at 11:30 A. M. At 4 P. M. it returned and asked to hear that part of the testimony of Lieutenant Smith relating to the crucial question whether the Duff car was moving or stopped when the collision occurred. His testimony on direct examination was read to the jury, but his testimony on cross-examination was not. Counsel stipulated that it was an accurate statement of his testimony. Thereafter two jurors insisted that Lieutenant Smith had given other testimony bearing on the question whether the Duff car was moving or stopped at the time of impact. The court said, "The testimony on that point has been read to you" and sent the jury out. It is apparent that the testimony of the witness that was not read to the jury supports the inference that the Duff car was moving at the instant of impact, whereas his testimony that was read supports a contrary inference. Defense counsel did not request the reading of the additional testimony or make any objection or comment. See, Duncan v. J. H. Corder & Son, 18 Cal.App.2d 77, 84, 62 P.2d 1387. The important consideration, however, is not whether the court committed error in not having the testimony on cross-examination read to the jury, but the fact that the interest of the two jurors in having that testimony read indicates that the jury was having great difficulty in finding any negligence on the part of Woodrow John Honold.

At 9:17 P. M. the jury returned and announced that it had reached its verdicts. In each of the wrongful death cases the verdicts awarded $5,000 against all three defendants jointly and an additional $300 against Woodrow John Honold. In the Leipert case the verdict awarded Denny Leipert $4,000 against all three defendants jointly and an additional $300 against Woodrow John Honold, and awarded Charles J. Leipert $1,000 against all three defendants. The award against the owners of the Honold car exceeded the maximum permitted by Vehicle Code section 402. The jury was polled on the verdicts, more than three answering that they were not their verdicts. In the Leipert case five jurors answered "No" and one juror answered "half yes, and half no." The court announced that the verdicts were incomplete and then read section 402 of the Vehicle Code and the rest of an instruction explaining how the section was to be applied. The jury returned to the jury room and was again brought in at 11:30 P.M., when the foreman announced that they could not reach a verdict. Upon inquiry by the court each juror expressed the opinion that they would be unable to agree. After considerable discussion the jury was again sent out. At 12:33 A. M. the jury returned with a verdict in this action awarding Denny Leipert $500 against all three defendants jointly, and an additional $700 against Woodrow John Honold. The jury was again polled and it stood nine to three in favor of the verdict.

The jury was out 13 hours, including the time out for lunch and dinner. After it was out four and a half hours it asked to have material evidence on the issue of liability re-read. Five hours later it returned a verdict that was repudiated by six of the jurors. Three and one half hours later it brought in a nine-to-three verdict awarding $1200 instead of the $4300 provided in the earlier proposed verdict.

The long deliberation could not have been caused by any dispute in regard to the nature and extent of Denny's injuries. After his parents testified with regard to expenses incurred in his treatment, no questions were asked on cross-examination. No evidence was introduced by defendants to contradict any of the testimony of Denny or his father in regard to the nature or treatment of Denny's injuries. Any difficulty must have arisen from a cause other than difficulty in regard to the nature and extent of his injuries. It is true that the jury was confused on the apportionment of damages under Vehicle Code section 402, but it is also true that it had great difficulty in determining whether or not defendant Woodrow John Honold was negligent and that only after prolonged disagreement was a 9–3 verdict returned awarding grossly inadequate damages.

[7] We have concluded that the record in this case so strongly indicates that the inadequate verdict for Denny Leipert was the result of compromise that it would be unjust to defendants to have a new trial limited to the issue of damages.

[8] Although defendants have appealed from the judgment, they have limited their arguments to the appeal from the order granting Denny Leipert a limited new trial. They seek a reversal of the order granting a limited new trial, and a reversal of the judgment only if that is necessary to preclude a limited new trial. Moreover, they have expressly stated that if the order is reversed they wish the judgment to stand. Plaintiffs also have expressly stated that they wish the judgment to stand if a limited new trial may not be had. They did not appeal from the judgment and did not move for a complete new trial in the event a limited new trial should be denied; they have vigorously urged that they intended that "the action of the trial court be restricted to either granting or denying the motion as made" and that neither the trial court nor the appellate courts have jurisdiction to order a complete new trial on the basis of that motion. It is clear, therefore, that all parties have deliberately waived any rights to a reversal of the judgment. Under these circumstances, the judgment should be affirmed. In re Estate of Hinde, 200 Cal. 710, 715–716, 254 P. 561; Hatch v. Galvin, 50 Cal. 441, 443, Hartman v. San Pedro Commercial Co., 66 Cal.App.2d 938, 153 P.2d 214.

The order granting a new trial is reversed. The judgment is affirmed. Each party is to bear his own costs on appeal.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The holding of the majority of this court in this and two companion cases,[1] in effect, nullifies the statutory provision (Code Civ.Proc., § 657) which expressly authorizes the trial court to grant a motion for a new trial on "part of the issues,"

[1] See Rose v. Melody Lane, Cal.Sup., 247 P.2d 335 and Cary v. Wentzel, Cal.Sup., 247 P.2d 341.

when such new trial is limited to the issue of damages only in cases where the damages awarded are deemed inadequate by the trial court. While there is no code section which expressly specifies inadequacy of damages as a ground for granting a motion for a new trial, it has been held that it comes within the purview of insufficiency of the evidence to support the verdict or judgment (Code Civ.Proc., § 657[6]; 20 Cal.Jur. 104). Such being the case, the same rule should be applied to the granting of a motion on the limited issue of damages, as to all issues. The rule in the latter type of cases being that if there is a conflict in the evidence, even though the evidence is overwhelmingly in favor of the party against whom the motion is granted, the order of the trial court granting a new trial on insufficiency of the evidence will not be disturbed on appeal, Brignoli v. Seaboard Transportation Co., 29 Cal.2d 782, 791, 178 P.2d 445; Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465; Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689. The same rule is applicable where a new trial is granted on the ground of erroneous instructions to the jury and it is claimed by the party against whom the new trial was granted that the error was not prejudicial, Mathers v. County of Riverside, 22 Cal.2d 781, 786, 141 P.2d 419; Finney v. Wierman, 52 Cal.App.2d 282, 126 P.2d 143; Thompson v. California Construction Co., 148 Cal. 35, 82 P. 367; Pettigrew v. O'Donnell, 32 Cal.App.2d 502, 90 P.2d 93; Fennessey v. Pacific Gas & Electric Co., 10 Cal.2d 538, 76 P.2d 104; Simmons v. Lamb, 35 Cal.App.2d 109, 94 P.2d 814. From the foregoing it necessarily follows that the same reasons exist for sustaining the trial court in granting a new trial limited to the issue of damages only as to the granting of a new trial on all issues on the ground of insufficiency of the evidence, or that prejudice resulted from an erroneous instruction.

The majority concede there is wisdom and merit in the legislation which authorizes a trial court to grant a new trial on limited issues. This should be obvious. Then the majority proceed by these three decisions to deprive the trial court of the power conferred upon it by statute to grant a new trial on the issue of damages only where the damages awarded are obviously inadequate.

These decisions take a step backward in our judicial procedure. They are the products of that same reactionary philosophy which has been invoked by a majority of this court to curtail the power of trial judges in their effort to accord to the less fortunate a greater degree of equal justice under law. See Sanguinetti v. Moore Dry Dock Company, 36 Cal.2d 812, 228 P.2d 557. There can be no doubt that the sole and only basis for these decisions is the fear by the majority that the plaintiffs in these cases might receive greater awards of damages than if the issue of liability was retried. To prevent this result the majority is willing to destroy the effectiveness of this remedial legislation. What is the court made rule which the majority apply to accomplish this result? It seems to be that if it appears to the majority that there is a conflict in the evidence as to liability, and the damages awarded are inadequate, it is an abuse of discretion for the trial court to grant a motion for a new trial on the issue of damages only. Where does this leave the trial court? Or, a question of greater moment is, what should a plaintiff do under such circumstances? Obviously, in the face of these three decisions, a trial judge or trial lawyer would be stupid to consider retrying anything other than all issues in any personal injury action under such circumstances, even though they had positive information that the jury had no difficulty in determining the issue of liability and that the issue of damages was the only problem which concerned it. And I cannot refrain from expressing my utter amazement at the ineptness of the majority in attempting to rationalize the deliberations and reactions of the juries in these cases. Obviously, such rationalization is not the function of this court. If it must be done, it is exclusively a function of the trial court. Those who have had experience in the trial of jury cases know that many factors influence the ultimate decision reached, and the trial court is in a much better position than this court to know what factors prevailed. Some jurors have fixed views with respect to economics, while others have racial or religious prejudices, which may influence them adversely to the cause of justice. While the record might not disclose such leanings, they would be apparent to an astute trial judge. Yet the majority of this court say, that in cases such as we have here, a trial judge is guilty of an abuse of discretion if he grants a new trial on the issue of damages only, even though he is satisfied that the inadequacy of an award of damages was due to one or more of the factors above mentioned, or some other factor which had no bearing whatever on the issue of liability. For this court to invade the province of the trial court in this field is as unwise as it is unfortunate.

For example, a man with an earning capacity of $300 per month, and a life expectancy of 20 years, who loses a leg in an automobile accident and is thereby incapacitated from pursuing his occupation, is awarded $10,000 by a jury. At the present value of money this would appear to be inadequate. But, would the majority of this court so hold if a trial judge denied a motion for a new trial made by plaintiff on the ground that the award was inadequate? It certainly would not. But, if the trial court would grant such a motion on the issue of damages only, the majority would obviously reverse if there was a conflict in the evidence on the issue of liability. In other words, the majority would hold the award inadequate as a matter of law in the latter instance, but not so if the motion for a new trial were denied or granted on all issues. The foregoing results are inescapable under the specious reasoning in the majority opinions in these three cases. The only thing that is made clear by these decisions is that the majority does not approve of a trial court granting a motion for a new trial on the issue of damages only in a case where the damages awarded are inadequate and there is a conflict in the evidence on the issue of liability. In such a case, the majority says, there must be a new trial of all the issues or none at all.

Of course, if a new trial were granted on the issue of damages only in a case where the trial court was of the opinion that the damages awarded were excessive, the majority would not disturb such an order. They would not do so for the reason that they would fear that proof of the facts establishing liability might result in a larger award of damages to the detriment of the defendant. Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752.

The majority opinion states "that a request for such a trial (on the issue of damages only) should be considered with the utmost caution", citing Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845 and Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398, but in both of these cases the trial court denied plaintiff's motion for a new trial and the appellate court was asked to reverse the judgment and direct a new trial on the issue of damages only. Obviously, it cannot be said that in such a case the trial court has exercised a discretion but has simply held that there was no error in the record justifying the granting of a motion for a new trial. The majority opinion also states "that any doubts (in ruling on a motion for a limited new trial) should be resolved in favor of granting a complete new trial", citing Keogh v. Maulding, 52 Cal.App.2d 17, 125 P.2d 858. But the majority opinion does not state whether such doubts should be entertained by the trial court or the appellate court. If the trial court has a discretion in passing upon a motion for a limited new trial, as the majority opinion concedes, then any doubt which may exist in the minds of an appellate court as to whether such limited new trial should have been granted, should be resolved in favor of the action of the trial court. Otherwise, it is not the discretion of the trial court which is being exercised in ruling on the motion for a limited new trial, but the discretion of the appellate court, which, under our judicial system has no power to review such a ruling of the trial court unless there is a gross, manifest and unmistakable abuse of discretion. Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 117 P.2d 850; In re Estate of Everts, 163 Cal. 449, 125 P.

1058; Conroy v. Perez, 64 Cal.App.2d 217, 148 P.2d 680; People ex rel. Department of Public Works v. McCullough, 100 Cal. App.2d 101, 223 P.2d 37; Ona v. Reachi, 105 Cal.App.2d 758, 233 P.2d 949; County of Los Angeles v. Bitter, 103 Cal.App.2d 385, 229 P.2d 466; Perry v. Fowler, 102 Cal.App.2d 808, 229 P.2d 46; Parks v. Dexter, 100 Cal.App.2d 521, 224 P.2d 121; J. Levin Co. v. Sherwood & Sherwood, 55 Cal.App. 308, 203 P. 404; Rigall v. Lewis, 1 Cal.App.2d 737, 37 P.2d 97; Spencer v. Nelson, 84 Cal.App.2d 61, 190 P.2d 40; Wold v. League of Cross, 107 Cal.App. 344, 290 P. 460; Amore v. Di Resta, 125 Cal. App. 410, 13 P.2d 986; Johnstone v. Johnson, 38 Cal.App.2d 700, 102 P.2d 374; Adams v. Hildebrand, 51 Cal.App.2d 117, 124 P.2d 80; Crandall v. McGrath, 51 Cal.App.2d 438, 124 P.2d 858; Bauman v. San Francisco, 42 Cal.App.2d 144, 108 P.2d 989; Pacific Tel. & Tel. Co. v. Wellman, 98 Cal.App. 2d 151, 219 P.2d 506; Tumelty v. Peerless Stages, 96 Cal.App. 530, 274 P. 430; Cox v. Tyrone Power Enterprises, 49 Cal.App. 2d 383, 121 P.2d 829; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 146 P.2d 34; Henslee v. Fox, 25 Cal.App.2d 286, 77 P.2d 307; Zeller v. Reid, 26 Cal. App.2d 421, 79 P.2d 449; Martin v. Donohue, 30 Cal.App.2d 219, 85 P.2d 913; Ohran v. Yolo County, 40 Cal.App.2d 298, 104 P.2d 700; Tornell v. Munson, 80 Cal. App.2d 123, 181 P.2d 112; Woods v. Eitze, 94 Cal.App.2d 910, 212 P.2d 12; Tripcevich v. Compton, 25 Cal.App.2d 188, 77 P.2d 286.

In the case of Crandall v. McGrath, supra [51 Cal.App.2d 438, 124 P.2d 859], the court clearly and succinctly stated the basis for the rule announced in the above cited cases in the following language: "The trial judge having heard all the evidence in a personal injury action, and having been convinced, he is in a peculiar position to know that nothing could be gained by relitigating the issue of negligence though dissatified with the award of damages. His decision in granting a new trial on the single issue of damages is the exercise of discretion and should ordinarily be final." In the case of Cox v. Tyrone Power Enterprises, supra, Mr. Justice Schauer, then a member of the District Court of Appeal, in speaking for the unanimous court in that case, took a position diametrically opposed to the position of the majority in the case at bar when he said, 49 Cal.App.2d at page 390, 121 P.2d at page 833: "While the evidence amply supports the conclusion that the damages awarded were inadequate, we do not find that it is such as to justify us in concluding, contrary to the trial judge, that the jury compromised the question of negligence by its inadequate award of damages. *Such a conclusion on this record would be more speculative than inferential.* The verdict here was for $1,250 in response to plaintiff's claim for $450 doctors' bills, $361 hospital bill, and general damages. The items for the doctors and the hospital were not disputed, but the extent of the injuries was seriously contested. The verdict not only awards recovery for all the special damages but includes $439 for general damages. That the general damage award is disproportionately small seems obvious and its inadequacy is the basis for the new trial order. *But that merely because we regard the award as too low we must also infer that jurors stultified themselves by bargaining inadequate damages for unjustified liability is a non sequitur.*" (Emphasis added.)

The majority opinion ignores what is said to be the guiding principle in cases of this character: "The guiding principle is that, although a verdict ought not to stand which is tainted with illegality, *there ought to be but one fair trial upon any issue, and that parties ought not to be compelled to try anew a question once disposed of by a decision against which no illegality can be shown. Thus, the parties and the state have been saved the expense, annoyance, and delay of a retrial of issues once settled by a trial as to which no reversible error appears.*" (Emphasis added.) 98 A.L.R. 941. Notwithstanding the rule announced in the above cited cases, many of which are cited in the majority opinion, the majority in the case at bar hold that "an abuse (of discretion) is shown when the damages are inadequate, the record discloses that the issue of liability is close, and other circumstances indicate that the verdict was probably the result of prejudice, sympathy, or compromise or that for some other reason the liability issue has not actually been determined." No authorities are cited in support of the foregoing statement, and it is clearly contrary to the rule announced in all of the above cited cases.

In a very few cases it has been held that the trial court committed an abuse of discretion in granting a motion for a new trial on the issue of damages only. Wallace v. Miller, 26 Cal.App.2d 55, 78 P.2d 745; Keogh v. Maulding, 52 Cal.App.2d 17, 125 P.2d 858; Shurman v. Fresno Ice Rink, 91 Cal.App.2d 469, 205 P.2d 77; Crawford v. Alioto, 105 Cal.App.2d 45, 233 P.2d 148. The last cited cases are out of harmony with the rule that has been generally adopted and followed by this court and the District Court's of Appeal as appears from the long line of decisions above cited, all of which hold that to justify reversal of an order granting a new trial on the issue of damages only there must be a gross, manifest and unmistakable abuse of discretion on the part of the trial court in granting such motion. I shall demonstrate from the record in this case that there is no justification whatever for the holding of the majority that the trial court abused its discretion in this case.

It is claimed by the majority that this is a close case on liability and the jury seemed to have some difficulty in arriving at its verdict. There are factors present which preclude that result. The question of liability was determined by the trial court to be clear rather than close and the other judgments in the case are res judicata on that issue; the only confusion on the part of the jury was with reference to the limited liability of an owner of a car under section 402 of the Vehicle Code.

There are five actions here involved which were consolidated for trial, the instant one for personal injuries and four for the deaths of five persons. The injuries and deaths were all caused by the same negligence of defendants and the verdicts are against the same defendants. Except for damages, identical issues were presented in each case. *Defendants' motion for a new trial on the ground of insufficiency of the evidence was denied.* Plaintiff, Denny Leipert's motion for a new trial on inadequacy of the damages was granted on that issue only. In denying *defendants'* motion for a new trial on the ground of insufficiency of the evidence it must be presumed that the trial court *weighed* the evidence *on liability* and, like the jury, concluded it was ample. It is said: "The trial court may, and indeed should, grant a motion for new trial where one of the grounds of the motion therefor is insufficiency of the evidence, if it is satisfied that the verdict or decision is not supported by, or is contrary to, the weight of the evidence, although the evidence is conflicting on the point or points at issue, since, in passing upon a motion for new trial, the trial court must weigh and consider the evidence of both parties, and determine for itself the just conclusion to be drawn. * * * The same rules apply to an order denying a new trial, which will be affirmed where the evidence was substantially conflicting and there was sufficient evidence to sustain the verdict." 20 Cal.Jur. 117. The court said in Mosekian v. Ginsberg, 122 Cal.App. 774, 777, 10 P.2d 525, 527: "When the question of the insufficiency of the evidence to justify the verdict is presented on a motion for a new trial, it becomes the duty of the trial judge to inquire into the question of sufficiency and to grant a new trial if in his judgment the evidence is insufficient to justify the verdict, or *to deny* the motion for a new trial if in his opinion the evidence is sufficient to sustain the verdict. * * * There is a clear distinction between the duties and powers of a trial court in passing upon a motion for a new trial upon the grounds heretofore mentioned and those of an appellate court in reviewing the matter on appeal from the judgment. The appellate court is not concerned with questions of preponderance of the testimony or weight of the evidence; the only matter for its determination is whether or not there is evidence which, if given its fullest effect, is legally sufficient to support the decision. * * * On the other hand, the trial court may weigh and consider the evidence on behalf of both parties and determine for itself the just conclusion to be drawn from it. The question of the insufficiency of the evidence to justify the verdict is addressed to the sound legal discretion of the trial court. * * * The courts of last resort of this state have repeatedly held that insufficiency of the evidence to justify a verdict is a ground for a new trial which is peculiarly within the discretion of the trial court, and its order either granting or *denying* a new trial will not be disturbed on appeal, unless it appears that there was a manifest abuse of discretion." (Emphasis added.)

As the trial court's denial of the motion for a new trial, made on the ground of insufficiency of the evidence, included a weighing of the evidence, this court cannot on appeal ignore its determination. It cannot, as does the majority opinion in effect say, that the question of liability is close. By so doing, it is, in effect, weighing the evidence. It is more than a matter of discretion with the trial court. It has weighed the evidence on liability and found it adequate. Where the evidence is conflicting, this court *cannot* set aside that determination, but that is the effect of the majority decision reversing the order granting a limited new trial to plaintiff and requiring a new trial on all the issues. That result is not reached here because neither plaintiff nor defendants want a new trial on all the issues but the case stands as authority for that proposition.

It is stated in the majority opinion that a large discretion rests with the trial court in determining whether a limited new trial should be granted, but that here there was an abuse of discretion. It is difficult to understand how this court can say there is an abuse of discretion when it cannot view the case from the same standpoint as the trial court. As seen, the latter court weighed the evidence and decided that liability had been established. This court may not weigh the evidence. Therefore, it may not say that the trial court abused its discretion—that it read the dial on the scales wrongly.

It will be recalled that no appeal was taken from the judgments in the death actions. They are, therefore, final determinations as to defendants' liability in each and all of these actions. It would be idle to send the case back for a new trial on all of the issues, including liability, because the rule of res judicata would be applied, and there would be nothing left to try except damages—the very issue embraced in the limited new trial which the trial court granted. That res judicata is pertinent to the case is clear from the principles enunciated in Bernhard v. Bank of America Nat. Trust & Savings Ass'n, 19 Cal.2d 807, 812, 122 P.2d 892, 894, where this court said: "There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.

"No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend. See 7 Bentham's Works Bowering's Ed., 171. Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted.
* * *

"In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" All three questions are answered in the affirmative in the instant case. The identical issue is whether defendant driver was negligent and was his negligence the proximate cause of the collision. The answer is yes in the four death actions. There are four final judgments on the merits of that issue. The party against whom the prior adjudications are asserted is the same.

It is said that the verdict was the result of a compromise because the jury wanted additional instructions on liability and had difficulty in arriving at a verdict. An examination of the record reveals that in arriving at a verdict the difficulty was apparently the amount allowable against an owner under section 402 of the Vehicle Code. It is true that after the jury had been deliberating for a time they requested the reading of the testimony of a witness on liability, but *thereafter* their sole concern was the *amount* of damages and how they should be apportioned among the various plaintiffs within the $10,000 limit. They were first asked by the court how they stood numerically and they replied 9 to 3 and then told to finish their verdict by determining the "balance of the matters presented to you." Verdicts were then returned but they were too large as against the owner, they being for $5,000 in each of three of the death actions and $10,000 in the fourth, or a total of $25,000. That for Denny Leipert was for $4,000, and for his father $1,000 thus increasing the total to $30,000. They were told that the verdicts were incomplete because they did not limit the owners' liability. When they were polled the indication was that the *amounts* awarded, and not liability, was the reason for diverse answers. For example, one juror said: "We wanted to have some instruction there, but you said it wouldn't do any good, so we were *confused on the money question.*" The court explained the $10,000 limitation and there was a discussion between the court and jurors on the subject. Later they were asked if they thought they could reach a verdict, to which negative replies were given, and then as the record discloses: "The Court: The jury has been out for twelve hours, with some slight rest, and they feel they are getting farther apart rather than closer together.

"Mr. Johnston: If the court please, I wonder if inquiry might properly be made towards determining whether there is some question of law and its application to the law?

"The Court (To Jury): Well, is it some particular problem of law that bothers you?

"Juror Sheik: Well, I believe the most confusion arises by not asking for some more instructions about the *money matter. We had agreed upon the negligence* and we came to the point about the $10,000 which has confused us, and suggestions were made for more instructions, and they didn't want to ask for any more instructions because we didn't think they would give the instructions we wanted." After further discussion about the *amounts* the jury again retired. They then returned verdicts which apportioned the $10,000 as follows: $1,700 each in three of the death actions and $3,400 in the fourth; $500 to Denny and $1,000 to his father, showing that they had finally grasped the method of procedure. Thus, I believe it is clear that the record points away from a compromise verdict much stronger than toward it. The issue of liability was settled, and *after* that, the confusion arose with respect to amounts and apportionment. In any event it is beyond this court's authority to declare that the trial court abused its discretion in accepting one of two possibilities, that is, that the verdict was not the result of a compromise on the issue of liability, for the only disagreement on the verdict related to the apportionment of the amount of damages, rather than on liability.

I would, therefore, affirm the order granting a new trial on the issue of damages only.

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39 Cal.2d 481

ROSE v. MELODY LANE OF WILSHIRE et al.

L. A. 21984.

Supreme Court of California, en Bank.

Aug. 13, 1952.

As Modified on Court's Own Motion

Sept. 11, 1952.

Jacob B. Rose brought an action against Melody Lane of Wilshire, and Pig'N Whistle Restaurants, and others, for injuries plaintiff sustained when stool on which plaintiff was sitting in cocktail lounge collapsed. The Superior Court, Los Angeles County, Albert F. Ross, J., rendered a judgment for plaintiff and defendant Pig'N Whistle Corporation appealed from the judgment and from order granting plaintiff's motion for new trial on single issue of damages. The Supreme Court, Traynor, J., held that record disclosed that issue of liability was close, that damages were inadequate, and that there were other circumstances indicating verdict was probably result of compromise of liability issue, so that granting new trial limited to issue of damages was an abuse of discretion.

Judgment and order reversed.

Carter, J., dissented.

For prior opinion, see 240 P.2d 307.

1. Negligence ⚿32(1), 44

Operator of cocktail lounge was not an insurer of safety of premises but was liable only for negligence in constructing, maintaining, or inspecting them.

2. Negligence ⚿136(22)

In action for injuries sustained in defendant's cocktail lounge when plaintiff sat down on stool, the upper part of which consisted of a leather seat and back and was held in place on pedestal by a metal pin, and pin broke causing chair to separate from supporting base and causing plaintiff to fall backward to floor, whether there was a latent defect, or whether rod was too small to support weight, or whether additional pin or other safety device was reasonably necessary to guard against injury, were for jury under evidence.

3. Negligence ⚿121(3)

In action for injuries sustained in defendant's cocktail lounge when plaintiff sat down on stool, the upper part of which consisted of a leather seat and back and was held in place on pedestal by a metal pin, and pin broke causing chair to separate from supporting base and causing plaintiff to fall backward to floor, plaintiff was entitled to rely upon doctrine of res ipsa loquitur.

4. Negligence ⚿121(2)

Doctrine of res ipsa loquitur applies if accident in question would not ordinarily have happened in absence of negligence and if defendant had exclusive control over instrumentality causing injury.

5. Negligence ⚿121(2)

When doctrine of res ipsa loquitur is applicable an inference of defendant's negligence may be drawn.

6. Appeal and Error ⚿1001(1)

On appeal inference of negligence which may be drawn when doctrine of res ipsa loquitur is applicable is sufficient to sustain verdict against defendant unless it is overcome by plaintiff's evidence, or unless it is conclusively rebutted by evidence that is clear, positive, uncontradicted, and of such nature that it cannot rationally be disbelieved.

7. Evidence ⚿571(6)

In action for injuries sustained in defendant's cocktail lounge when plaintiff sat down on stool, the upper part of which consisted of a leather seat and back and was held in place on pedestal by a metal pin, and pin broke causing chair to separate from supporting base and causing plaintiff to fall backward to floor, credibility of defendant's expert witness relative to existence of a latent defect in pin, and probative value of his testimony, were questions for jury.

8. Negligence ⚿121(2)

Doctrine of res ipsa loquitur concerns a type of circumstantial evidence upon which plaintiff may rely to discharge plaintiff's burden of proving defendant's negligence.

9. Negligence ⚿121(3)

In action for injuries sustained in defendant's cocktail lounge when plaintiff sat down on stool, upper part of which consisted of a leather seat and back and was held in place on pedestal by a metal pin, and pin broke causing chair to separate from supporting base and causing plaintiff to fall backward to floor, jury could draw inference of negligence on part of defendant which arose from nature of accident and fact that defendant and defendant's agents were only persons whose negligence could have been involved, even though no instructions specifically authorized jury to do so.

10. New Trial ⚿9

Granting of new trial of injury action limited to issue of damages rests in discretion of trial court.

11. New Trial ⚿9

Trial court abuses discretion in granting new trial of injury action limited to issue of damages when record discloses that issue of liability is close, damages are inadequate and there are other circumstances indicating verdict was probably result of compromise of liability issue.

12. New Trial ⚷9

When jury in injury action fails to compensate plaintiff for special damages indicated by evidence, and despite fact that injuries have been painful, makes no award or allows only a trifling sum for general damages, only reasonable conclusion is that jurors compromised issue of liability, and new trial limited to damages issue is improper, and a contrary conclusion is justified only when evidence of defendant's negligence is overwhelming.

◆

Sidney A. Moss and Henry F. Walker, Los Angeles, for appellant.

David Schwartz, Beverly Hills, and Milton L. Schwartz, Sacramento, for respondent.

TRAYNOR, Justice.

This action was brought to recover for personal injuries sustained in defendant's cocktail lounge when the stool on which plaintiff was sitting collapsed. Defendant's motion for a directed verdict was denied. The jury returned a verdict for plaintiff for $1 general damages and $250 special damages. Plaintiff's motion for a new trial on the single issue of damages was granted. Defendant has appealed from the judgment and from the order granting a limited new trial.

Sufficiency of the Evidence

At about 11:00 p.m. plaintiff and a friend entered defendant's cocktail room for a drink on their way home from a lodge meeting. There is no question of intoxication; the injuries were sustained before any liquor was consumed. Almost immediately upon their sitting down at the bar, and while his companion was giving their order to the attendant, plaintiff's chair separated fom its supporting base and he fell backward to the floor, sustaining injury.

The upper part of the stool consisted of a leather seat and back and was held in place on its pedestal by a metal pin. Defendant's expert testified that the pin broke as the result of a progressive fatigue fracture, which is a weakening of the metal owing to continued local stress. He stated that this defect could not be detected before the break, even with the aid of a microscope, and that such a pin might last indefinitely or only a short time. Defendant's maintenance mechanic testified that this type of seat made a partial turn to right or left on a ball bearing swivel and that he removed all the seats every 30 to 60 days to lubricate the bearings. He had greased the seat in question about two weeks before the accident and had found nothing wrong with the pin. Defendant's assistant manager testified that he checked the seats almost every day, that he must have inspected this seat not more than two or three days before the accident, and that he discovered no defect.

[1] Defendant contends that this evidence conclusively shows that the accident resulted from a latent defect in the pin, that defendant did not know of the defect, and that reasonable inspection to ascertain the condition of the stools had been made. Since defendant is not an insurer of the safety of its premises but is liable only for negligence in constructing, maintaining, or inspecting them, Blumberg v. M. & T., Inc., 34 Cal.2d. 226, 229, 209 P.2d 1; Johnston v. De La Guerra Properties, Inc., 28 Cal. 2d 394, 399-400, 170 P.2d 5; Perbost v. San Marino Hall-School, 88 Cal.App.2d 796, 802, 803, 199 P.2d 701; McKellar v. Pendergast, 68 Cal.App.2d 485, 489, 156 P.2d 950, it argues that the evidence is insufficient to sustain the verdict.

[2] The jury, however was not required to accept defendant's theory of the accident. There are at least two other theories consistent with the evidence that would support the verdict.

(1) The very fact that it is virtually impossible to detect this type of defect made it all the more important that defendant install stools so designed that the possibility of a break is reduced to a minimum. The expert testimony indicated that a progressive fatigue fracture develops gradually as a result of continued localized stress and that "any metal is likely to start fatigue." Such stress was to be anticipated in view

of the swivel action of the seat; defendant's maintenance mechanic testified, as his opinion of the accident, that "when they twisted the seat and forced it, it broke." The jury may reasonably have concluded that the pin was not large enough, or of a suitable design, to withstand the strain that would be placed upon it. This view was substantially that of the trial judge. In denying defendant's motion for a directed verdict, he said, "I believe there is sufficient evidence for the jury to decide whether or not there was a latent defect, or whether the rod was perhaps too small to support the weight * * *." It may even have been the conclusion of the jury that an additional pin or other safety device was reasonably necessary to guard against injury.

[3, 4] (2) Plaintiff was entitled to rely upon the doctrine of res ipsa loquitur. That doctrine applies if the accident in question would not ordinarily have happened in the absence of negligence and if defendant had exclusive control over the instrumentality causing the injury. Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 457, 150 P.2d 436; Lejeune v. General Petroleum Corp., 128 Cal.App. 404, 412, 18 P.2d 429; Judson v. Giant Powder Co., 107 Cal. 549, 556, 40 P. 1020, 29 L.R.A. 718; Scott v. London & St. Katherine Docks Co., 3 H. & C. 596, 601, 159 Eng.Rep. 665, 667.

Seats designed for use by patrons of commercial establishments do not ordinarily collapse without negligence in their construction, maintenance, or use. Gross v. Fox Ritz Theatre Corp., 12 Cal.App.2d 255, 256, 55 P.2d 227; Micek v. Weaver-Jackson Co., 12 Cal.App.2d 19, 21–22, 54 P.2d 768; Gow v. Multnomah Hotel, 191 Or. 45, 224 P.2d 552, 560, 228 P.2d 791; Billroy's Comedians v. Sweeny, 238 Ky. 277, 278, 37 S.W.2d 43; Sasso v. Randforce Amusement Corp., 243 App.Div. 552, 275 N.Y.S. 891; Fox v. Bronx Amusement Co., 9 Ohio App. 426, 430; cf. Durning v. Hyman, 286 Pa. 376, 379–382, 133 A. 568, 53 A.L.R. 851. See also Gates v. Crane Co., 107 Conn. 201, 203, 139 A. 782; Bence v. Dembo, 98 Ind.App. 52, 56–57, 183 N.E. 326.

Defendant and its agents were in exclusive control of the stool up to the time plaintiff sat upon it. It is true that in one sense plaintiff was in control of the stool while he was using it; at least one court has held that this circumstance is sufficient to prevent the application of res ipsa loquitur. Kilgore v. Shepard Co., 52 R.I. 151, 154, 158 A. 720; contra, Gow v. Multnomah Hotel, supra, 191 Or. 45, 224 P.2d 552, 556–560, 228 P.2d 791; see also, Prosser on Torts, p. 298. Such a view is artificial and ignores the purpose of the requirement that defendant have exclusive control. Once it has been established that the accident was more probably than not the result of negligence, it need only be determined that defendant is the sole person who could have been guilty of that negligence. Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458, 150 P.2d 436; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 517–518, 203 P.2d 522; Breidenbach v. M. McCormick Co., 20 Cal.App. 184, 190, 128 P. 423. Here it was the condition of the stool, not the use made of it, that was responsible for the fall. Plaintiff had done no more than sit upon it when it gave way, and there is no suggestion that his conduct was in any way improper. So far as construction, inspection, or maintenance of the stool were concerned, defendant had exclusive control. Plaintiff's actions had no more legal significance as a cause of the accident than those of the innocent bystander in the typical res ipsa loquitur case.

[5–7] When res ipsa loquitur is applicable, as it is here, an inference of defendant's negligence may be drawn. On appeal that inference is sufficient to sustain a verdict against defendant unless it is overcome by plaintiff's own evidence, see Binns v. Standen, 118 Cal.App. 625, 627–628, 5 P.2d 637; Gritsch v. Pickwick Stages System, 131 Cal.App. 774, 785, 22 P.2d 554; Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183, 212–214; cf. Leet v. Union Pacific R. R. Co., 25 Cal.2d 605, 621–622, 155 P.2d 42, 158 A.L.R. 1008, or unless it is conclusively rebutted by evidence that is "clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved". Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868, 870; Leet v. Union Pacific R. R. Co., 25 Cal.2d 605, 622, 155 P.2d 42, 158 A.L.R. 1008. The inference in this case was not dispelled by plaintiff's own evidence. Nor did defendant's countershowing conclusively establish absence of negligence on its part. The jury may have rejected defendant's evidence that the accident resulted from a latent defect in the pin. The credibility of defendant's expert witness and the probative value of his testimony were questions for the triers of fact. Huth v. Katz, 30 Cal.2d 605, 609, 184 P.2d 521; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 461, 150 P.2d 436; Blank v. Coffin, 20 Cal. 2d 457, 461–462, 126 P.2d 868; Meyer v. Tobin, 214 Cal. 135, 137, 4 P.2d 542; Michener v. Hutton, 203 Cal. 604, 609–612, 265 P. 238, 59 A.L.R. 480; Lejeune v. General Petroleum Corp., 128 Cal.App. 404, 416–417, 18 P.2d 429; Reinzi v. Tilyou, 252 N.Y. 97, 99–100, 169 N.E. 101. Johnston v. Black Co., 33 Cal.App.2d 363, 368–369, 91 P.2d 921, is inconsistent with the foregoing cases and is disapproved. Moreover, there was evidence that after the accident the back of the chair was found broken; it is possible that a defect in the back of the chair was the cause of plaintiff's fall and that the weakened pin broke later as a result of the strain suddenly placed upon it. The fact that plaintiff fell immediately upon sitting down suggests that the chair was defective before he used it. In this connection the jury may have concluded that the inspections made by defendant's employees were insufficient to discharge defendant's duty of care. Particularly in view of the subdued lighting in the cocktail room, it cannot be said as a matter of law that an examination of the stool two or three days before the accident was all that was reasonably required. The jury may even have believed that no such examination was made.

[8, 9] Defendant contends that, since no instruction on res ipsa loquitur was requested by plaintiff or given by the trial court, it is now too late to rely upon that theory. The doctrine of res ipsa loquitur concerns a type of circumstantial evidence upon which plaintiff may rely to discharge his burden of proving defendant's negligence. Such evidence was given to the jury in this case. The nature of the accident and the fact that defendant and its agents were the only persons whose negligence could have been involved give rise to the inference that defendant was negligent. There is no reason why the jury may not draw that inference without, as well as with, a specific instruction authorizing them to do so. Fedler v. Hygelund, 106 Cal.App.2d 480, 235 P.2d 247.

Limited New Trial

[10, 11] The granting of a new trial limited to the issue of damages appropriately rests in the discretion of the trial court, but an abuse of that discretion is shown when the record discloses that the issue of liability is close, the damages are inadequate, and there are other circumstances that indicate that the verdict was probably the result of a compromise of the liability issue. Leipert v. Honold, Cal.Sup., 247 P.2d 324. An examination of the present case in the light of this rule indicates that the order granting a limited new trial should be reversed.

(1) *Evidence of liability.* The issue of liability was sharply contested, for defendant made a strong showing that the accident resulted from a latent defect of which it had no knowledge and for which it could not reasonably be held responsible. Plaintiff contends that the cases in which it has been held that a conflict on the liability issue is a circumstance to be considered in determining the propriety of a limited new trial have all involved questions of contributory negligence. See, for example, Wallace v. Miller, 26 Cal.App.2d 55, 56, 78 P.2d 745; Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 9, 175 P. 26, 177 P. 845. That distinction, however, is not material. Uncertainty concerning defendant's liability is the controlling consideration, and it makes no difference whether that uncertainty arises in connection with defendant's negligence or plaintiff's contributory negligence.

(2) *Inadequacy of damages.* The evidence shows that plaintiff was shaken and excited at the time of his fall but did not feel significant discomfort until he was awakened during the night by pain in the lower part of his back. The next day he consulted a physician, and he was given treatment for several months, which continued to the time of the trial. When he testified, plaintiff was still unable to sit for extended periods without pain, particularly on hard surfaces. For some time after the accident, he found it necessary to assign to an employee a number of the duties he had regularly performed at his candy store. Plaintiff's physician testified that plaintiff had sustained an injury to his coccyx, that in his opinion it was a permanent injury, and that such an injury is painful. The bill for his medical services, covering about 75 treatments, was $300. In addition plaintiff incurred an expense of $52 for X-rays. The verdict was for $1 general damages and $250 special damages; it was thus more than $100 less than the medical and X-ray charges.

[12] When the jury fails to compensate plaintiff for the special damages indicated by the evidence, and despite the fact that his injuries have been painful, makes no award or allows only a trifling sum for his general damages, the only reasonable conclusion is that the jurors compromised the issue of liability, and a new trial limited to the damages issue is improper. See Hughes v. Schwartz, 51 Cal.App.2d 362, 367–368, 124 P.2d 886; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 16, 146 P.2d 34; Adams v. Hildebrand, 51 Cal.App.2d 117, 118–119, 124 P.2d 80. A contrary conclusion is justified only when the evidence of defendant's negligence is "overwhelming." See Taylor v. Pole, 16 Cal.2d 668, 675, 107 P.2d 614; Crandall v. McGrath, 51 Cal.App.2d 438, 440–442, 124 P.2d 858.

It is claimed that the inadequacy of the award is attributable to the fact that the damages issue was not argued by counsel. It is not likely, however, that, even without the aid of counsel, the jurors would have allowed less than the special damages shown and only $1 for pain and suffering.

(3) *Other circumstances indicating compromise.* More than three hours after the case was submitted to them, the jurors returned for a re-reading of the testimony of defendant's maintenance mechanic. This witness was not present at the accident and had no knowledge concerning plaintiff's injuries; his testimony related exclusively to the construction and maintenance of the stool. The trial was a short one, and the fact that the jurors were at that time still debating defendant's liability demonstrates the difficulty they were having in determining whether or not defendant was negligent. In the light of the gross inadequacy of the award, this circumstance also supports the conclusion that the verdict was the result of a compromise.

Defendant has appealed not only from the order granting a limited new trial but also from the judgment. Since its liability has never been properly determined, the judgment must be reversed.

The judgment and order are reversed. Each side is to bear its own costs on appeal.

GIBSON, C. J., and SHENK, EDMONDS and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

CARTER, Justice.

I dissent.

The views which I have expressed in my dissenting opinion in Leipert v. Honold, Cal.Sup., 247 P.2d 324, are equally applicable to this case.

I would, therefore, affirm the order granting a new trial on the issue of damages only.

On Petition for Modification.

Appellant's petition for a modification denied; SCHAUER, J., dissenting.

39 Cal.2d 491

CARY et ux. v. WENTZEL et al.

L. A. 22028.

Supreme Court of California, in Bank.
Aug. 13, 1952.

George E. Cary and Mabel Cary, husband and wife, brought an action against Lawrence Wentzel for injury which resulted when defendant's automobile collided with oncoming automobile on highway and oncoming automobile then collided with plaintiffs' automobile which had been traveling behind defendant's automobile. The Superior Court, San Luis Obispo County, Ray B. Lyon, J., rendered a judgment for plaintiffs and granted plaintiffs' motion for new trial on issue of damages only and defendant appealed from the judgment and from order granting limited new trial. The Supreme Court, Traynor, J., held that record established that verdict was result of a compromise between jurors who believed defendant should pay substantial damages and jurors who believed he should pay none and that defendant was entitled to new trial on issue of defendant's liability.

Judgment and order reversed.

Carter, J., dissented.

For prior opinion see 240 P.2d 304.

1. New Trial 🔑9

Granting of new trial of injury action limited to damages issue is addressed to sound discretion of trial court.

2. Appeal and Error 🔑977(1)

Order granting new trial of injury action limited to damages issue will be reversed when it is shown on appeal that damages awarded by jury are inadequate, that issue of liability is close, and other circumstances indicate that verdict was probably result of prejudice, sympathy, or improper compromise.

3. Negligence 🔑93(8)

Negligence of driver of automobile would not be imputed to guest.

4. New Trial 🔑9

In action for injuries which resulted when defendant's automobile collided with oncoming automobile and oncoming automobile then collided with plaintiff's automobile which had been traveling behind defendant's automobile, record established that verdict against defendant was result of compromise between jurors who believed defendant should pay substantial damages and jurors who believed defendant should pay none, and defendant was entitled to new trial on issue of defendant's liability and trial court abused its discretion in granting plaintiff's motion for new trial on issue of damages only.

A. H. Brazil, San Luis Obispo, for appellant.

Kenneth J. Thayer and Dorsett M. Phillips, Bakersfield, for respondents.

TRAYNOR, Justice.

At about four o'clock on the afternoon of December 26, 1948, plaintiffs George and Mabel Cary, husband and wife, were proceeding west on Highway 41 approximately ten miles east of Paso Robles. Mr. Cary was driving. The pavement at that point was fourteen feet wide and had a center line that separated the highway into two lanes, for traffic in each direction. The sky was overcast and it was drizzling. For several miles they had been following, at a distance of about 100 feet, an automobile owned and being driven by defendant, Lawrence Wentzel. Defendant's wife and child were riding with him. Both cars were traveling approximately 35 miles per hour. A third automobile was being driven in the opposite direction by Robert Seelinger, with whom Mrs. Dora Grove was riding as a guest. Defendant's and Seelinger's cars collided, and Seelinger's car swerved in front of and collided with plaintiffs' car. Mrs. Grove died several days later as a result of injuries received in the accident. Plaintiffs and Seelinger were injured, and their cars were damaged.

It is conceded that plaintiffs were not guilty of contributory negligence. The principal issue at the trial was whether defendant or Seelinger was responsible for the first collision. Three witnesses (plaintiffs and Seelinger) testified that defendant's car was being driven partly on the wrong side of the center line; two witnesses (defendant and his wife) testified that Seelinger suddenly crossed the center line into their path.

Defendant was sued by Seelinger, by the heirs of Mrs. Grove, and by the Carys, and the three suits were consolidated for trial. The jury found for defendant in the Seelinger and Grove actions and returned a verdict for plaintiffs in the amount of $1,000 in the Cary action. Seelinger did not move for a new trial and did not appeal; the judgment against him is now final. Mrs. Grove's heirs were granted a new trial, but they later voluntarily dismissed their action. In the Cary case, defendant's motion for a new trial was denied, and plaintiffs' motion for a new trial on the issue of damages only was granted. Defendant has appealed from the order granting a limited new trial and from the judgment. He contends that the jury did not actually determine that he was negligent and that the verdict against him was the result of sympathy or an improper compromise. He therefore seeks a new trial on all issues.

[1, 2] The principles that govern the granting of new trials limited to the damages issue were reviewed in Leipert v. Honold, Cal.Sup., 247 P.2d 324. We there pointed out that the question is addressed in the first instance to the sound discretion of the trial court. An order granting such a limited new trial will be reversed, however, when it is shown on appeal that the damages awarded by the jury are inadequate, the issue of liability is close, and other circumstances indicate that the verdict was probably the result of prejudice, sympathy, or an improper compromise.

(1) *Inadequacy of damages.* Defendant contends that the $1,000 verdict was less than the undisputed special damages and therefore could not have resulted from a decision by the jury that defendant was negligent. See Wallace v. Miller, 26 Cal. App.2d 55, 56, 78 P.2d 745; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 16, 146 P.2d 34. The amount of plaintiffs' special damages, however, is disputed. Defendant contends that the special damages shown totaled $1199.[1] Plaintiffs contend that only $704 special damages were proved, so that the verdict allowed $296 for general damages. The difference between these two versions of the special damages results from defendant's inclusion of $175 for hospital bills and $320 for future dental work. Plaintiffs suggest that the jury may have disallowed the hospital expenses because they related to services that were rendered to Mrs. Cary by Army hospitals and for which Mr. Cary, as a soldier, would not be liable. There was no evidence, however, that would justify such action. The Carys testified that bills from the Army had been received. They agreed on the length of time she had been hospitalized (three and a half months) and on the amount they were charged ($1.75 per day). At no time during the trial was this expense disputed. We cannot assume that the jurors, without evidence to support them, speculated concerning the nature and extent of free hospital service given by the Government to wives of servicemen. If they had concluded that defendant was negligent, they would certainly have awarded plaintiffs the cost of this hospitalization. The expense of future dental work could not, of course, be definitely determined at the time of trial. There can be no doubt, however, that such work had been made necessary by the accident, for three of Mrs. Cary's teeth had been broken and had had to be extracted and others had been cracked and loosened. The only evidence concerning the reasonable value of the needed bridgework was the testimony of Mrs. Cary that her dentist had estimated the expense at $320. In view of the undisputed injuries to her teeth, this estimate was not excessive. Cf. Keogh v. Maulding, 52 Cal. App.2d 17, 18, 21, 125 P.2d 858.

It must be concluded that there was no legitimate reason that would have prompted the jury to exclude the cost of hospitalization and future bridgework from the special damages necessarily to be allowed in the event defendant were found liable. It follows that defendant is correct in his claim that the verdict for special damages should have been $1199. The failure to award this minimum amount is a convincing indication that the jury had not reached the conclusion that defendant was negligent.

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[1] The figure claimed by defendant is actually $1219, but it is apparent that an inadvertent error of $20 has been made.

Moreover, the jury should have allowed general damages for plaintiffs' suffering, inconvenience, and loss of time. Mrs. Cary was seriously injured. She was thrown into the windshield, radio, and heater of their car and sustained lacerations on her forehead, chin, tongue, the inside of her mouth, and her left knee. In addition there were the broken and loosened teeth already mentioned, and bruises on her chest, shoulders, back, and legs. The cut on her chin left a scar. At the time of the trial, almost a year and a half after the accident, she was still bedridden and continued to suffer pain in her back and knee. A number of abscesses on her back developed and persisted to the time of trial; it is possible, however, that the jury concluded that these were related to an earlier disease ("valley fever") from which she had been suffering. Whatever may have been the cause of her continued general disability, it is clear that the injuries received in the accident were painful, extensive, and, in part at least, permanent. Mr. Cary was also injured, but had substantially recovered at the time of the trial. He was thrown against the steering wheel, bending it six inches, and he sustained bruises and cuts on his head, chest, and knee.

The failure of the jury to allow substantial general damages for these injuries, as well as for several weeks loss of use of the automobile during repairs, also indicates that the liability issue had not been decided.

(2) *Evidence of liability.* The jury had only the testimony of the parties themselves from which to determine whether defendant or Seelinger was driving on the wrong side of the road. Seelinger and plaintiffs testified that defendant was at fault; defendant and his wife testified that Seelinger was at fault. It is apparent that the jury's task with respect to this issue was exceptionally difficult.

It is also significant that the testimony of Seelinger and plaintiffs was to a certain extent inconsistent. Seelinger testified that as his car approached defendant's car, he saw defendant's left wheels a foot or two over the center line for a distance of 100 to 200 feet before the accident. Plaintiffs testified, however, that defendant crossed over the line only a short time before the accident and that at the time of the collision defendant's car was still traveling at an angle from the center line of about 25 degrees. Mr. Cary admitted in his testimony, moreover, that he did not state to the officers investigating the accident that defendant had driven on the wrong side of the highway.

[3] (3) *Other circumstances indicating compromise.* The verdict against Seelinger is not inconsistent with the verdict in favor of plaintiffs, for the jury could have concluded that defendant was negligent and that Seelinger was guilty of contributory negligence. The court's instructions, however, limited the issue of contributory negligence to the Seelinger suit; Mrs. Grove was a guest in Seelinger's car and his negligence would not be imputed to her. Reynolds v. Filomeo, 38 Cal.2d 5, 9–10, 236 P.2d 801. The verdict against Mrs. Grove's heirs is therefore at variance with the verdict against defendant in the Cary action—the latter necessarily implies that defendant was negligent whereas the former implies that he was not. One of these verdicts is erroneous, and the gross inadequacy of the award in the Cary case suggests at once where the error lies.

It is contended that the court's failure to give a damages instruction in the Grove case was responsible for the verdict against Mrs. Grove's heirs. This explanation is not persuasive. Special damages covering hospital and funeral expenses were proved by the executor of Mrs. Grove's estate and were at no time disputed by defendant; that much at least would have been allowed by the jury. Moreover, during their deliberations the jurors returned to the courtroom for instructions on questions that were causing difficulty. They would probably have sought similar aid from the court with regard to the measure of damages had they reached that issue and had difficulty in determining it.

[4] We have concluded that the verdict against defendant in the Cary action was the result of a compromise between jurors who believed that defendant should pay substantial damages and jurors who believed that he should pay none. There has not been, therefore, an acceptable determination of defendant's liability, and defendant is entitled to a new trial on that issue.

The judgment and order appealed from are reversed.

GIBSON, C. J., and SHENK, EDMONDS and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

CARTER, Justice.

I dissent.

The views which I have expressed in my dissenting opinion in Leipert v. Honold, Cal.Sup., 247 P.2d 324, are equally applicable to this case.

I would, therefore, affirm the order granting a new trial on the issue of damages only.

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39 Cal.2d 436

ZENTZ v. COCA COLA BOTTLING CO. OF FRESNO.

S. F. 18456.

Supreme Court of California, in Bank.

Aug. 6, 1952.

Mary E. Zentz brought an action against Coca Cola Bottling Company of Fresno, a corporation, for injuries which resulted when bottle containing a soft drink which had been bottled and delivered to plaintiff's restaurant by defendant exploded. The Superior Court, Fresno County, Paul A. Eymann, Judge pro tem., rendered a judgment adverse to the defendant and the defendant appealed. The Supreme Court, Gibson, C. J., held that plaintiff under record was entitled to invoke aid of doctrine of res ipsa loquitur.

Affirmed.

Prior opinion 232 P.2d 507.

1. Negligence 🔑121(2)

"Res ipsa loquitur" means the thing, or affair, speaks for itself, and, so speaking, authorizes inference of negligence in absence of showing to contrary.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Ipsa Loquitur".

2. Negligence 🔑121(2)

Where thing is shown to be under management of defendant or defendant's servants, and accident is such as in ordinary course of things does not happen if those who have management use proper care, it affords reasonable evidence, in absence of explanation by defendant, that accident arose from want of proper care.

3. Negligence 🔑121(2)

Doctrine of res ipsa loquitur is not applicable where it is at least equally probable that accident was caused by some fault for which defendants were not liable and where it cannot be said that it is more likely than not that accident was caused by negligence of defendants.

4. Negligence 🔑121(2)

Although doctrine of res ipsa loquitur will not ordinarily apply if it is equally probable that negligence was that of someone other than defendant, plaintiff need not exclude all other persons who might possibly have been responsible where defendant's negligence appears to be more probable explanation of accident.

5. Negligence 🔑121(2)

Fact that accident occurs some time after defendant relinquishes control of instrumentality which causes accident does not preclude application of doctrine of res ipsa loquitur provided there is evidence that instrumentality had not been improperly handled by plaintiff or some third person, or its condition otherwise changed, after control was relinquished by defendant, but it must appear that defendant had sufficient control or connection with accident that it can be said that he was more probably than not the person responsible for plaintiff's injury.

6. Negligence ⇨122(1)

A defendant in action for damages has burden of proving contributory negligence.

7. Negligence ⇨121(2)

A plaintiff may properly rely upon doctrine of res ipsa loquitur even though he has participated in events leading to accident if evidence excludes his conduct as responsible cause.

8. Negligence ⇨121(2)

Doctrine of res ipsa loquitur may be applied even though defendant is not in a better position than plaintiff to explain what occurred if it appears more probable than not that injury resulted from negligence on part of defendant.

9. Negligence ⇨121(2)

Doctrine of res ipsa loquitur may be applied against several defendants where circumstances are such as to show probability that all of them were negligent.

10. Negligence ⇨27

A soft drink bottling company would be liable for injuries resulting to retailer who bought soft drink from bottler and was injured when a bottle exploded when being taken from retailer's soft drink cooler if injury was result of defect in glass of bottle which was caused by improper bottling procedure or by mishandling by bottler's employees during preparation for delivery or during actual delivery.

11. Negligence ⇨16

One who bottles liquids under pressure must adopt different methods of procedure and take precautionary steps not required of one bottling inert liquids.

12. Negligence ⇨121(3)

An inference of negligence arises from failure of carbonated soft drink bottler to discover visible defect in glass bottle since such defect would normally be discovered upon reasonable inspection.

13. Negligence ⇨121(3)

In action brought against bottler of carbonated soft drink for injuries which plaintiff suffered when plaintiff reached into cooler in plaintiff's restaurant, in which bottles of defendant's soft drink had been placed an hour previously by bottler's delivery truck driver, and a bottle exploded, balance of probabilities under evidence pointed to bottler's negligence as most likely explanation of accident and plaintiff was therefore entitled to invoke aid of doctrine of res ipsa loquitur.

14. Trial ⇨296(7)

In action brought against bottler of carbonated soft drink for injuries which plaintiff suffered when plaintiff reached into cooler in plaintiff's restaurant, in which bottles of defendant's soft drink had been placed an hour previously by bottler's delivery truck driver, and a bottle exploded, giving of instruction that happening of accident gave rise to inference of negligence on part of defendant was not error in view of other instructions although evidence was conflicting as to whether plaintiff was injured by bottle containing defendant's soft drink.

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Ray W. Hays and James N. Hays, Fresno, for appellant.

L. Kenneth Say, Fresno, for respondent.

GIBSON, Chief Justice.

Plaintiff was injured by the explosion of a bottle of Coca Cola which had been bottled and delivered to her restaurant by defendant. She brought this action for damages, and defendant appeals from a judgment upon a jury verdict in her favor.

Soft drinks were kept in the restaurant in a cooler which stood about waist high and opened from the top. The cooler was empty on the day of the accident when the driver of defendant's truck delivered a number of cases of Coca Cola. He placed the bottles in the cooler four at a time until it was filled, and while he was doing this one bottle broke when he struck it against another. No one else handled the bottles from the time they were loaded onto the truck until they were placed in the cooler.

About an hour after the delivery plaintiff reached into the cooler, and, before she touched any of the bottles, one exploded. Three customers testified that they heard a "pop," that plaintiff screamed, and that they saw her clutching her right arm, which had been severely cut.

Defendant's plant manager testified that, prior to the accident, the only tests defendant made to discover defective bottles were visual inspections which took place as the bottles were moved along a conveyor belt at a speed in excess of 150 a minute while they were being washed and filled. He also testified that bottles were sometimes mishandled by defendant's employees and that as a result bottles occasionally broke.

The principal question in this case is whether it was proper to give an instruction to the jury that from the happening of the accident, as established by the evidence, there arose an inference that the proximate cause of the occurrence was some negligent conduct on the part of defendant. This, of course, depends upon whether, under the facts of this case, plaintiff was entitled to the benefit of the doctrine of res ipsa loquitur.

[1] An increasing number of the cases coming to this court involve res ipsa loquitur, and this may be due not only to the fact that the doctrine is often difficult to apply but also to confusion which has arisen because the opinions have not always used the same language in stating the rule. Res ipsa loquitur, when translated, "means simply 'the thing, or affair, speaks for itself,' and, so speaking, authorizes the inference of negligence in the absence of a showing to the contrary." O'Connor v. Mennie, 169 Cal. 217, 223, 146 P. 674, 676; see also Ales v. Ryan, 8 Cal.2d 82, 98, 64 P.2d 409; Michener v. Hutton, 203 Cal. 604, 607, 265 P. 238, 59 A.L.R. 480. There is, of course, no magic in the Latin phrase, and its use as a convenient label for the doctrine may have resulted in some of the confusion which is found in the statements of the principles upon which the rule is based.

[2] The statement of the doctrine which, with some variation, was used in many of the earlier California decisions appears in Michener v. Hutton, 203 Cal. 604, 607, 265 P. 238, 239, where it was said: "The courts of this state have long since adopted the rule as expressed in 1 Shearman and Redfield on Negligence, (6th Ed.) p. 132, viz.: 'Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care.' [Citations.]"[1] See also Dixon v. Pluns, 1893, 98 Cal. 384, 389, 33 P. 268, 20 L.R.A. 698; Judson v. Giant Powder Co., 107 Cal. 549, 556, 40 P. 1020, 29 L.R.A. 718; McCurrie v. Southern Pac. Co., 122 Cal. 558, 561–562, 55 P. 324; Chico Bridge Co. v. Sacramento Tr. Co., 123 Cal. 178, 55 P. 780; Harrison v. Sutter Street Ry. Co., 134 Cal. 549, 550, 66 P. 787, 55 L.R.A. 608; Rowe v. Such, 134 Cal. 573, 574–575, 66 P. 862, 67 P. 760; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 344, 73 P. 164; Cody v. Market St. Railway Co., 148 Cal. 90, 94, 82 P. 666; Valente v. Sierra Railway Co., 151 Cal. 534, 538, 91 P. 481; Housel v. Pacific Electric Ry. Co., 167 Cal. 245, 247, 139 P. 73, 51 L.R.A.,N.S., 1105; O'Connor v. Mennie, 169 Cal. 217, 223, 146 P. 674; Hernandez v. Southern California Gas Co., 213 Cal. 384, 388, 2 P.2d 360; Godfrey v. Brown, 220 Cal. 57, 64, 29 P.2d 165, 93 A.L.R. 1092; Ales v. Ryan, 8 Cal.2d 82, 95, 64 P.2d 409. Other cases have used different language in setting

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[1] The language used by Shearman & Redfield was quoted from the opinion of Chief Justice Erle in Scott v. London & St. Katherine Docks Co. [1865] 3 H. & C. 596, 601, 159 Eng.Rep. 665, 667. Even before the Scott case this court declared that in view of the high degree of care owed by a common carrier, the occurrence of an accident to a stagecoach gave rise to a prima facie presumption in favor of a passenger that the coachman was negligent. Fairchild v. California Stage Co., 1859, 13 Cal. 599, 603–605; see also Boyce v. California Stage Co., 25 Cal. 460, 467–469; Bush v. Barnett, 96 Cal. 202, 203–204, 31 P. 2.

forth the rule and have referred to "control" rather than "management" and to what "'ordinarily would not have occurred'" instead of to what "in the ordinary course of things does not happen". Olson v. Whitthorne & Swan, 203 Cal. 206, 208, 263 P. 518, 519, 58 A.L.R. 129; see also Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 457–458, 150 P.2d 436; cf. Hinds v. Wheadon, 19 Cal.2d 458–461, 121 P.2d 724.

It was stated in Judson v. Giant Powder Co., 107 Cal. 549, 556, 40 P. 1020, 1021, 29 L.R.A. 718, that the doctrine is based on "the experience of the past" and the theory that what "has happened in the past, under the same conditions, will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown." In another early case it was said: "The bedrock of this principle * * * is that of probabilities * * *." Harrison v. Sutter St. Ry. Co., 134 Cal. 549, 552, 66 P. 787, 788, 55 L.R.A. 608. Since the decision of the Judson case in 1895, the words "probably," "probable," "probability" and "probabilities" have been repeatedly used in this connection, both as part of the rule and as the basic reason, or one of the reasons, for it. Harrison v. Sutter Street Ry. Co., supra; Osgood v. Los Angeles, etc., Co., 137 Cal. 280, 282, 70 P. 169; Smith v. O'Donnell, 215 Cal. 714, 722, 12 P.2d 933; Godfrey v. Brown, 220 Cal. 57, 66, 29 P.2d 165, 93 A.L.R. 1092; Honea v. City Dairy, Inc., 22 Cal. 2d 614, 617, 620, 621, 140 P.2d 369; Leet v. Union Pac. R. R. Co., 25 Cal.2d 605, 619–621, 155 P.2d 42, 158 A.L.R. 1008; La Porte v. Houston, 33 Cal.2d 167, 169, 199 P.2d 665; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 517, 203 P.2d 522; Cavero v. Franklin, etc., Benevolent Soc., 36 Cal.2d 301, 312–314, 223 P.2d 471; Raber v. Tumin, 36 Cal.2d 654, 659–661, 226 P.2d 574. In the La Porte case, 33 Cal.2d at page 169, 199 P.2d at page 666, we said, after assuming that defendants were in control at the time of the accident, that "the applicability of the doctrine of res ipsa loquitur depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of their [defendants'] negligence. [Citations.] 'Where no such balance of probabilities in favor of negligence can be found, res ipsa loquitur does not apply.'" In determining whether such a probability exists with regard to a particular occurrence, the courts have relied both upon common knowledge and the testimony of expert witnesses. See, for example, Cavero v. Franklin, etc., Benevolent Soc., 36 Cal. 2d 301, 309, 223 P.2d 471; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 459, 460, 150 P.2d 436; Juchert v. California Water Service Co., 16 Cal.2d 500, 515, 106 P.2d 886; Judson v. Giant Powder Co., 107 Cal. 549, 561, 40 P. 1020, 29 L.R.A. 718.

[3] All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent. In the absence of such a probability there would be no basis for an inference of negligence which would serve to take the place of evidence of some specific negligent act or omission. The defendant, of course, should not be liable unless it appears from all the facts and circumstances that there is a sufficient causal connection between his conduct and the plaintiff's injury, and it has been held that res ipsa loquitur will not apply if it is equally probable that the negligence was that of someone other than the defendant. La Porte v. Houston, 33 Cal.2d 167, 169–170, 199 P.2d 665; Hernandez v. Southern California Gas Co., 213 Cal. 384, 387–388, 2 P.2d 360; Olson v. Whitthorne & Swan, 203 Cal. 206, 208–209, 263 P. 518, 58 A.L.R. 129; Tower v. Humboldt Transit Co., 176 Cal., 602, 607, 169 P. 227. As said in the La Porte case, supra, 33 Cal.2d at page 170, 199 P.2d at page 666, the doctrine is not applicable where it is "at least equally probable that the accident was caused by some fault * * * for which defendants were not liable" and where "it cannot be said that it is more likely than not that the accident was caused by the negligence of *defendants*". (Italics added.) In dealing with this problem the courts have usually said that the defendant must have "management" or "control" of the agency or instrumentality which caused the injury.

See, for example, Raber v. Tumin, 36 Cal.2d 654, 659, 226 P.2d 574; Hinds v. Wheadon, 19 Cal.2d 458, 461, 121 P.2d 724; Michener v. Hutton, 203 Cal. 604, 607, 609, 265 P. 238, 59 A.L.R. 480; Olson v. Whitthorne & Swan, 203 Cal. 206, 208, 263 P. 518, 58 A.L.R. 129; Judson v. Giant Powder Co., 107 Cal. 549, 556, 40 P. 1020; 19 Cal.Jur. 708–709. It has been stated that the purpose of this requirement is to eliminate the possibility that the accident was caused by someone other than the defendant. See Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458, 150 P.2d 436; Honea v. City Dairy, Inc., 22 Cal.2d 614, 618, 140 P.2d 369; 1 Shearman and Redfield on Negligence (rev. ed., 1941), pp. 153–154; Prosser on Torts (1941), p. 298. Accordingly, its use is merely to aid the courts in determining whether, under the general rule, it is more probable than not that the injury was the result of the *defendant's* negligence.

[4, 5] The requirement of control is not an absolute one. Although, as we have seen, the doctrine will not ordinarily apply if it is equally probable that the negligence was that of someone other than the defendant, the plaintiff need not exclude all other persons who might possibly have been reponsible where the defendant's negligence appears to be the more probable explanation of the accident. See Helms v. Pacific Gas & Electric Co., 21 Cal.App.2d 711, 713–714, 70 P.2d 247 (third person might have tampered with electrolier located on public street); Van Horn v. Pacific Refining, etc., Co., 27 Cal.App. 105, 108–110, 148 P. 951 (third person might have loosened pipe cap); Prosser, Res Ipsa Loquitur in California (1949), 37 Cal.L. Rev. 183, 197–201. Further, it is settled that the fact that the accident occurs some time after the defendant relinquishes control of the instrumentality which causes the accident does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled by the plaintiff or some third person, or its condition otherwise changed, after control was relinquished by the defendant. Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 517–518, 203 P.2d 522; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458–459, 150 P.2d 436; see Honea v. City Dairy, Inc., 22 Cal.2d 614, 617–618, 140 P.2d 369. Of course, it must appear that the defendant had sufficient control or connection with the accident that it can be said that he was more probably than not the person responsible for plaintiff's injury.

[6, 7] Some cases have stated that the accident must not have been due to any voluntary action or contribution on the part of the plaintiff. See Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258; Raber v. Tumin, 36 Cal.2d 654, 659, 226 P.2d 574; Cavero v. Franklin, etc., Benevolent Soc., 36 Cal.2d 301, 309, 223 P.2d 471; Druzanich v. Criley, 19 Cal.2d 439, 444, 122 P.2d 53; 9 Wigmore on Evidence (3rd ed., 1940), § 2509. This is allied to the condition of control by the defendant and has also been employed as a means of showing that the defendant, rather than the plaintiff, had control and was responsible for the injury. See Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458, 150 P.2d 436. It should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof, and its purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident. As recently held by the Supreme Court of Oregon in a well reasoned opinion, a plaintiff may properly rely upon res ipsa loquitur even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause. Gow v. Multnomah Hotel, 191 Or. 45, 224 P.2d 552, 555–560, 228 P.2d 791.

[8] Another factor which some of the cases have considered in applying the doctrine is that the defendant may have superior knowledge of what occurred and that the chief evidence of the cause of the accident may be accessible to the defendant but inaccessible to the plaintiff. See Ybarra v. Spangard, 25 Cal.2d 486, 490, 154 P.2d 687, 162 A.L.R. 1258; Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 731–732, 81 P.2d 950, 118 A.L.R. 533; Anderson v. I. M. Jameson Corp., 7 Cal.2d 60, 64, 59 P.2d 962;

Smith v. O'Donnell, 215 Cal. 714, 722, 12 P.2d 933; Kenney v. Antonetti, 211 Cal. 336, 339, 295 P. 341; Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 5, 207 P. 378, 22 A.L.R. 1462; O'Connor v. Mennie, 169 Cal. 217, 225–226, 146 P. 674; Steele v. Pacific Electric Ry. Co., 168 Cal. 375, 378–379, 143 P. 718; Housel v. Pacific Electric Ry. Co., 167 Cal. 245, 249–250, 139 P. 73, 51 L.R.A., N.S., 1105; Wyatt v. Pacific Elec. Ry. Co., 156 Cal. 170, 174, 103 P. 892. See also Palmer, A Strange Misplacement of Legislative Power, 25 Cal.St.Bar.J. 440, 444. It seems clear, however, that the doctrine may be applied even though the defendant is not in a better position than plaintiff to explain what occurred if it appears more probable than not that the injury resulted from negligence on the part of defendant. See Leet v. Union Pac. R. R. Co., 25 Cal. 2d 605, 619, 620, 155 P.2d 42, 158 A.L.R. 1008; cf. Parker v. James Granger, Inc., 4 Cal.2d 668, 675, 52 P.2d 226; see Prosser, Res Ipsa Loquitur in California (1949), 37 Cal.L.Rev., 183, 202–204.

The doctrine has been applied in certain specific unusual situations where there is clearly a probability that one or more of several persons was negligent, but where the plaintiff is unable to point out which of them is responsible for his injury. For example, the doctrine has been applied against a common carrier and in favor of its passenger who was injured in a collision between the public conveyance and another vehicle. The reason given for applying the doctrine in such cases is "that, in view of the very high degree of care essential under the law on the part of a carrier of persons towards those who are its passengers, such a collision would not happen in the ordinary course of events if the carrier exercised such care, and that ordinarily when such an accident occurs it is due to failure on the part of the person operating the car to use the proper degree of care in so operating it, or, in other words, to 'the manner in which defendant used or directed the instrumentality under its control.'" Housel v. Pacific Electric Ry. Co., 167 Cal. 245, 249, 139 P. 73, 75, 51 L.R.A., N.S., 1105; Smith v. O'Donnell, 215 Cal. 714, 723, 12 P.2d 933.

Another unusual situation in which the doctrine was applied although plaintiff could not prove which of several defendants actually caused his injuries is found in Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258. In that case a patient received injuries while unconscious during the course of medical treatment, and we held that all persons having any control over his body could properly be called upon to give an explanation of their conduct. See also Dierman v. Providence Hospital, 31 Cal.2d 290, 292, 188 P.2d 12; Cavero v. Franklin etc., Benevolent Soc., 36 Cal.2d 301, 308 et seq., 223 P.2d 471. While it did not appear that any particular defendant had exclusive control or that it was more probable than not that the injury resulted from negligence on the part of each individual defendant, the court relied on the fact that the defendants had superior knowledge and that there was a special relationship between the parties since the plaintiff had submitted himself to the defendants' care.

[9] The doctrine may, of course, be applied against several defendants where the circumstances are such as to show a probability that all of them were negligent. See Prosser, Res Ipsa Loquitur in California (1949), 37 Cal.L.Rev. 183, 207–208; cf. Raber v. Tumin, 36 Cal.2d 654, 226 P.2d 574; Godfrey v. Brown, 220 Cal. 57, 29 P.2d 165, 93 A.L.R. 1092.

In summary, it appears from the foregoing that, as a general rule, res ipsa loquitur applies where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible. In determining whether such probabilities exist with regard to a particular occurrence, the courts have relied both upon common knowledge and the testimony of expert witnesses, and they have considered the circumstances relating to the accident in each particular case, such as the extent of control exercised by the defendant, the plaintiff's own conduct, the likelihood of negligence by some third person, and, in some situations, evidence that the defendant is better able than the plaintiff to explain what happened. All of these matters have been treated as aids to help the courts in determining whether the accident was of such a nature that the injury was more probably than not the result of the defendant's negligence.

In the present case, it seems reasonably clear that the accident probably would not have occurred without negligence by someone. The bottle may have been improperly handled in such a manner as to damage it; there may have been a failure to make a proper inspection for defects; it could have been filled with an excessive charge of gas; or it might have been improperly manufactured. Common experience indicates that it would be unreasonable to hold that a bottle of carbonated liquid would be likely to explode if all persons who had anything to do with it had exercised proper care.

A more difficult question is whether we can say, under all the circumstances, that the accident was of such a nature that it warrants a reasonable inference that defendant, rather than someone else, was responsible for the unknown negligent act or omission which caused the explosion. It is undisputed that defendant had control over the bottle and its contents for a substantial portion of the time during which the defect which caused the explosion might either have been created or discovered. Defendant did not have actual control after the bottle was delivered to the restaurant nor while it was being manufactured, and it is, of course, possible that the bottle might have exploded because of improper handling after delivery or because it was improperly manufactured.

Plaintiff, however, introduced evidence which is sufficient to warrant an inference that the bottle was not mistreated subsequent to the time it was placed in the cooler by defendant's driver. The cooler, which was covered by a lid, appears to have been a safe and proper container for storage and refrigeration of carbonated beverages. Plaintiff did not handle any of the bottles which were delivered by defendant, and the bottle simply exploded without being touched when plaintiff reached into the cooler. Although some of the bottles were removed by plaintiff's employees during the interval between the delivery and the accident, the construction of the cooler was such that the bottles would ordinarily be lifted straight up through the top without disturbing any of those remaining. It is not necessary that plaintiff eliminate every remote possibility of injury to the bottle after defendant relinquished control, and it could reasonably be inferred that the bottle which exploded was not injured by plaintiff or any third person after it was left by defendant's driver. See Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 518, 203 P.2d 522; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458, 150 P.2d 436. Since sound and properly prepared bottles of carbonated beverages will not explode when carefully handled, Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 459, 150 P.2d 436; cf. Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 517, 203 P.2d 522, and since there is evidence that the bottle was kept in a safe place after delivery by defendant, the jury could properly find that the bottle was in some manner defective when defendant's employee placed it in the cooler.

[10, 11] We must, therefore, examine the possible reasons why the bottle was defective when delivered to plaintiff, ascertain which would and which would not be attributable to the negligence of defendant, and determine whether we can say that, in the light of common experience, the defective condition more probably than not resulted from a cause or causes for which defendant is responsible. Some of the possible causes could clearly be attributed to negligence on the part of defendant. Defendant would, of course, be liable for any defect in the glass which may have been caused by improper bottling procedure or by mishandling by its employees during preparation for delivery or during actual delivery. An excessive internal pressure might well have caused the explosion, and the charging of the bottle with gas was entirely within the control of defendant. In Honea v. City Dairy, Inc., 22 Cal.2d 614, 622, 140 P.2d 369, we recognized that in applying the doctrine of res ipsa loquitur a distinction could be made between cases involving bottles of milk and those dealing with bottles of carbonated beverages. One who bottles liquids under pressure necessarily must adopt different methods of procedure and take precautionary steps not required of one bottling inert liquids. We held in Eşcola v. Coca Cola Bottling Co., 24 Cal.2d 453, 459, 150 P.2d 436, 439, that since "it is a matter of common knowledge that an overcharge would not ordinarily result without negligence, it follows under the doctrine of res ipsa loquitur that if the bottle was in fact excessively charged an inference of defendant's negligence would arise."

[12] Further, the explosion may have resulted from a visible defect in the glass bottle, and the Escola case is likewise authority for the proposition that an inference of negligence would arise from the failure of the bottler to discover defects of this type, since they would normally be discovered upon a reasonable inspection. 24 Cal. 2d at pages 459–460, 150 P.2d 436.

The evidence does not show whether the bottle which exploded was a new or a used one. In the Escola case, 24 Cal.2d at pages 460–461, 150 P.2d 436, we held that if defects develop in used bottles which are not discoverable upon visual inspection, there is a duty upon the bottler of carbonated beverages to make appropriate tests before they are refilled, and that if such tests are not commercially practicable the bottles should not be re-used. The only suggested possible cause of the defective condition of the bottle which might not be attributable to defendant's negligence is that the bottle may have been a new one and may have contained latent defects which the bottler had no practicable means of discovering. See Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 460, 150 P.2d 436; Honea v. City Dairy, Inc., 22 Cal.2d 614, 618–621, 140 P.2d 369. It is our opinion, however, that the existence of this possibility is insufficient to prevent application of the doctrine of res ipsa loquitur.

[13] In view of the foregoing, it seems clear that there is a balance of probabilities pointing to defendant's negligence as the most likely explanation of the accident, and plaintiff is therefore entitled to invoke the aid of the doctrine of res ipsa loquitur. This conclusion is in accord with decisions in many other jurisdictions where the doctrine has been applied under circumstances similar to those present here. See Groves v. Florida Coca-Cola Bottling Co., Fla., 40 So.2d 128; Starke Coca-Cola Bottling Co. v. Carrington, 159 Fla. 718, 32 So.2d 583; Payne v. Rome Coca-Cola Bottling Co., 10 Ga.App., 762, 73 S.E. 1087; Joly v. Jones, 115 Vt. 174, 55 A.2d 181; Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968, 160 A.L.R. 1445; Ortego v. Nehi Bottling Works, 199 La. 599, 6 So.2d 677; Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601; MacPherson v. Canada Dry Ginger Ale, Inc., 129 N.J.L. 365, 29 A.2d 868.

[14] Defendant contends that there was a conflict in the evidence as to whether plaintiff was injured by a Coca Cola bottle or by a bottle of a different brand and that the trial court improperly took the determination of this question from the jury when it instructed that the happening of the accident gave rise to an inference of negligent conduct "on the part of the defendant." The jury was told, however, that this instruction is based upon a doctrine which may be applied only where "some certain instrumentality, by which injury to the plaintiff was proximately caused, was in the possession and under the exclusive control of the defendant at the time the cause of the injury was set in motion * * *." It thus appears that the jury could not have been misled in the manner suggested by defendant.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

39 Cal.2d 450

KNELL et al. v. MORRIS et al.

L. A. 22142.

Supreme Court of California, in Bank.

Aug. 12, 1952.

Max Knell, and others, brought an action against Ray Morris, and others, for damages which resulted when water leaked from defective heater which had been installed by named defendant on premises located above plaintiff's premises and rented by defendant MacMar, Inc., whose employee had worked on the heater shortly before the accident. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered a judgment adverse to the plaintiffs and the plaintiffs appealed. The Supreme Court, Gibson, C. J., held that nonsuit was improperly granted as to the same defendant.

Judgment reversed as to the same defendants and affirmed as to remaining defendants.

Prior opinion 234 P.2d 1025.

1. Appeal and Error ⚿927(3)

On appeal from judgment of nonsuit granted in favor of defendants in action for damages facts would be stated most favorably to plaintiffs and all reasonable inferences would be drawn in behalf of plaintiffs.

2. Negligence ⚿121(2)

Doctrine of res ipsa loquitur may be invoked where accident is of such nature that it can be said, in light of past experience, that it was probably result of someone's negligence and that defendant is probably the responsible party.

3. Master and Servant ⚿300

A plumber who was sent by his employer to repair a leaking water heater and who attempted to repair pinhole leak he found by using a radiator compound to seal opening had affirmative obligation to make appropriate tests when he put heater back into operation.

4. Master and Servant ⚿304

An independent contractor who sent plumber to repair a leaking water heater belonging to another would be liable to occupants of premises below premises in which heater was located for damages resulting from leaking of such radiator after contractor's employee attempted to repair radiator if damages resulted from negligence of contractor's employee in repairing radiator.

5. Master and Servant ⚿315

Generally an employer is not liable for acts of independent contractor.

6. Master and Servant ⚿332(3)

Negligence ⚿136(5)

In action for damages which resulted when water leaked from defective water heater which was located in premises above plaintiff's premises, and which defendant independent contractor had attempted to fix on call from representative of owner of heater by sending a plumber who attempted to repair leak by using a radiator compound, evidence would support finding that defendant independent contractor was negligent and that heater was a fixture, so that nonsuit was improperly granted to defendant independent contractor and defendant occupier of premises above plaintiff's premises.

7. Master and Servant ⚿315

Possessor of land is answerable for negligent failure of an independent contractor to put or maintain buildings and structures thereon in reasonably safe condition.

8. Fixtures ⚿7

Whether a water heater is realty or personalty is a question of fact and various factors must be considered, such as manner of its annexation, its adaptability to purpose for which realty is used, and intention of party making annexation.

9. Fixtures ⚿4

As to innocent parties the intent which controls as to whether a water heater is realty or personalty is intent which is reasonably manifested by physical facts and outward appearances, rather than any express or implied intent of those making annexation.

◆

Victor Ford Collins and Arnold M. Cannan, Los Angeles, for appellants.

DeForrest Home, Eugene Kelly, Los Angeles, Desser, Rau, Christensen & Hoffman and William Christensen, Beverly Hills, for respondents.

GIBSON, Chief Justice.

Plaintiffs' property was injured by water which leaked from a defective heater. They brought this action for damages against Morris, the owner of a plumbing business, who had installed the heater on premises leased by MacMar, Inc., and whose employee, Rule, worked on the heater shortly before the accident. Plaintiffs also sued MacMar, Inc., a corporation which owned the heater; Dan Spellman, its secretary and treasurer; and Mack E. Marin, who was associated with the corporation. A judgment of nonsuit was granted in favor of all defendants, and plaintiffs appealed.

[1] In accordance with the settled rule, the facts will be stated most favorably to plaintiffs, and all reasonable inferences will be drawn in their behalf. MacMar, Inc., occupied the floor immediately above plaintiffs' luggage store, and the heater, described as a nine section, cast iron, gas-fired water heater, was originally purchased about one year before the accident. In the late afternoon of April 28, 1948, Spellman heard the heater making a hissing noise, and, upon investigating, found that it was leaking. It does not appear that this leak caused any damage to plaintiffs' property. Spellman immediately turned off the water and notified Morris, who sent his employee, Rule, a master plumber, to repair it. Rule found a "pinhole" leak in the second section and used a radiator compound for the purpose of sealing the opening. Morris testified that this preparation is used by placing it in the water in the heater and boiling the solution for a number of minutes, and that as it circulates through the heater "it seals up the openings whatever the cause may be." After using the compound Rule put the heater in operation and left the premises. At about 7 o'clock the following morning, it was found that water from the heater had caused the ceilings in plaintiffs' store to fall and had damaged the floor coverings and merchandise. Examination of the heater revealed that sections three, four and five contained several cracks which were about the thickness of a cigarette paper and ranged in length from one to four inches.

Liability of Morris

[2] There is no evidence of any specific act of negligence on the part of Morris, and the question is whether the facts entitle plaintiffs to the benefit of the doctrine of res ipsa loquitur. This doctrine may be invoked where the accident is of such a nature that it can be said, in the light of past experience, that it was probably the result of someone's negligence and that the defendant is probably the responsible party. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344. As pointed out in the Zentz case, the courts, in determining applicability of the doctrine, have relied upon common knowledge as well as expert testimony, and they have considered such circumstances as the extent of control which the defendant exercised over the instrumentality causing the accident, the plaintiff's own conduct, the likelihood of negligence by a third person, and, in some situations, the fact that the defendant may be better able than the plaintiff to explain what happened.

It is clear that in the present case the accident probably would not have occurred unless someone was negligent, and the question is whether the evidence is sufficient to justify application of res ipsa loquitur as to Morris. The evidence shows that the boiler compound, if properly applied, would seal up small holes and cracks, and that there thus was available a safe and effective method of repairing the leak. In view of the fact that additional leaks developed within a short time after Rule put the heater in operation, it is probable that he either failed to use the compound properly, so that it did not seal all the cracks then existing, or carelessly did his work in such a manner as to induce cracks in the heater where none had existed before. This might have been done, for example, by lighting the gas with insufficient water in the heater or by suddenly running cold water into the heater after it had been brought to a high temperature. It should be noted in this connection that the cracks developed in three of the nine separate sections of a comparatively new heater and that these openings were of a different character from the "pinhole" which the plumber found when he was called in to repair the leak.

[3] Furthermore, Rule was under an affirmative obligation to make appropriate tests when he put the heater back into operation, and one obvious method would have been to observe, for a reasonable time, whether any leaks developed after the water became fully heated. Although this method might not reveal every type of defect in the heater, it is likely that it would have disclosed cracks such as those which were apparent the next morning, whether they resulted from an act of the plumber or from a defect in the heater. The amount of water present and the amount of damage done indicate that the heater must have been leaking for some time before 7 o'clock in the morning when the damage was discovered. The heater was constructed so that the flame of the gas burner would be extinguished when the water reached a certain temperature, and, although Morris testified that Rule said he stayed until this occurred, due care may have required him to stay longer. Moreover, the trier of fact was not compelled to believe Morris' hearsay testimony and could have inferred that Rule did not test the heater in this manner but, instead, left the premises immediately after he put it in operation, without waiting until the water became hot and perhaps even without waiting until the heater became filled with water.

Although it is, of course, possible that the damage was caused by something not attributable to Morris, we do not believe that this is an equally probable explanation for the accident. The heater was rendered harmless when the water was turned off by Spellman, and the leakage which caused the damage occurred after the heater was again placed in operation by Rule. It could be reasonably inferred from the facts proved that no one touched the heater, which operated automatically, after it was repaired and before the accident occurred. Morris argues that the leakage causing the damage may have been due to cracks which developed after the heater was repaired and that they may have resulted from defects in manufacture which were not discoverable upon reasonable inspection. This possibility, however, would appear to be very remote, and in our opinion is not sufficient to prevent the application of the doctrine of res ipsa loquitur as against Morris.

[4] The next question is whether Morris owed any duty of care with respect to plaintiffs, the violation of which would result in liability to them. Morris testified that Rule was his employee, and there is evidence which would support a finding that Morris was acting as an independent contractor. He would, of course, be liable to MacMar for any negligence of his employee, Rule. It has been suggested, however, that if Morris was an independent contractor and the work was completed by him and accepted by MacMar, he would be under no duty to plaintiffs. See Hale v. Depaoli, 33 Cal.2d 228, 230 et seq., 201 P.2d 1, 13 A.L.R.2d 183; Johnston v. Long, 56 Cal.App.2d 834, 837, 133 P.2d 409. Even if it be assumed that such facts would relieve Morris of liability to plaintiffs, there is no evidence that the work was accepted by MacMar, Inc., and the record does not compel the conclusion that the work was completed when Rule put the heater in operation. The court therefore erred in granting a motion for nonsuit as to Morris.

Liability of MacMar, Inc.

[5, 6] Inasmuch as the evidence is sufficient to support a finding that Morris was negligent, it was error to grant a nonsuit as to MacMar, Inc. The fact that Morris was acting in the capacity of an independent contractor does not necessarily absolve the corporation from liability. The general rule of nonliability of an employer for the acts of an independent contractor is subject to numerous exceptions. See Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 143 P.2d 929; McCordic v. Crawford, 23 Cal.2d 1, 142 P.2d 7; Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 110 P.2d 1044; Snow v. Marian Realty Co.,

212 Cal. 622, 299 P. 720; Luce v. Holloway, 156 Cal. 162, 103 P. 886; Rest., Torts, §§ 410–429; Prosser on Torts, 1941, p. 486, et seq.; Harper on Torts, 1933, p. 645 et seq.; 23 A.L.R. 984. There is evidence in the present case which is sufficient to support a finding in favor of plaintiffs under at least one of these exceptions, and it is unnecessary for us to consider whether MacMar may be liable under any other theory.

[7–9] It is well settled that the possessor of land is answerable for the negligent failure of an independent contractor to put or maintain buildings and structures thereon in reasonably safe condition. See Rest., Torts, § 422. This principle was recently applied in Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 143 P.2d 929, to hold the owner of premises liable for the defective condition of an elevator. MacMar, Inc., points out that the Pepperdine rule is limited to maintenance of buildings, structures or things which are an integral part thereof, and it contends that the water heater is merely personalty. Whether a water heater is realty or personalty is, of course, a question of fact, see M. P. Moller, Inc., v. Wilson, 8 Cal.2d 31, 38, 63 P.2d 818; 22 Am.Jur. 772–773, and various factors must be considered, such as the manner of its annexation, its adaptability to the purpose for which the realty is used, and the intention of the party making the annexation. See Simms v. County of Los Angeles, 35 Cal.2d 303, 309, 217 P.2d 936. As to innocent third parties, the intent which controls is that which is reasonably manifested by physical facts and outward appearances, rather than any express or implied intent of those making the annexation. See Simms v. County of Los Angeles, 35 Cal.2d 303, 309, 217 P.2d 936; Trabue Pittman Corp. v. County of L. A., 29 Cal.2d 385, 397, 175 P.2d 512; M. P. Moller, Inc., v. Wilson, 8 Cal.2d 31, 37–38, 63 P.2d 818; People v. Church, 57 Cal. App.2d Supp. 1032, 1048, 136 P.2d 139. In the present case it can reasonably be inferred that the heater was attached to the building by means of gas and water pipes, and the evidence, although meager, is sufficient to permit a finding that the heater was permanently affixed to the realty and was adapted to the purpose for which the premises were used. Cf. Broadway Improve. etc., Co. v. Trumansky, 2 Cal.2d 465, 468–469, 41 P.2d 553. If the jury should find that the heater was a fixture, MacMar, Inc., would be charged with a nondelegable duty of care with respect to its maintenance under the rule of the Pepperdine case.

Liability of Spellman and Marin

Plaintiffs concede that a nonsuit was properly granted as to Marin, and we can find no evidence which would support a finding of negligence on the part of Spellman. When Spellman discovered the "pinhole" leak, he immediately rendered the heater harmless by turning off the water and called Morris to make the repairs. There is nothing to show that he had anything to do with the heater or any knowledge of anything that occurred thereafter before the discovery of the damage on the following morning. Spellman, of course, could not be held responsible for the negligence of Morris.

As to defendants Marin and Spellman, the judgment is affirmed, and as to defendants Morris and MacMar, Inc., the judgment is reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

112 Cal.App.2d 823

ROBERTS v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 15366.

District Court of Appeal, First District, Division 2, California.

Aug. 25, 1952.

Action by John Stewart Roberts against Bank of America National Trust and Savings Association, and another. The Superior Court, Alameda County entered an adverse judgment, and plaintiff appealed. The defendants moved to dismiss the appeal, and plaintiff moved for relief from default. The District Court of Appeal, Dooling, J., held that the right of the bankrupt to proceed with prosecution of his appeal was revested in him on abandonment by trustee of the litigation as an asset of the bankrupt's estate.

Motion for relief from default granted and motion to dismiss appeal denied.

1. Bankruptcy ⚷390

Right of bankrupt to proceed with prosecution of appeal was revested in bankrupt on abandonment by trustee of the litigation as an asset of the bankrupt's estate.

2. Appeal and Error ⚷629

Where trustee in bankruptcy would not prosecute appeal started by bankrupt nor voluntarily abandon the litigation as an asset of bankrupt's estate until motion to dismiss was filed for failure to timely prepare and file proper transcript, bankrupt was entitled to relief from default on abandonment of the litigation by trustee. Rules on Appeal, rule 1 et seq.

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McNeil, Markley & Sapiro, San Francisco, for appellant.

Samuel B. Stewart, Jr., San Francisco, H. H. Bechtel, Carlisle C. Crosby, Peter J. Crosby, Jr., Oakland, for respondents.

DOOLING, Justice.

Appellant filed his notice of appeal herein on November 2, 1951. On August 8, 1951 appellant was adjudicated a bankrupt in the United States District Court. Although appellant according to his verified application for relief from default "requested and demanded of the Trustee in Bankruptcy to proceed with the appeal herein * * * said Trustee refused and failed to proceed with and has abandoned said appeal and has taken no action herein."

Respondents moved to dismiss the appeal for various failures to comply with the Rules on Appeal looking toward the preparation of a transcript and for the long delay in lodging a transcript with the court. Appellant has moved the court for relief from default based upon his adjudication of bankruptcy and the failure of the trustee in bankruptcy despite appellant's demands that he do so to proceed with the preparation of a record on appeal. Shortly before the motion to dismiss and the motion for relief from default came on for hearing before us appellant procured, over opposition, an order from the referee in bankruptcy determining that the trustee in bankruptcy had abandoned the rights in this litigation as an asset of the bankrupt's estate.

After the adjudication of bankruptcy and until the order of abandonment the litigation was an asset of appellant's estate as a bankrupt and in control of the trustee in bankruptcy and out of appellant's control.

[1, 2] The situation is unusual but appeals to us as a proper case for the granting of relief from default. Only since the adjudication of abandonment has appellant had any personal right to proceed with the prosecution of his appeal because only since the adjudication of abandonment are appellant's rights in this litigation certainly revested in him. In re Estate of Aldrich, 35 Cal.2d 20, 23 et seq., 215 P.2d 724, 19 A.L.R.2d 885. It seems to us that it would be manifestly unfair to deprive appellant of his right of appeal under all of the circumstances solely because of the lack of diligence of his trustee in bankruptcy who would neither prosecute the appeal nor voluntarily abandon it as an asset of the bankrupt's estate.

Motion for relief from default granted. Motion to dismiss appeal denied.

NOURSE, P. J., and GOODELL, J., concur.

112 Cal.App.2d 750

STONE v. LOBSIEN.

Civ. 15205.

District Court of Appeal, First District,
Division 1, California.
Aug. 18, 1952.

Rehearing Denied Sept. 17, 1952.
Hearing Denied Oct. 16, 1952.

Action by Louise Stone against Ethel Lobsien to quiet title to certain real property and for determination that defendant held record title in trust for plaintiff. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peters, P. J., held that the evidence warranted the conclusion that defendant was trustee of resulting trust in favor of plaintiff.

Judgment affirmed.

1. Trusts 🔑89(2)

In action by claimant against transferee of realty, evidence supported finding that title was taken in name of transferee with understanding that transferee was to hold legal title in trust for claimant, who paid down payment and subsequent installments on purchase price, and warranted conclusion that transferee was trustee of resulting trust.

2. Trusts 🔑77

To establish resulting trust, it need not be shown that claimant paid purchase price of realty at or before conveyance thereof to transferee.

3. Trusts 🔑72

Where transferee of realty loans purchase price thereof to claimant, there must be evidence of claimant's obligation to repay loan before a resulting trust in his favor will arise.

4. Trusts 🔑89(3)

In action to establish resulting trust, evidence that claimant made down payment on purchase price and subsequent installment payments thereon, and that transferee of realty agreed to hold title as a convenience to claimant, raised implied promise on claimant's part to pay installments, for which transferee had assumed liability.

5. Mortgages 🔑375

No personal liability attaches to party who signs purchase money deed of trust as vendee, and in event of default deficiency judgment cannot be taken against vendee. Code Civ.Proc. § 580b.

6. Equity 🔑65(1)

Rule that unclean hands doctrine will bar party from equitable relief upon showing of his intent to defraud applies as a matter of law only when evidence is susceptible of no other inference.

7. Equity 🔑65(2)

Claimant was not precluded from establishing resulting trust upon ground of unclean hands in that title to realty was placed in transferee's name with intent to defraud welfare board, where no fraud was in fact perpetrated and evidence established that transaction was so handled at vendor's suggestion, for his additional security.

8. Appeal and Error 🔑173(2)

In action to quiet title and establish resulting trust, defense of unclean hands was not available on appeal where it was not pleaded or made an issue at the trial.

9. Equity 🔑65(1)

Where defense of unclean hands was first raised in closing brief in trial court and argued on motion for new trial, refusal to consider the issue at that late stage was within discretion of trial court.

10. Appeal and Error 🔑173(6)
Contracts 🔑342

Illegality of contract need not be pleaded nor raised in trial court, but may be raised for first time on appeal.

11. Trial 🔑397(4)

In action to quiet title and establish resulting trust, court's failure to especially find on pleaded defenses of laches and estoppel was not error, where no substantial evidence supported such defenses.

Mancuso, Herron & Winn, John Wynne Herron, San Francisco, for appellant.

David E. Peckinpah, Denver C. Peckinpah, L. N. Barber, Fresno, for respondent.

PETERS, Presiding Justice.

Plaintiff, Louise Stone, brought this action against defendant Ethel Lobsien, to have the title to certain real property quieted and to have it determined that defendant, the record title holder, holds such title in trust for plaintiff. The trial court found that there was a resulting trust, and entered its judgment accordingly. Defendant appeals.

At the time of the events here involved, the plaintiff, her husband, and the defendant, were close friends. All three were members of the Seventh Day Adventist Church, Mr. Stone being a minister in that faith, and the two women being teachers in a church school. In 1935 Mr. Stone became blind, and thereafter was on blind relief. Plaintiff continued to teach, apparently as a substitute, but by 1940 she was on the W.P.A. rolls. They lived in rented premises.

Defendant, who was a widow, testified that prior to 1940 she had loaned the plaintiff and her husband several sums of money variously estimated by her as totalling $300, $400, or $500. This was denied by plaintiff.

The property involved herein is a small home on Roosevelt Way in San Francisco. This house is located on the street in back of defendant's residence. On the morning of December 1, 1940, defendant's daughter, then about 21 (defendant was out of town that day and for several days thereafter), telephoned to plaintiff and told her that the Roosevelt Way property was for sale, and suggested that plaintiff and her husband "could either buy or maybe rent it." The daughter offered to come over and drive them to see the property. This she did, and then she drove them to the real estate office handling the property—Doelger's Judah Street office—and left them there. Plaintiff and her husband then talked to the real estate agent and gave him a $5 deposit. They were told that the total purchase price was $1,955, that $255 had to be paid as a down payment, and the balance secured by a note and deed of trust calling for payments of $17.50 per month. On the same or the next day a contract of sale naming the Stones as purchasers and Doelger as seller was drafted and delivered. This contract recites the receipt of the $5 deposit and requires a further down payment of $250.

At one of these conferences the real estate agent suggested that, because both of the Stones were on relief, the seller would like some other person who would be additional security on the note. The daughter of defendant suggested that her mother might be willing to sign, and volunteered to write to her and secure her consent. Such consent was given. Thereupon, the Stones advised the real estate man to name defendant as grantee in the deed and as maker of the note. This was done, and defendant, on December 13, 1940, signed the deed of trust and the installment note. The deed, naming defendant as grantee, was delivered to the Stones. Admittedly the Stones paid the $250 additional down payment, title and other conveyance charges.

The defendant denied most of this testimony. While she admitted that the Stones paid the $255 down payment, she claimed that this was done as partial payment on the debt they owed her. The trial court has found that no such debt existed, and such finding is supported. Defendant also testified that before leaving town just before December 1, 1940, she told her daughter to purchase the property, and requested Mr. Stone to help her if she had any difficulties. She further testified that up to the trial she did not know who conducted the negotiations, and did not know the amount of the down payment. This testimony was not believed by the trial court. It is interesting to note that, although defendant's daughter was called as a witness for defendant, she was not asked one word about the transactions of 1940.

It is admitted that, immediately after the purchase transaction was completed, the Stones moved into the house. Thereafter, the Stones made all of the installment payments and paid the insurance, taxes, and for all repairs. Defendant claims that this was done pursuant to an agreement she had with Mr. Stone that such payments should constitute rent. This was denied by plaintiff. This conflict, too, has been resolved against defendant by the trial court.

Late in 1949, Mr. Stone died and was buried at Reedley, California, where Mrs. Stone went and stayed several weeks. Before leaving San Francisco she left the key to the premises with defendant. A few days after her return she discovered that a strong box in the house had been opened and all the papers in reference to the house removed. She asked defendant about the papers and was told that defendant had taken them because they were needed in a dispute with the telephone company. Defendant refused to return the papers, and this litigation followed. Plaintiff testified that among the papers taken was an executed deed from defendant to the Stones which had not been recorded. Defendant denied the existence of such deed, claiming that the only deed taken was the deed from Doelger to her. Plaintiff alone testified as to the existence of this deed, and the trial court made no finding in reference to it. The judgment is not based on the existence of any such deed.

On this evidence the trial court found that the Stones and Doelger entered into the contract of sale; that it was orally agreed between the defendant and the Stones that the Stones should make the down payment, and that title should be taken in the name of defendant who agreed to sign the note and deed of trust; that the Stones agreed to make all payments; that defendant agreed to hold the title in trust for the Stones and to reconvey to them upon request; that the documents were so executed; that the Stones took possession and made the installment, insurance, tax and repair payments; that the Stones requested a reconveyance but defendant refused to convey. The court adjudged that defendant held title in trust for Mrs. Stone and ordered the property reconveyed to her.

[1] The contention that the findings are unsupported is without merit. The evidence, although conflicting, supports the findings that title was taken in the name of appellant, that the down payment and the installments were paid by the respondent and her husband, and that there was an understanding that appellant was to hold the legal title as a convenience for, and in trust for, respondent and her husband.

[2] One of the major contentions of appellant is that no resulting trust arose because the evidence shows that the payments by respondent and her husband were made after the conveyance to appellant. It is claimed that, even according to respondent's testimony, appellant loaned her credit to respondent by signing the note and deed of trust. It is urged that, as a matter of law, payments made after the conveyance in satisfaction of such loan of credit cannot give rise to a resulting trust. In support of this contention the old cases of Woodside v. Hewel, 109 Cal. 481, 42 P. 152, and Lincoln v. Chamberlain, 61 Cal.App. 399, 214 P. 1013, are cited, as well as the more recent cases of Bradley v. Duty, 73 Cal.App.2d 522, 166 P.2d 914, and McQuin v. Rice, 88 Cal.App.2d 914, 199 P.2d 742. If it be assumed that appellant did lend her credit in this transaction, a point that is very doubtful, and if the cases cited require contemporaneous payment, such cases no longer represent the law of California. The problem was recently reviewed by the Supreme Court in Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3, see, also, Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478, where the Supreme Court expressly disapproved the rule of the Lincoln case that a contemporaneous payment of money by the claimant must be shown, and held to the contrary. The later appellate court cases cited rely upon the disapproved rule of the Lincoln case. For this reason it must be held that the rule requiring contemporaneous payment is no longer the law of this state.

[3, 4] Appellant points out that she assumed liability on the deed of trust and note, and urges that there is no evidence of a promise on the part of respondent or her husband to pay the installments on the note. She claims that such an agreement is indispensable to a resulting trust. It is true that there is no specific evidence of a promise by respondent or her husband to make the installment payments. It is no doubt the law that when the transferee loans the purchase price to the claimant, that, before a resulting trust will arise, there must be evidence of an obligation by the claimant to repay the loan. Fuschi v. Vir Den, 107 Cal.App. 2d 280, 236 P.2d 829; Neusted v. Skerns-

well, 69 Cal.App.2d 361, 159 P.2d 49; Mazzera v. Wolf, 30 Cal.2d 531, 183 P.2d 649. Perhaps that same rule applies where the transferee does not lend money, but lends credit. But, in the instant case, a promise on the part of the Stones to make the installment payments is necessarily implied from the very nature of the transaction, and by the evidence of what the parties did after the conveyance was made. Here the claimant—respondent—made the down payment. The transferee—appellant—did not pay out one cent. Thereafter, the payments were made by respondent and her husband. This evidence, when considered in connection with the evidence that appellant agreed to hold title simply as a convenience to respondent and her husband, raised an implied promise on the part of respondent to make the installment payments.

[5] Moreover, in the instant case, a promise by respondent to appellant to pay off the transferee's liability on the note and deed of trust would be of very little legal significance. The documents signed by appellant—the note and deed of trust—imposed no personal liability on appellant. This was a purchase money deed of trust, and, in this state, there is no personal liability imposed on the vendee of a purchase money deed of trust. In the event of a default, no deficiency judgment could have been taken against appellant. § 580b, Code Civ.Proc.; Winklemen v. Sides, 31 Cal.App.2d 387, 88 P.2d 147. In Brown v. Volz, 90 Cal.App.2d 793, 204 P.2d 110, and in Harper v. Heizer, 103 Cal.App.2d 388, 229 P.2d 828, it was held that no detriment attaches to a party who signs a purchase money deed of trust. This being so, it is apparent that appellant did not lend her credit at all in this transaction. As thus analyzed, the transaction is simply the case of one person paying the consideration and another taking title, the most elementary and simplest type of a resulting trust.

Appellant places considerable reliance on the case of Fuschi v. Vir Den, 107 Cal.App.2d 280, 236 P.2d 829, a case factually quite similar to the instant one. In that case, however, there was evidence, believed by the trial court, that the down payment was made on behalf of the transferee, that the payments made by the claimant were rent, and that no promise to repay the transferee was ever made by the claimant. The appellate court simply sustained findings that there was no resulting trust. In the instant case the trial court believed the contrary evidence. The two cases are not inconsistent.

The next contentions of appellant are that respondent has come into court with unclean hands, and that the transaction was illegal. These contentions are based upon certain evidence given by respondent on cross-examination. She there testified that the transaction was handled as it was for two reasons, one, that the seller wanted further security, and second, that she and her husband were doubtful, both being on relief, if they could own real property without violating welfare regulations. The exact testimony is as follows: "When the papers were drawn up, that was the—there was the two reasons, that they wanted—Mr. Brackett wanted a signer for it; was one, that our financial backing wasn't good for a long term lease; and the other one, they informed me that being—my husband being on the blind pension, and I on the WPA, that we couldn't—that we would have her for a cosigner, and then we would take it as rent, and give it in to the Welfare as rent, until—being we didn't own the place, until it was paid for, that we would consider it as rent. And so that was the way it was handed in, as rent."

Respondent further stated that on the welfare forms they put down the payments as rent, because the property did not belong to them, it being their intent, when the property was paid for, to list it as their property. In response to a question as to whether they had represented to the welfare investigator that they were renting the property respondent answered: "We put it in that we were renting, on the basis we didn't own the property until we had it paid for, and we was holding the deed that we could file at any time we wished to file it. And so it was put in as we were paying rent." Respondent admitted that she and her husband reported to the welfare officials that they were paying monthly rent of $30, but she also testified that she thought the investigator knew that they were making the monthly installment payments on the property and were paying the other expenses, which roughly totalled about $30 per month. Certainly the welfare office knew that the Stones were making the payments and paying all expenses and repairs on the property because appellant conceded she so informed the welfare people of these facts by letter.

The appellant claims that this evidence demonstrates, as a matter of law, that the Stones entered into the deal with the intent of misleading the welfare department. Based on this premise it is then urged that this demonstrates that the Stones have unclean hands, which, so it is contended, deprived the trial court of power to grant any equitable relief. It should be here noted that the welfare department was not, in fact, defrauded. There is no law prohibiting recipients of relief from owning real property of the value of $1,995, less encumbrances.

[6, 7] It is probably the law that the unclean hands doctrine will bar a party from relief in equity where there is a mere intent to defraud without actual fraud resulting. Tognazzi v. Wilhelm, 6 Cal.2d 123, 56 P.2d 1227; Allstead v. Laumeister, 16 Cal.App. 59, 116 P. 296; Belling v. Croter, 57 Cal. App.2d 296, 134 P.2d 532. But that rule applies as a matter of law only where the evidence is susceptible of but the one inference that the transaction was entered into with the intent to defraud. It is quite apparent that this transaction was entered into primarily at the suggestion of the seller in order to give the seller what he thought was better security. So far as the welfare department was concerned, all it was interested in was the amount of money spent and not whether the Stones had legal or equitable title to the property. The evidence, although ambiguous and somewhat conflicting, is susceptible of the interpretation that the welfare people knew that the Stones were buying the place, and certainly knew how the payments were being made. In support of the trial court we must construe the evidence most favorably to respondent. So construed, there was no intent to defraud.

[8, 9] Moreover, unclean hands was not pleaded by appellant nor was it made an issue at the trial. This defense must be raised in the trial court to be available. Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478; Scannell v. Murphy, 82 Cal.App.2d 844, 187 P.2d 790. Appellant does contend that she did raise the issue in her closing brief in the trial court, and did argue it on the motion for a new trial. It was within the discretion of the trial court to refuse to consider the issue at that late date.

[10] Appellant also argues that the transaction constituted an illegal contract to defraud the welfare department, and correctly points out that illegality need not be pleaded nor raised in the trial court, but may be raised for the first time on appeal. Penn Mutual Life Insurance Co. v. Bank of America, etc., Ass'n, 5 Cal.2d 288, 54 P. 2d 453; Dealey v. East San Mateo Land Co., 21 Cal.App. 39, 130 P. 1066; Morey v. Paladini, 187 Cal. 727, 203 P. 760.

The complete answer to this contention is that, as already pointed out, the evidence supports the inference that the Stones had an innocent purpose, and did not enter into the contract with intent to defraud or mislead anyone.

Moreover, even if the Stones entered into the transaction because they believed, contrary to the fact, that under relief regulations they could not own real property, such belief would not render the contract illegal as a matter of law. The case is not unlike Svistunoff v. Svistunoff, 94 Cal.App. 2d 651, 211 P.2d 352. There parents who wanted to come to the United States as emigrants transferred property to their son so that he could execute an affidavit that his parents would not become public charges. The boy then refused to reconvey. A resulting trust was decreed even though all concerned thought, incorrectly, that they were misleading the government, and such holding was affirmed on appeal. See, also, Solomon v. Walton, 109 Cal.App.2d 381, 241 P.2d 49.

[11] Appellant also objects to the failure of the trial court to find expressly on her pleaded defenses of laches and estoppel.

She pleaded that she was injured by respondent in not bringing the action until after the death of Mr. Stone so that he was unavailable as a witness, that the property has increased in value, and that she expended time, effort and money on the property. There was no substantial evidence to support these defenses. As to Mr. Stone's absence, appellant did not show she was injured—in fact, what evidence there is of his declarations demonstrates that he would have been adverse to her. There is no evidence at all of a change in value, or that appellant spent money or labor on the property. Thus, if findings had been made on these issues they would necessarily have been adverse. This being so, it was not error to fail to find on these issues.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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112 Cal.App.2d 719

COLLINS v. CITY & COUNTY OF SAN FRANCISCO et al.

Civ. 15135.

District Court of Appeal, First District, Division 1, California.

Aug. 18, 1952.

Action by Francis J. Collins against City and County of San Francisco and others for a judgment declaring invalidity of referendum at which a salary standardization ordinance adopted by board of supervisors was rejected and other reliefs. The Superior Court, City and County of San Francisco, Thomas P. O'Donnell, J., sustained a demurrer without leave to amend and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that salary standardization ordinance was legislative in character and was subject to the referendum.

Judgment affirmed.

1. Appeal and Error 🔑78(3), 870(5)

An order sustaining a demurrer is interlocutory and not appealable, the appeal being properly taken from the subsequently entered judgment.

2. Appeal and Error 🔑782

Appellate courts have no jurisdiction to entertain an appeal from a nonappealable order.

3. Appeal and Error 🔑417(1)

Notices of appeal should be liberally construed to permit, if possible, a hearing on the merits.

4. Appeal and Error 🔑419(1)

Where notice of appeal was filed within 60 days of entry of either judgment or minute order sustaining a demurrer without leave to amend, was addressed to all respondents and their attorneys so that no one was mislead and no prejudice to respondents existed, appeal would be treated as being from the appealable judgment, though notice of appeal incorrectly described the judgment as a minute order and erroneously gave date of minute order rather than date of judgment.

5. Declaratory Judgment 🔑5

Superior court has some discretion to refuse to entertain jurisdiction in a declaratory relief action. Code Civ.Proc. § 1061.

6. Appeal and Error 🔑960(1)

In order to sustain action of trial court in sustaining a demurrer without leave to amend in a declaratory judgment action on ground that trial court was exercising its discretion to deny relief in such cases, it must appear directly or indirectly that such discretion was in fact exercised. Code Civ.Proc. § 1061.

7. Appeal and Error 🔑960(1)

Where formal order sustaining a demurrer without leave to amend in declaratory judgment action demonstrated that the denial of relief was based upon the merits of controversy, such order could not be sustained as constituting exercise of discretionary power of trial court in such actions to refuse to entertain jurisdiction. Code Civ.Proc. § 1061.

8. Declaratory Judgment 🔑394

It cannot be inferred that discretion of trial judge to deny relief in a declaratory judgment action has been exercised, where trial judge, by opinion, fully discloses that he did not exercise any discretion but decided the case on its merits. Code Civ.Proc. § 1061.

9. Declaratory Judgment ⚷273

Action by civil service employee of city and county for a judgment declaring invalidity of referendum at which salary standardization ordinance adopted by board of supervisors was rejected and an order requiring payment to all affected employees of the salaries they would have received under rejected ordinance sought either equitable relief or mandamus within the jurisdiction of superior court regardless of the amount in controversy. Code Civ. Proc. § 1061.

10. Judgment ⚷562

Denial of an application for a prerogative writ will not be considered to be a denial on the merits and hence is not res judicata of the merits, if any other possible ground for denial exists.

11. Judgment ⚷702

Denial without opinion of an application by a taxpayer for a writ of mandate to prevent submission of salary standardization ordinance adopted by board of supervisors to a referendum was not res judicata of the merits in subsequent class action by an employee of city and county for a judgment declaring such referendum to be invalid, since denial may have been based on belief that applicant as a taxpayer did not have a sufficient interest to warrant granting the writ and previous proceeding did not involve the same parties as were involved in class action.

12. Evidence ⚷43(3)

The District Court of Appeal could take judicial notice of the record of proceedings on application to Supreme Court for a writ of mandate.

13. Judgment ⚷948(1, 2)

Ordinarily the defense of res judicata must be pleaded and may not be raised by demurrer.

14. Municipal Corporations ⚷108.8

Under the state constitution and the charter of San Francisco, the right of referendum is limited to legislative acts and administrative, executive and judicial acts are excluded. Const. art. 4, § 1.

15. Statutes ⚷302, 342

The initiative and referendum, since they deal with reserved powers of the people, should be liberally construed to uphold the power thus reserved to the people, wherever that can reasonably be done. Const. art. 4, § 1.

16. Constitutional Law ⚷70(1)

Courts are properly reluctant to interfere with the legislative process.

17. Municipal Corporations ⚷108.8

Under the charter of San Francisco authorizing board of supervisors to approve, amend or reject schedule of compensations proposed by civil service commission and requiring that such compensation be consistent with prevailing rates for comparable service and working conditions in private employment or other governmental organizations for services requiring comparable training and experience, adoption of salary standardization ordinance by board of supervisors involved a discretionary fact finding process and ordinance was therefore legislative in character and subject to the referendum. Const. art. 4, § 1.

18. Municipal Corporations ⚷108.6

Salary standardization ordinance adopted by San Francisco board of supervisors was not excluded from the referendum process by charter provision excluding annual budget and appropriation ordinances, supplemental appropriation ordinances and annual salary ordinances. Const. art. 4, § 1.

19. Statutes ⚷342

Provisions in referendum statutes for certain exclusions from the referendum process must be strictly construed.

20. Statutes ⚷195

Where a statute expresses certain exceptions to a general rule, other exceptions are necessarily excluded under expressio unius est exclusio alterius maxim.

◆

H. Ward Dawson, Jr., San Francisco, for appellant.

Dion R. Holm, City Atty., George E. Baglin, Deputy City Atty., San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiff, as an employee of the City and County of San Francisco, brought this action on his own behalf and on behalf of some 7,835 other employees similarly situated, to have it determined that the salary standardization ordinance passed by the Board of Supervisors in 1950 was improperly submitted to a referendum. At that referendum the ordinance was rejected by the voters. The action seeks a declaration of the validity or non-validity of the referendum, and, if the referendum is held to have been invalid, then an order requiring the payment to all civil service employees affected of the salaries they would have received under the rejected ordinance. The trial court sustained a demurrer without leave to amend. The plaintiff appeals.

[1, 2] Before considering the appeal on its merits, there are certain preliminary points to which reference should be made. First, it must be determined if the appeal has been taken from an appealable order. The notice of appeal recites that the appeal is taken from "the minute order sustaining the demurrer of defendants without leave to amend made herein on May 31, 1951, and entered herein June 1, 1951, and from the whole thereof." It is hornbook law that the order sustaining a demurrer is interlocutory, is not appealable, and that the appeal must be taken from the subsequently entered judgment. Weiss v. Garofalo, 89 Cal.App.2d 811, 201 P.2d 845; Hardy v. San Fernando Valley Chamber of Commerce, 99 Cal.App.2d 572, 222 P.2d 314; Sturgeon v. City of Hawthorne, 106 Cal.App. 352, 289 P. 229; Cornic v. Stewart, 179 Cal. 242, 176 P. 164. Of course, the appellate courts have "no power to make appealable an order which is nonappealable. The problem is one of jurisdiction. If appellants appealed from a nonappealable order we cannot remedy the defect. We cannot consider an appeal where none was taken." Schmidt v. Townsend, 103 Cal.App.2d 185, 186, 229 P.2d 488, 489.

[3] But the court has the power of interpretation. "Where it is perfectly apparent, as it is here, that appellant seeks a review of an order of dismissal, and where, as here, the notice of appeal is filed in ample time from either the entry of the order or judgment, and where, as here, the notice of appeal is addressed to all respondents and to their attorneys so that no one is misled, and where, as here, no prejudice to respondents exists, the notice of appeal should be treated as being from the appealable order even if the notice incorrectly designates the 'order' as a 'judgment,' and erroneously gives the date of the entry of the judgment rather than that of the order. It is therefore held that the notice of appeal is effective as to all respondents." Holden v. California Employment, etc., Comm. 101 Cal.App.2d 427, 431, 225 P.2d 634, 636. As also pointed out in that case, notices of appeal should be liberally construed to permit, if possible, a hearing on the merits. Many cases are there cited to illustrate that in applying this liberal rule, courts have frequently construed the word "order" to mean "judgment," and vice versa. In re Estate of Stone, 173 Cal. 675, 161 P. 258, there was an incorrect designation of the proceeding appealed from, and a wrong date in the notice. Nevertheless, the court, by liberally construing the notice, permitted the appeal to be effective. See, also, Airline Transport Carriers v. Batchelor, 102 Cal.App.2d 241, 227 P.2d 480; People v. Saad, 105 Cal.App.2d Supp. 851, 234 P.2d 785.

[4] In the present case the order sustaining the demurrer was filed June 1, 1951. The judgment was entered June 29, 1951. The notice of appeal was filed July 23, 1951. Thus the notice was filed within sixty days of the entry of either the judgment or the minute order. All of the other requirements enumerated in the quotation from the Holden case are here present. That being so, although the notice of appeal incorrectly describes the judgment as a "minute order," and erroneously gives the date of the minute order rather

than the date of the judgment, we will treat the appeal as being from the appealable judgment.

The second objection of respondents to the consideration of this appeal on its merits is that in a declaratory relief action such as this the trial court may refuse to entertain jurisdiction where the amount claimed by the petitioning party is $300, or less. It is urged that the order sustaining the demurrer without leave to amend should be interpreted as an exercise of the discretionary power of the court conferred upon it by section 1061 of the Code of Civil Procedure.

[5] There is no doubt, insofar as Mr. Collins is concerned, that the amount he would receive in the event the relief prayed for is granted is $300 or less. There is also no doubt but that some discretion is granted to the trial court in declaratory relief actions. Section 1061 of the Code of Civil Procedure provides: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." There are cases that hold that the lack of the requisite jurisdictional sum is a factor that the trial court may consider on a motion to dismiss. Simpson v. Security First Nat. Bank, 71 Cal.App.2d 154, 162 P.2d 494; A. Hamburger & Sons, Inc., v. Kice, 129 Cal.App. 68, 18 P.2d 115. The Simpson case even holds that the exercise of this discretion can be properly undertaken upon consideration of a demurrer.

[6-8] These cases, however, have no application here. That is so because, even though a trial court may exercise its discretion to deny relief in such an action by sustaining a demurrer without the right to amend, it must appear directly or indirectly that such discretion was in fact exercised. In the instant case the record demonstrates that the denial of relief was not based upon the discretion of the trial judge, but was based upon the merits of the controversy. On May 31, 1951, a simple minute order sustaining the demurrer was filed. On June 1, 1951, the trial court filed a formal order sustaining the demurrer. This order is, in fact, a detailed opinion fully disclosing the reasons why, in the opinion of the judge, the demurrer should be sustained. That opinion fully and fairly discloses that relief was denied on the merits, and not in the exercise of any discretion. While a trial judge may deny relief in his discretion, it cannot be inferred that such discretion has been exercised where the trial judge, by opinion, fully discloses that he did not exercise any discretion, but decided the case on its merits.

There are other answers to this contention. While appellant Collins asks for himself but $300 in monetary relief, it is obvious, and the complaint so alleges, that this is a class suit brought on behalf of some 7,835 other employees similarly situated. The amount in controversy far exceeds $300.

[9] Moreover, this is not a simple action by Collins to recover a $300 judgment. He does not seek a judgment against anyone for that or any other sum. There is no prayer for money relief. What Collins seeks is an order compelling the controller to pay the proper salaries to him and to the other employees. This is either an equitable form of relief or a request for mandamus, which, in either event, is within the jurisdiction of the Superior Court, so that the question of the amount in controversy does not arise at all.

[10] The last jurisdictional question raised by respondents is that a prior suit for a writ of mandate brought by another party to stop the election here involved, and which was denied by the Supreme Court without an opinion, is *res judicata* of the entire controversy. It appears that just prior to the referendum election, one Ivan Flamm, as a taxpayer, filed in the Supreme Court a petition for a writ of mandate against Thomas A. Toomey, as registrar of voters, seeking in that fashion to prevent the referendum. The petition was denied without opinion. It is now well settled that the denial of an application for a prerogative writ will not be considered to be a denial on the merits and so

res judicata, if any other possible ground for denial exists. "If there is any other possible ground other than the merits upon which the denial of the petition for a writ could have been based, such denial is not res judicata of the merits in a subsequent proceeding." McDonough v. Garrison, 68 Cal.App.2d 318, 327, 156 P.2d 983, 988.

[11] An examination of the Flamm petition discloses that it was filed by a taxpayer. Perhaps the Supreme Court, rightly or wrongly, believed that was not sufficient interest to warrant granting the writ. That alone presents a possible ground of denial that prevents such denial being *res judicata* in this proceeding.

[12, 13] Moreover, the same parties were not involved in the prior proceeding as are involved in the instant one. An examination of the Flamm record, of which we may take judicial notice—Corum v. Hartford Accident & Indemnity Co., 67 Cal.App.2d 891, 155 P.2d 710, discloses that Flamm was suing as a taxpayer and that the action was not a class action. In addition, it is doubtful if the defense of *res judicata* may be raised by demurrer. Normally, one relying on such a defense must plead it. See cases collected 15 Cal.Jur. p. 208, § 230.

For these, and other, reasons the Flamm proceeding cannot be held to be *res judicata.*

That brings us to the merits of this controversy—Is a salary standardization ordinance subject to a referendum under the San Francisco charter?

The state Constitution, Art. IV, § 1, provides, in part: "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to be exercised under such procedure as may be provided by law. Until otherwise provided by law, the legislative body of any such county, city and county, city or town may provide for the manner of exercising the initiative and referendum powers herein reserved to such counties, cities and counties, cities and towns, but shall not require more than fifteen per cent of the electors thereof to propose any initiative measure nor more than ten per cent of the electors thereof to order the referendum. Nothing contained in this section shall be construed as affecting or limiting the present or future powers of cities or cities and counties having charters adopted under the provisions of Section 8 of Article XI of this Constitution. In the submission to the electors of any measure under this section, all officers shall be guided by the general laws of this State, except as is herein otherwise provided. This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved."

The San Francisco city charter, section 179, provides, in part:

> "The registered voters shall have power to * * * reject at the polls, any ordinance, act or other measure which is within the power conferred upon the board of supervisors to enact, * * *
>
> "If, before the time any other ordinance involving legislative matters becomes effective, there shall be filed with the board of supervisors a petition signed by qualified electors * * *
>
> [Procedure for referendum is then set forth.]
>
> "Annual budget and appropriation ordinances, supplemental appropriation ordinances, the annual salary ordinance, or ordinances amending the same, the ordinances levying taxes, any ordinance appropriating money from the emergency reserve fund, ordinances authorizing the city attorney to compromise litigation, and ordinances necessary to enable the mayor to carry out any of the powers vested in him in the case of a public emergency as defined in section 25 of the charter, ordinances enacted pursuant to section 219 of the charter, as well as ordinances relative to purely administrative matters, shall not be subject to referendum."

In order to ascertain whether either or both or neither of these provisions authorize a referendum on a salary standardization ordinance, reference must be made to the long and complex provisions of the charter providing for salary standardization. The key section is 151. The first paragraph of that section provides: "The board of supervisors shall have power and it shall be its duty to fix by ordinance from time to time, as in this section provided, all salaries, wages, and compensations of every kind and nature, except pension or retirement allowances, for the positions, or places of employment, of all officers and employees of all departments, offices, boards and commissions of the city and county in all cases where such compensations are paid by the city and county."

The next paragraph of the section sets forth certain exclusions, and then the charter continues by setting forth in detail how the "ordinance" referred to in the first paragraph shall be prepared and passed. Thus it is provided that: "In fixing schedules of compensation as in this section provided, the civil service commission shall prepare and submit to the board of supervisors and the board shall adopt a schedule of compensations which shall include all classifications, positions and places of employment * * * subject to the provisions of this section; * * *" The section then permits the commission to propose and the board to adopt amendments to the schedule necessary to cover any new classifications. The paragraph then continues: "Under the schedules of compensation recommended by the civil service commission and adopted by the board of supervisors as herein provided, like compensation shall be paid for like service, * * * and * * * the proposed schedules of compensation shall provide for minima, intermediate, and maxima salaries * * *. The compensations fixed as herein provided shall be in accord with the generally prevailing rates of wages for like service and working conditions in private employment or in other comparable governmental organizations in this state; provided, that for specialized services which are peculiar to the municipal service and not duplicated elsewhere in private or other governmental organizations in this state, the commission shall recommend and the board of supervisors shall fix a compensation which shall be in accord with the wages paid in private employment or other governmental organizations in the state for the nearest comparable service and working conditions; and provided further that if the civil service commission determines on the basis of facts and data collected as hereinafter provided that the rates generally prevailing for a particular service in private employment or in other governmental organizations are inconsistent with the rates generally prevailing in private employment or other governmental organizations for services requiring generally comparable training and experience, the commission shall set forth these data in its official records and shall recommend and the board of supervisors shall fix a compensation for such service that shall be consistent with the compensations fixed by the board of supervisors for other services requiring generally comparable training and experience; * * *"

The next paragraph describes, in some detail, the duties and functions of the civil service commission. It reads, in part, as follows: "The proposed schedules of compensation or any amendments thereto shall be recommended by the civil service commission solely on the basis of facts and data obtained in a comprehensive investigation and survey concerning wages paid in private employment for like service and working conditions or in other governmental organizations in this state. The commission shall set forth in the official records of its proceedings all of the data thus obtained and on the basis of such data the commission shall set forth in its official records an order making its findings as to what is the generally prevailing rate of pay for each class of employment in the municipal service as herein provided, and shall recommend a rate of pay for each such classification in accordance therewith. The proposed schedules of compensation recommended by the civil service commission shall be transmitted to the board of supervisors, together with a compilation of a summary of the data obtained and considered by the civil service commission and a comparison showing existing schedules. * * *"

The balance of the paragraph requires that existing schedules and the proposed new schedules shall be published for two weeks before being submitted to the board of supervisors. The next paragraph defines the duties of the board. It provides as follows: "The board of supervisors may approve, amend or reject the schedule of compensations proposed by the civil service commission; provided, that before making any amendment thereto the data considered by the board of supervisors as warranting such amendment shall be transmitted to the civil service commission for review and analysis and the commission shall make a report thereon to the board of supervisors, together with a report as to what other changes, and the cost thereof such proposed amendment would require to maintain an equitable relationship with other rates in such schedule."

The next paragraph starts off with a provision not here relevant referring to the salaries of incumbents, and then concludes as follows: "The salaries and wages paid to employees whose compensations are subject to the provisions of this section shall be those fixed in the schedule of compensations adopted by the board of supervisors as herein provided and in accord with the provisions of the ordinance of the board of supervisors adopting the said schedule, and the compensations set forth in the budget estimates, and the annual salary ordinance and appropriations therefor shall be in accord therewith."

The next paragraph reads, in part, as follows: "Not later than January 15th, 1944, and every five years thereafter and more often if in the judgment of the civil service commission or the board of supervisors economic conditions have changed to the extent that revision of existing schedules may be warranted in order to reflect current prevailing conditions, the civil service commission shall prepare and submit to the board of supervisors a schedule of compensations as in this section provided. A schedule of compensations or amendments thereto as provided herein which is adopted by the board of supervisors on or before April 1st of any year shall become effective at the beginning of the next succeeding fiscal year and a schedule of compensations or amendments thereto adopted by the board of supervisors after April 1st of any year shall not become effective until the beginning of the second succeeding fiscal year. * * *"

[14–16] The major contention of the appellant is that the fixing of salaries by the board of supervisors as set forth in section 151 is an administrative act and not a legislative one, and so cannot be made the subject of a referendum. Much is said in the briefs as to whether a city, by charter provision, may expand the extent of the referendum power beyond that granted in the Constitution, or is limited thereby—in other words, whether the Constitution is a minimum or a maximum grant of power.[1] We do not find it necessary to decide this question, because under the state Constitution and the charter of San Francisco, as already quoted, the right of referendum is limited to legislative acts and excludes administrative, executive or judicial acts. The initiative and referendum are two forms of legislative power reserved to the people. Since they deal with the reserved powers of the people, they should be liberally construed to uphold the power wherever that can reasonably be done. Warner v. Kenny, 27 Cal.

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[1] For cases holding or implying that the state Constitution limits the referendum powers of charter cities, see McKevitt v. City of Sacramento, 55 Cal.App. 117, 203 P. 132; Dye v. Council of City of Compton, 80 Cal.App.2d 486, 182 P.2d 623; Chase v. Kalber, 28 Cal.App. 561, 153 P. 397; Kleiber v. City, etc., of San Francisco, 18 Cal.2d 718, 117 P.2d 657; Brown v. Boyd, 33 Cal.App.2d 416, 91 P.2d 926. For cases holding or implying that chartered cities may make a broader use of referendum powers than the limits set forth in the Constitution, see Hopping v. Council of City of Richmond, 170 Cal. 605, 150 P. 977; Dwyer v. City Council, 200 Cal. 505, 253 P. 932.

2d 627, 165 P.2d 889. The courts are reluctant, and properly so, to interfere with the legislative process. Santa Clara County v. Superior Court, 33 Cal.2d 552, 203 P.2d 1.

The key question presented is whether the board of supervisors, in passing a salary standardization ordinance, acts administratively or legislatively. The appellant argues that under section 151 the charter fixes the policy, the civil service commission finds the facts, and the board merely follows the mandate of the charter and the recommendations of the commission. Therefore, so it is argued, the board acts merely in an administrative capacity. This contention was disposed of by the trial judge, the Hon. Thomas P. O'Donnell, in a well-reasoned opinion which adequately disposes of this issue. It was there said, in part:

> "It is plaintiff's theory that section 151 declares a public purpose and fixes the standards by which such purpose is to be effectuated, and that therefore the Board acted merely as an administrative vehicle in bringing this purpose to fruition through the adoption of Ordinance 5955.
>
> "It is settled in this State that ordinarily the fixing of salaries of municipal employees is a legislative act. Spencer v. City of Alhambra, 44 Cal. App.2d 75, 111 P.2d 910; City and County of San Francisco v. Boyd, 22 Cal.2d 685, 140 P.2d 666. Plaintiff would remove the instant case from the operation of that rule on the ground that Section 151 provides a complete method for fixing salaries, leaving nothing for the Board to do other than put the provisions of that section into effect.
>
> "The following clause of Section 151 would seem to provide the answer to that contention. It reads: 'The board of supervisors may approve, amend or reject the schedule of compensations proposed by the civil service commission.' The obvious effect of the clause just quoted is (1) that the Commission acts in an advisory capacity only, and (2) that the Board's authority is (within the bounds of reasonableness) plenary. As said by our Supreme Court in commenting on this self-same provision: 'Thus it is clear that the rates of compensation are fixed by the board of supervisors and involve an exercise of the independent judgment of that body.' (Boyd case, supra [22 Cal.2d at page] 692 [140 P.2d at page 669]).
>
> "Other provisions of Section 151 are inferentially corroborative of this conclusion. For instance, the section provides that salaries shall be fixed 'by ordinance.' If the fixing of salaries was intended to be an administrative process only, why would not a simple resolution of the Board suffice? The answer would seem to be that the people desired to reserve the right of review of the Board's action by referendum.
>
> "Again, if the people in adopting Section 151 had intended that the fixing of salaries thereunder was to be but a perfunctory administrative process, is it not reasonable to believe that the execution of the provisions of that section would have been vested in an administrative body—the Civil Service Commission, for instance—rather than in a body whose functions are primarily legislative?
>
> "Turning to Charter section 179 which enumerates the acts of the Board that are exempt from referendum, we find that it includes those that deal with 'purely administrative matters.' The word 'purely' must be deemed to have been used advisedly. Conceding for the purpose of discussion that Ordinance 5955 does, in view of the provisions of Section 151, have certain administrative aspects, can it fairly be said that it is 'purely' administrative? Is not Ordinance 5955 at least partially legislative in character in that it makes new law, and in the making thereof 'involve[s] an exercise of the independent judgment of that body'? (Boyd case, supra.)"

[17] We agree with this reasoning. Under section 151 the board exercises some legislative discretion as to the standardization process. Since the board has the power to reject the schedules submitted by the commission and to amend them, although it must then await additional data from the commission, it is obvious that the board exercises considerable discretion in the process. The factual determination of such difficult questions as "prevailing rates" and "comparable service and working conditions," and "comparable training and experience," and what constitutes "consistent" compensation, clearly involves a discretionary fact finding process, and is therefore legislative in character. City and County of San Francisco v. Boyd, 22 Cal.2d 685, 140 P.2d 666.

[18–20] It will be noted that section 179 excludes from the referendum process "Annual budget and appropriation ordinances, supplemental appropriation ordinances, the annual salary ordinance, or ordinances amending the same." Appellant urges that these exclusions, by necessary implication, include the salary standardization ordinance because salary standardization is an integral part of the budgetary process. The argument is untenable. The salary standardization ordinance is not included by name in the exclusions, and we cannot include it under the guise of interpretation. As already pointed out, referendum statutes must be liberally construed in favor of this reserved power. Exclusions must be strictly construed. Under the familiar maxim of *expressio unius est exclusio alterius* it is well settled that, when a statute expresses certain exceptions to a general rule, other exceptions are necessarily excluded. See cases collected 23 Cal.Jur. p. 740, § 118. The annual salary ordinance, the annual budget and the appropriation ordinances are a separate process from the standardization ordinance and the charter so provides.

It is no answer to argue, as does appellant, that the exclusions in section 179 were adopted in 1935, while the salary standardization procedure was not adopted until 1943. Of course, if the people had desired in 1943 to exclude the salary standardization ordinance from the referendum they could, would and should have amended section 179 to so provide.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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112 Cal.App.2d 876

KNOLL et al. v. SCHLEUSSNER et al.

Civ. 18970.

District Court of Appeal, Second District,
Division 1, California.

Aug. 27, 1952.

Rehearing Denied Sept. 24, 1952.

Action in usury by John M. Knoll and another against Charles Schleussner and others, seeking treble damages and injunctive relief. The Superior Court of Los Angeles County, C. C. McDonald, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Drapeau, J., held that the evidence supported the finding that the transaction was free from usury at the time it was entered into.

Judgment affirmed.

1. Usury 🔑16

Question as to whether a contract is within purview of the Usury Law is to be determined by the court by reference to its substance, as disclosed by a consideration of the entire transaction, regardless of its form.

2. Usury 🔑117

The presumption that litigant has not violated the law will be indulged in favor of the legality of the disputed transaction, and if showing as to usuriousness leaves triers of fact in doubt as to whether contract is within purview of Usury Law, the doubt is to be resolved in favor of sustaining the transaction.

3. Usury 🔑64

A contract is not usurious which does not in its inception require payments which are usurious, even though sums are subsequently paid by obligor to obligee as bonuses, which, coupled with interest paid, amount to a sum in excess of legal rate of interest.

4. Usury ⚷117

The burden is upon one charging exaction of usurious interest, to prove such charge by a preponderance of evidence.

5. Usury ⚷117

In usury action by obligor against obligee, evidence supported finding that the transaction was free from usury at the time it was entered into.

◆

Richard A. Haley, Los Angeles, for appellants.

Miller, Vandegrift & Middleton, Los Angeles, for respondents.

DRAPEAU, Justice.

By the instant action in usury, plaintiffs sought treble damages and injunctive relief. Their complaint alleges that on March 10, 1950, defendants agreed to lend them $4000, and as security therefor required them to execute a note and trust deed covering real property owned by them. In addition, defendants "demanded as a bonus for said loan" that plaintiffs agree to build a child's playground and tennis court on defendants' property, and to provide a caterpillar tractor and the necessary labor and materials to complete them.

Plaintiffs received $3500 from defendants and in April of 1950, completed the playground and tennis court, as agreed upon, at a cost to them of $956.50. During this period defendants gave plaintiffs $200 to pay certain labor charges on the construction work and demanded a note from plaintiffs to cover it.

It is further alleged that defendants actually advanced to plaintiffs $3700 and no more, for which they received interest of $956.50, which is in excess of 12% per annum and therefore violative of the Usury Law of California.

The answer denied the usury and alleged that when the loan was made, plaintiffs were then indebted to defendants in the sum of $700.

The trial court found:

"I. That within one month prior to March 10, 1950, in pursuance of an oral agreement entered into between plaintiffs and defendants there was an account stated between plaintiffs and defendants wherein and whereby there was found to be due and owing to defendants by plaintiffs the sum of $700 which plaintiffs then and there orally agreed to pay to defendants.

"II. That on or about March 10, 1950, plaintiffs and defendants orally agreed that plaintiffs would perform work and supply materials and equipment for the leveling off, the building of a wall and other miscellaneous work on property owned by defendants to the extent of $200 worth. That said verbal agreement further provided that plaintiffs were not to be paid any money for said work on said property but that the said work was to be done by plaintiffs for the purpose of repaying to defendants a portion of a $700 debt then owed by plaintiffs to defendants.

"III. That any work performed or materials furnished for any work done on defendants' property by plaintiffs in pursuance of said agreement was not so performed or furnished as a bonus for the use of money lent, and said work, if any, did not constitute interest and was not usurious."

The court further found that "on or about April, 1950, defendants paid to plaintiffs the sum of $200 for the purpose of having the plaintiffs pay for certain work and materials furnished for work on property owned by defendants. That said sum of $200 was used by plaintiffs for the said purpose. That plaintiffs are not and never were obligated to repay said sum of $200 to defendants."

From the judgment which followed in favor of defendants, plaintiffs appeal.

Appellants concede the correctness of Finding No. I, but assert that Findings Nos. II and III are not supported by the evidence.

Appellants presented evidence to the effect that they needed $3500 with which to purchase a caterpillar tractor. After some discussion, respondents agreed to lend them this amount. Respondent Charles Schleussner told Mr. Knoll "If I go into this with you, I want you to come up here and do my work first"; i. e., level off a small area on his back yard and build a brick retaining wall about 60 feet in length. Mr. Knoll estimated this would cost about $180. Just before they opened the escrow on the loan, said respondent told Mr. Knoll, "I am going to give you $3500.00, and I want you to sign a note for $4000.00, because I just want to get the work done. I want something to hurry you up; hold it over your head. * * * You can trust me. We have trusted each other before. * * * You don't have to worry about it." According to Mrs. Knoll's testimony, Mr. Schleussner said: "Ted, I am going to ask you to sign a note for $500.00 more than the amount you are going to receive. In other words, you are going to get $3500.00 but you are going to sign for four. I am going to hold that over your head, in the event you don't do the work, as you promised first in a hurry in my yard, and you don't go off on a tangent and work over on your property, or do another job, and let me sit there waiting for that job, and it will never be done."

In answer to the question: "You were obligated only to do $180.00 worth of work?" appellant Knoll stated, "I wasn't obligated to do $180.00 worth of work. * * * I was obligated to do a job that Mr. Schleussner planned, that included my time and my tractor, plus $180.00 to be expended by me in other items, and other payroll. I wasn't to be paid for my own time or my own equipment.

> "Q. That is right. You had an agreement with Schleussner that he would pay anything over and above $180.00, didn't you? A. No.
>
> "Q. Well, who was to pay that? A. Well, we didn't have that agreement to begin with. That came up after we were there a few days.
>
> "Q. That is what I say, that was long after, a month or so after the loan was granted, wasn't it? A. Well, it was sometime afterwards. The job kept getting—.
>
> "Q. You had your $3500.00 already? A. Yes. * * *
>
> "Q. And you were to go on there and do $180.00 worth of work? * * * A. No; don't call it $180.00. I was to do a certain job that included my equipment, my time and approximately $180.00 out of my pocket.
>
> "Q. And that is all you considered yourself obligated to do— A. That is right."

Respondent Charles Schleussner testified that through the years he and Mr. Knoll had had many business dealings. When they were discussing the loan of $3500, it was agreed that Mr. Knoll was indebted to respondents on account of such past dealings in the sum of $700. In answer to the question, "Will you tell me why it was that you requested and required then only a $4000.00 note?", Mr. Schleussner said, "Because it was originally going to be a $4200.00 note. I told you the day Mr. Knoll left we reached this figure. He was going to talk it over with his wife. He came back the following day or several days later, and he said, 'As long as I am going to use this money to buy the tractor, it will help me to work out the $200.00, and just put $500.00 of it in escrow, in addition to the rest which I already owe you, which I will owe you now. So therefore, we will draw up the trust deed on the property for $4000.00 for six months. I only need the money for 30 or 60 days, and it will be fine for both of us.' Therefore, when I went into escrow I saw the $4000.00 note and trust deed, and as far as I was concerned, that was protection; that is what I wanted." This witness was then asked how Mr. Knoll was going to work out the remaining $200.00 of the original $700.00. To this he replied: "Work it out on the back of my property. * * * He was going to use his bulldozer or his tractor, and he was going to build a retaining wall. * * * we estimated the work was going to run around $200.00 roughly, what I wanted done, and that was to coincide with his figure. We really very particularly went over this, and we thought the work would cost $200.00. At that time he was going to drive the tractor himself. * * * He was going to do it for me at a reasonable figure but it got to be more than that; if we enlarged the job, then I would pay him more which was natural, unless we were only going to work a day or two. * * * *after we made the loan*, and we started to work, *we started to change the whole deal, to build it large enough so we could put a tennis court in.* * * * we changed the plans several times after he once got started, and I told him he wasn't to do any more than he agreed to do, and *I would pay all the bills beyond that.* * * * Q. Did you have an agreement with reference to whether he spent more than $200.00? A. Yes, I did. *He was to present me with the bills and I would credit it to him at the time of the settlement of the trust deed, at the end of six months.* * * * In the meantime I gave him $200.00 more." (Emphasis added.)

This witness further testified that Mr. Knoll never told him that he had a $320 bill against him for the use of his tractor; neither did he mention any other bills for labor or material. That when he first saw the figure of $956, it "knocked" him over. "I didn't understand how he could have run up the amount of $956.00, how it was humanly possible."

An examination of the voluminous record, from which the foregoing résumé has been extracted, reveals amply sufficient evidence to support the findings complained of.

[1] As stated in 11 Cal.Jur.Supp. (1950 Rev.) 163, secs 13, 14 (Usury): "The nature of the transaction—as being usurious or otherwise—being disputed, the question as to whether the contract is within the purview of the Usury Law is to be determined by the court by reference to its substance, regardless of its form. The entire transaction, of which the written contract is part, is to be considered in determining the issue as to usuriousness. * * *

[2] "The presumption that the litigant has not violated the law will be indulged in favor of the legality of the disputed transaction. If the showing as to usuriousness leaves the triers of fact in doubt as to whether the contract is within the purview of the Usury Law, the doubt is to be resolved in favor of sustaining the transaction.

"As between two constructions, one of which involves usury, and the other of which shows the transaction to be nonusurious, the court will accept the latter interpretation. (Citing authorities.)"

[3] A contract is not usurious where it "does not in its inception require payments which are usurious, even though sums are subsequently paid by the obligor to the obligee as bonuses, which coupled with interest paid amount to a sum in excess of the legal rate of interest." Goldenzwig v. Shaddock, 31 Cal.App.2d 719, 722, 88 P.2d 933, 934.

[4] Moreover, as stated in Goldenzwig v. Shaddock, supra, "The burden is upon one, who charges the exaction of usurious interest, to prove such charge by a preponderance of evidence. Ewalt v. Mortgage Securities, Inc., 129 Cal.App. 559, 564, 19 P.2d 60.

"(2) A contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction. Sharp v. Mortgage Security Corp., 215 Cal. 287, 290, 9 P.2d 819; O. A. Graybeal Co. v. Cook, 111 Cal.App. 518, 528, 295 P. 1088."

[5] The evidence presented by respondents supports the finding that the transaction was free from usury at the time it was entered into.

And if, as the improvement plan developed, appellants did more work than originally contemplated, it was not done in consideration of the loan made to them by respondents.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

112 Cal.App.2d 797

PEOPLE v. GERUNDO.

Cr. 2306.

District Court of Appeal, Third District, California.

Aug. 23, 1952.

Rehearing Denied Sept. 4, 1952.

Hearing Denied Sept. 18, 1952.

Defendant was convicted in the Superior Court, Napa County, Thomas F. Keating, J., of theft of an automobile, and he appealed. The District Court of Appeal, Adams, P. J., held that accused's contention that he had a right to the automobile taken, under a contract of sale between him and the owners thereof, was unsupported by the evidence.

Judgment affirmed.

1. Indictment and Information ⚷57

Statute merging larceny, embezzlement and obtaining property by false pretenses into crime of theft is constitutional as against contention that it involves four or more other offenses. Pen.Code, § 484.

2. Constitutional Law ⚷265

In prosecution for theft of automobile, accusation by information, as permitted by statute, did not deprive accused of due process of law. U.S.C.A.Const. Amend. 14; Const. art. 1, § 8.

3. Judgment ⚷648

In prosecution for theft of automobile, where accused's petition for writ of mandate to compel county supervisors to provide funds for counsel had been previously denied by appellate court, such disposition controlled when point was again raised on appeal from conviction.

4. Criminal Law ⚷1144(1)

In prosecution for theft of automobile, where record of preliminary hearing was not before it, appellate court necessarily presumed that evidence therein was sufficient.

5. Larceny ⚷65

In prosecution for grand theft in that accused appropriated to his own use an automobile which owners had allowed him to take on approval, accused's contention that he had a right to the automobile under a contract of sale between him and owners thereof was unsupported by the evidence.

6. Larceny ⚷28(1)

Information that accused willfully, unlawfully and feloniously took the property of others sufficiently charged statutory crime of theft. Pen.Code, §§ 484, 952.

7. Criminal Law ⚷1037(1, 2)

Where accused failed to object to alleged misstatements of the district attorney in argument to jury, or to assign them as misconduct or to request court to admonish jury to disregard them, they were not reviewable on appeal from conviction for theft of automobile.

8. Larceny ⚷28(4)

Under statute providing that in charging theft it shall be sufficient to allege in information that defendant unlawfully took labor or property of another, it is unnecessary to allege particular kind of grand theft involved. Pen.Code, §§ 484, 952.

9. Criminal Law ⚷814(3)

In prosecution for theft of automobile, accused's proposed instruction dealing with crime of obtaining property by false pretenses was properly refused where there was no evidence of that element.

10. Larceny ⚷68(1, 2)

In prosecution for grand theft in that accused appropriated to his own use an automobile which owners had allowed him to take on approval, questions of whether accused had complied with terms of writing signed by accused and owners of automobile, and of what accused's intent was in failing either to return automobile or to pay anything therefor, were for the jury.

11. Larceny ⚷65

In prosecution for grand theft in that accused appropriated to his own use an automobile which owners had allowed him to take on approval, evidence sustained finding that accused was not justified in failure to return the automobile.

12. Criminal Law ⚷807(1)

In prosecution for theft of automobile, refusal to give instruction proposed by accused which was long, complicated and argumentative, and which would only have tended to confuse jury, was not error.

13. Conspiracy ⚷34

Discrepancies in testimony furnish no basis for charge of conspiracy among witnesses or on part of prosecution, but in fact tend to negative such conspiracy.

14. Criminal Law ⚷1159(4)

In prosecution for theft of automobile, discrepancies in testimony were for jury's consideration, and not for appellate court.

15. Bail ⚷43

In prosecution for theft of automobile, release of accused on bail was a matter resting in discretion of trial court.

16. Criminal Law ⚷1147

Refusal of trial court to consider time accused had already spent in jail in fixing length of jail sentence, imposed as a condition of probation after conviction of theft of automobile, was within discretion of trial court and was not reviewable on appeal, defendant being under no obligation to accept probation under terms granted.

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Vito Gerundo, in pro. per.

Edmund G. Brown, Atty. Gen., Doris H. Maier and Wallace G. Colthurst, Deputy Attys. Gen., Sacramento, for respondent.

ADAMS, Presiding Justice.

Defendant was charged with and convicted by a jury of theft of an automobile in violation of section 484 of the Penal Code. He moved for a new trial which was denied, and he has appealed from the judgment rendered and from the order denying a new trial.

Defendant, appearing in pro. per., in an opening brief of 93 pages, assigns 23 points which he urges constitute grounds for reversal: (1) That section 484 of the Penal Code is unconstitutional because it involves "four or more other offenses," etc.; (2) an accusation by information is unconstitutional; (3) the trial court failed to provide *effective* counsel for defendant in violation of the Fourteenth Amendment; (4) the evidence at the preliminary hearing was insufficient to justify holding defendant for trial; (5) defendant was deprived of property without due process of law; (6) if no false pretenses were used in obtaining what he alleges was a contract upon which he secured the right to possession of the automobile, his possession was legal and a defense against a charge of larceny; (7) defendant could not be convicted of larceny by trick and device under the provisions of Penal Code section 484, which is a special case of obtaining property by false pretenses, unless the pretenses were proven by the testimony of two witnesses, or that of one witness and corroborating circumstances, in accordance with section 1110 of the Penal Code; (8) defendant had the right to possession of the automobile involved and was an owner and therefore could not be convicted of the theft of his own property; (9) where there exists no fiduciary relationship between a claimant and a defendant and there is a *claim* of title in the chattel in the defendant, there can be no conviction of theft under the Penal Code section 484; (10) the jury reached a verdict against the law and the evidence; (11) larceny by trick and device involves an unlawful violation of possession and cannot be committed where right to possession has been acquired lawfully; (12) the district attorney was guilty of prejudicial misconduct in interfering with defendant's preparation of his case and in making prejudicial statements during the trial; (13) the trial court erred in failing to give an instruction proposed by defendant on obtaining property by false pretenses; (14) the trial court erred in allowing the jury to determine the legal and binding character of a contract which was not an issue in the trial and in which the court had no jurisdiction under Penal Code secton 484; (15) the court erred in permitting parol evidence regarding other agreements not in the written contract; (16) the court made prejudicial statements before the jury, did not admonish the jury to disregard stricken testimony and interfered with the conduct of defendant's case; (17) (omitted); (18) the court erred in not giving defendant's proposed instruction defining theft and the effect of the owner's consent; (19) the court violated defendant's constitutional privilege by failing to give his proposed instruction No. 5; (20) the court erred in failing to give defendant's proposed instruction No. 14 which he asserts is required by Penal Code section 1110 as larceny by trick and device is obtaining property by false pretenses; (21) defendant was convicted upon false and perjured testimony and evidence as a result of conspiracy by executive and judicial officers of the state; (22) state officers conspired to prevent the release of defendant on bail and to hinder the preparation of his defense; (23) the court erred in refusing to grant to defendant credit for the time spent in jail prior to sentence, thus violating the Fourteenth Amendment.

[1] Section 484 of the Penal Code provides: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of * * * personal property, * * * is guilty of theft." It has been held constitutional in numerous cases. See People v. Robinson, 107 Cal.App. 211, 218, 290 P. 470; People v. Dunn, 40 Cal.App.2d 6, 17, 104 P.2d 119. Also see People v. Wiezel, 39 Cal.App.2d 657, 665, 104 P.2d 70; People v. Ilderton, 14 Cal.App.2d 647, 58 P.2d 986, where arguments similar to those made to this court were made against section 952 of the Penal Code regarding the manner of charging theft.

[2] As for appellant's second contention that procedure by information is not due process under the Fourteenth Amendment, and Article I, section 8, of the California Constitution, the contrary has been established in numerous cases. See Hurtado v. State of California, 110 U.S. 516, 4 S.Ct. 111, 292, 28 L.Ed. 232; People v. Raffington, 98 Cal.App.2d 455, 220 P.2d 967; People v. Sewell, 95 Cal.App.2d 850, 214 P.2d 113; In re Davis, 68 Cal.App.2d 798, 158 P.2d 36.

[3] Appellant's argument in support of his third point is that he should have been provided with counsel paid for by the supervisors of Napa County. The record shows that defendant first appeared by an able and experienced Napa attorney whom he first employed but declined to retain further. The court then furnished him with two other able attorneys, but Gerundo refused to accept them. He sought a writ of mandate in the trial court to compel the board of supervisors to provide funds for counsel, which petition was denied. He thereafter filed a similar petition in this court which was likewise denied. This court has therefore already passed upon point 3.

[4] Regarding the contention that the evidence at his preliminary hearing was insufficient, such record is not before us, so we cannot say whether or not it was sufficient, and must therefore presume that it was.

[5] Regarding the fifth assignment of error, defendant argues, as he does in other connections, that there was a valid existing contract of sale between him and the owners of the automobile which he is alleged to have stolen, and that he therefore had a right to the possession of the car and could not be accused of stealing his own property. There is ample evidence to the contrary. It shows that Smith and Palzis, a corporation in Napa, owned a used car lot. On Monday, April 17, 1950, defendant visited that car lot and stated to the attendant that he wanted to buy a certain Hudson car there exhibited. The salesman gave him a price of $900 and defendant stated that he would buy the car if his wife, in San Francisco, approved; and he requested permission to take the car, promising to return it the following Wednesday. Defendant was referred to the head office of the corporation where he signed an agreement to purchase, which described the car, gave the total price as $939, and provided for a down payment of $339, in cash, the balance to be paid in designated monthly installments. There was written upon this instrument: "This deal to be completed on wife's Okeh—Wed. A.M. Otherwise this contract void." It also contained the provision: "This contract shall not become binding upon the seller unless and until the same shall have

been accepted in writing signed by Smith & Palzis, Inc."

Mr. Smith testified that the foregoing was merely a "work sheet", that a conditional sales contract was to be executed thereafter when the car was returned the following Wednesday and the down payment made. Gerundo took the car but did not return it on Wednesday or at all, never executed a conditional sales contract or made any payment whatsoever; and no communication from him was ever thereafter received by Smith and Palzis or either of them. There is evidence that Gerundo had the car in his possession for some eight and one-half months and that, after both he and the car had been sought for many months, the car was finally found in Berkeley in front of the place where defendant, under the name of Nathan, had rented a room, and that it then bore the license plates of another car which had been stolen; also there had been an alteration of the motor number, a 3 having been changed to an 8. A Mrs. Bledsoe, who testified that defendant had rented a room in her house, said that she had seen defendant drive the car, and that, after it had been taken away by the police in defendant's absence, defendant asked her what had become of *his* car. He then departed and was not located until he was arrested some days later in Berkeley where he gave his name as Nathan.

[6] Under the foregoing circumstances it is futile for defendant to argue that he was deprived of property without due process. He argues, however, that there was no evidence that he took the car by false pretenses; but this assumes that such was the charge against him and that his possession of the car was pursuant to a valid contract of sale. The charge against defendant was that he "* * * did wilfully, unlawfully and feloniously take the property of Don Smith and Peter Palzis, to-wit: a 1946 Hudson automobile then and there of the reasonable value of $900.00 (Nine Hundred Dollars) in violation of section 484 of the Penal Code of the State of California." Furthermore, obtaining property by fraud and false pretenses is only one of the several crimes now included within section 484 and defined as "theft"; and in section 952 of the Penal Code, it is provided that "In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another"; and as for appellant's argument that there was a valid contract of sale of the car to him, the evidence is to the contrary, to wit, that he took the car purportedly to show to his wife for her determination as to whether it would be purchased, that he was to return the same with her decision the following Wednesday, and that, if he did purchase it, he would make a down payment of $339 and sign a conditional sale contract.

As for appellant's points 7 to 11, inclusive, these are all based upon defendant's erroneous contention that he had a contract of sale and therefore had title to the car, a contention not supported by the evidence.

[7] Regarding the charge of prejudicial misconduct by the district attorney in not allowing him access to his papers which he says he wanted for the purpose of showing that he "had suffered from a serious nervous breakdown about a year before and was still feeling the effects," appellant deals at some length with his complaint in this connection; but the record shows that during the trial he was given access to all of the papers which were existent, many of which were not even in the possession of the district attorney; and he admitted that he had obtained all the information he needed from them. Nowhere does the record disclose an instance where he was prevented from examining any paper in the hands of the court or the district attorney. All of his requests were complied with. As for the alleged misstatements of the district attorney in his argument to the jury, the defendant failed to object to them or to assign them as misconduct or to request the court to admonish the jury to disregard them. They are, therefore, not reviewable on appeal. People v. Sampsell, 34 Cal.2d 757, 763, 214 P.2d 813; People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881. Furthermore, we do not find that any statements of the district attorney were made in bad faith, were unjustified, or resulted in injury or injustice to appellant.

[8, 9] Regarding appellant's 13th assignment of error—the refusal of the trial court to give his proposed instruction No. 7—said instruction dealt with the "crime of obtaining property by false pretenses with intent to defraud," and concluded with the statement: "If you find from the evidence that defendant obtained possession of the automobile in question with the consent of the owner as the result of a contract of sale in which defendant did not make any false representations of a past or present fact, then you must acquit him of the charge and bring in a verdict of not guilty." Appellant argues that the charge against him was obtaining property by false pretenses and that there was no proof of same, and he again asserts that he had a right to possession of the car because of the contract which he signed, and that by refusing the foregoing instruction the court took from the jury the only issue before them, plainly an erroneous assertion. The proposed instruction singled out but one element of the offense with which defendant was charged. In People v. Nor Woods, 37 Cal.2d 584, 587, 233 P.2d 897, defendant was charged with grand theft. He contended that the information was defective in failing to specify the kind of grand theft with which he was charged; but the court quoted from Penal Code section 952, that it was sufficient to allege that the defendant took the property of another, and stated that there was no error in failing to instruct the jury that they must agree upon the method by which the theft was committed; that defendant could be found guity of theft by one means or another and that it was immaterial whether or not they agreed as to the technical pigeonhole into which the theft fell. On his motion for a new trial in this case defendant urged this point, but the court stated that there was no evidence of false pretenses, wherefore no instruction regarding them was needed.

[10] In point 14 appellant asserts that the trial court allowed the jury to determine the legal and binding character of the writing which defendant signed when he took possession of the car to show to his wife, and in which writing he agreed to return it on the following Wednesday. He asserts that: "The failure to instruct the jury that the contract by which defendant claimed title to the automobile was a legal and binding instrument in which all property rights except bare title, were in the defendant and that he could not be convicted of 'theft' of his own property and therefore they should acquit the defendant, was a prejudicial action conviction against the defendant, and defendant was thereby denied due process." Appellant produced no authority for the somewhat confused argument contained in his brief. He does not refer to any instruction proposed by him which set forth his theory, and it was proper for the court to submit to the jury the question whether defendant had complied with the terms of the writing signed, which on its face limited his right of possession to the following Wednesday and until he had signed a conditional sales contract and made the down payment of $339, and to determine from the evidence what his intent was in failing to return the car, to pay anything therefor, etc. See People v. Norris, 99 Cal.App.2d 658, 661, 222 P.2d 283; People v. Applegate, 91 Cal.App.2d 163, 175, 204 P.2d 689; People v. Eiseman, 78 Cal.App. 223, 248 P. 716; 15 Cal.Jur., sec. 12, pp. 907–908

[11] Appellant's point 15 is that the trial court erred in permitting parol evidence regarding the reaching of other agreements not in the written contract. He does not state what these other agreements were, but apparently attempts to justify his failure to return the car. We find no merit in this point. Whether or not he furnished sufficient excuse was a matter of fact for the jury to determine, which it resolved against him on ample evidence to support its verdict.

In his 16th assignment of error appellant complains that the trial court made prejudicial statements before the jury, did not admonish it to disregard stricken testimony, and interfered with the conduct of defendant's case. He does not point out just when these matters occurred, and we are satisfied from a reading of the record that such general criticisms by appellant are unjustified; that the trial court extended great latitude to defendant and was in all respects fair and even generous to him.

The 18th assignment of error is that the trial court erred in not giving defendant's proposed instruction that theft is the wrongful or fraudulent taking or carrying away of the personal goods of another without a "claim" of right, and concluding with: "If you find from the law and the evidence that the defendant obtained possession of the automobile in question with the consent of the owner or that he had a bona fide claim of right in the said automobile then you must acquit him of the charge by bringing in a verdict of not guilty." No authority is cited by defendant in support of his argument that he could not have been guilty of theft because he asserted a "claim" of right. The court instructed the jury: "When one receives the possession of property lawfully by virtue of the fact that it is entrusted to him, and thereafter he violates his trust and fraudulently converts the property to his own use or to a use not authorized by the owner, his theft is called embezzlement." The law stated in that instruction was set forth in People v. Cannon, 77 Cal.App.2d 678, 689, 176 P.2d 409.

[12] Point 19 relied upon by appellant is that the court "violated the defendant's constitutional privilege" by failing to give his proposed instruction No. 5. That instruction was long, complicated and argumentative. Without setting it forth here, it suffices to say that we are satisfied that the giving of same would only have tended to confuse the jury, and that its refusal was not error.

Point 20 is that the court erred in failing to give the defendant's proposed instruction embodying Penal Code section 1110 which requires that "upon a trial for false pretenses" corroboration must be present to justify conviction. Here again appellant adverts to his claim that the charge against him was obtaining property by false pretenses, and he argues that Smith's testimony as to the facts of the case required corroboration; but section 1110 excludes the necessity for corroborative testimony when a writing is signed by a defendant as is the case here. The section has no application to the facts shown by the record.

[13, 14] Point 21 contains a charge that defendant was convicted upon false and perjured testimony as a result of a conspiracy of executive and judicial officers contrary to the Fourteenth Amendment of the United States Constitution. He bases this upon alleged discrepancies in testimony of certain officers. Such discrepancies are not unusual in a trial, and they furnish no basis for a charge of conspiracy among such witnesses or on the part of the prosecution; in fact, they tend to negative such a conspiracy. No authority is cited by appellant to support this contention. Discrepancies were for the jury's consideration and are not for an appellate court.

[15] Point 22 contains a charge that there was a conspiracy by state officers to prevent his release on bail and to hinder the preparation of his defense. The release of defendant on bail was a matter resting in the discretion of the trial court and it has nothing to do with the defendant's conviction. He had three months within which to prepare his defense, and, as the record shows, not only refused the assistance of counsel of his own choosing, but refused to accept the assistance of two attorneys appointed by the court, but insisted he would represent himself unless the county supervisors would agree to pay for counsel for him.

[16] Point 23 refers to the refusal of the trial court to consider the time defendant had already spent in jail in fixing the length of the jail sentence imposed as a condition of probation granted to defendant, which condition was that he serve one year in the county jail. This matter was one for the discretion of the trial court; it indicates no abuse of discretion and is not reviewable here. Defendant was under no obligation to accept probation under the terms granted.

We find no reversible error, wherefore the judgment and order denying a new trial are affirmed.

VAN DYKE, J., and SCHOTTKY, Justice pro tem., concur.

112 Cal.App.2d 776

GRASSLANDS WATER ASS'N, Inc. v. LUCKY LEVEN LAND & CATTLE CO.

Civ. 8051.

District Court of Appeal, Third District, California.

Aug. 21, 1952.

Action by Grasslands Water Association, Inc., against Lucky Leven Land and Cattle Co., for assessment levied by plaintiff against defendant after defendant had attempted to surrender its stock in manner which did not comply with plaintiff's by-laws. The Superior Court, Merced County, R. R. Sischo, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that evidence was not sufficient to establish waiver of by-law requirement or estoppel preventing assertion thereof.

Judgment reversed.

1. Principal and Agent ⚷125, 150(1)

Whatever the title by which he is designated, within scope of his authority, an agent's acts or statements are in legal effect equal to those of the principal, but beyond it, they have no operation as against the principal save as a basis for ratification or estoppel.

2. Principal and Agent ⚷99

The agent's authority comprises all powers, whether express, implied, or ostensible, with which he is vested by the principal, but no more, since in the last analysis it rests upon the principal's consent.

3. Estoppel ⚷52

"Estoppel" arises when one party to a transaction intentionally leads another to believe in a particular thing as being true under such circumstances as to make it inequitable thereafter for such party to defeat a justifiable reliance on the thing believed to be true.

See publication Words and Phrases, for other judicial constructions and definitions of "Estoppel".

4. Estoppel ⚷85

Waters and Water Courses ⚷234

Where water corporation's by-laws enabled stockholders to withdraw from corporation by surrendering stock, endorsed, to corporation's secretary and notifying corporation in writing of intent to withdraw at least 30 days before end of any calendar year, telephone conversation informing corporation's engineer of such intent and requesting information on procedure to be followed and engineer's advice to wait until following January did not constitute waiver by corporation of by-laws requirements or estoppel preventing assertion thereof on part of corporation which had not given actual or ostensible authority to engineer to speak for corporation in respect to withdrawal.

◆

Claude L. Rowe, Fresno, for appellant.

Treadwell & Kane, Merced, for respondent.

VAN DYKE, Justice.

Appellant, as plaintiff in the trial court, brought this action to recover from the respondent the sum of $884. The complaint alleged that respondent was indebted to appellant on account of an assessment against the respondent as a stockholder of the appellant corporation, made pursuant to the appellant's by-laws.

It appears that appellant is a nonprofit corporation organized in 1944 principally for the purpose of supplying water to its members who are owners of lands served by appellant. Its by-laws describe the exterior boundaries of the lands which may be served by it and provide that the cost of such service shall be borne by all the stockholders in the proportion that the number of shares of stock owned by each bears to the total outstanding stock of the corporation. The by-laws provide for the levying of assessments as one of the permitted means whereby the necessary funds to pay for the service rendered by the corporation may be raised. Acting under this authority, the corporation in February and July of 1949 levied assessments of $1 per acre upon the lands of its stockholders, including respondent. Respondent refused to pay and this action followed.

Basically, respondent's defense was that it was not a stockholder so as to be liable for the assessments purportedly levied against it. Admittedly, respondent was a stockholder through 1948, but it claims to have withdrawn from the corporation by substantial compliance with the conditions for such withdrawal provided by the bylaws; that any defect in its compliance was waived by appellant and that appellant by its conduct was estopped to claim that respondent had not effectively withdrawn so as to be beyond the reach of assessment. Upon the subject of withdrawal the bylaws provided that all stockholders might cease to become such by surrendering their stock, properly endorsed, to the secretary of the corporation and notifying the corporation in writing at least 30 days before December 31st of any calendar year, of their desire to forfeit their membership in the corporation. There were other conditions, but no claim is made by either party to this action that they were not met. The trial court found in accordance with the contentions of respondent, and from the judgment in its favor this appeal was taken.

It is not claimed by respondent that it either notified appellant in writing of its withdrawal or surrendered its stock to appellant's secretary, until some time during January of 1949, and it therefore of necessity admits that it did not literally comply with the provisions of the by-laws regarding withdrawal. It relies upon the following facts to sustain the judgment rendered in its favor. During 1949 respondent drilled a well upon its lands from which it planned to furnish water to its own acreage, and upon the completion and testing of the well intended to withdraw from appellant corporation. Its president testified that about November 28th he began attempting to get in touch with the general manager of appellant, who was also its secretary and treasurer, concerning respondent's withdrawal. He was unable to reach him but on December 1st he again called the office of appellant on the telephone and was answered by an employee of appellant, its engineer. Respondent's president told this man that his corporation had drilled its well and wanted to surrender its stock and asked that he be told how to go about it. This question was not answered. On the contrary, the engineer replied "You are all paid up for '48, why don't you wait until January of '49, after the Directors' meeting, and * * * maybe you can make it so that you can still hang onto your stock." Respondent's president, aware that they had paid a sum of money per share for the stock when originally purchased, testified that he thereupon waited until the 10th of January. He then learned from a newspaper that although the meeting had been held it had adjourned without any action because a quorum was not present. He thereupon sent in the certificate of stock endorsed in blank with a note to the engineer with whom he had talked, saying "as per our telephone conversation, I am herewith enclosing the Lucky Leven Land and Cattle Company stock for cancellation." On February 25th following the stock was returned by appellant, the letter of transmittal drawing the respondent's attention to the provisions of the by-laws governing withdrawal. In the meantime, on February 15th, the appellant's board of directors declared the first assessment of $1 per acre against the respondent and from that time on the appellant has asserted and respondent has denied the respondent's continued liability through 1949 for its share of the cost of operation of appellant, measured by the two assessments.

We can find no support in the foregoing for the judgment rendered. No claim is made, nor could it be made upon this record, that the provisions of the by-laws governing withdrawal of members were in any way unreasonable or unjust. Respondent had given its written consent thereto. It appears that a reasonable regard for the proper administration of the affairs of appellant rendered the particular by-law appropriate. The secretary-manager of appellant testified, and it is nowhere denied, that knowledge of the amount of acreage to be served was needed by appellant well in advance of the time when service was to be made in order that it might make definite and necessary arrangements for the delivery of the required quantity of water, which water it generally purchased under contract from the Federal Bureau of Reclamation. The judgment in favor of respondent then must rest upon an affirmative showing that by reason of the single conversation held between respondent's president and appellant's employee the plain provisions of the by-laws governing withdrawal were waived, or that in some manner what was said by the employee to respondent's president at that time estops appellant from contending that by its failure to comply with the by-laws respondent remained a member through 1949, so far as liability for appellant's corporate expenses for that period are concerned.

[1, 2] We think it unnecessary to determine how or in what manner or by what authority the pertinent by-laws of appellant in this case might be waived, for certainly it must be said that it could not be waived by any agent of appellant unless that agent had actual or ostensible authority to speak and act for the corporation upon the subject of withdrawal by respondent. "Whatever the title by which he is designated, within the scope of his authority an agent's acts or statements are in legal effect equivalent to those of the principal, but beyond it they have no operation as against the principal save as a basis for ratification or estoppel."; 2 C.J.S., Agency, § 91, p. 1182. "The agent's authority comprises all powers, whether express, implied, or ostensible, with which he is vested by the principal, but no more, since in the last analysis it rests upon the principal's consent." 2 C.J.S., Agency, § 91, p. 1184.

[3, 4] There is nothing in the title of "Engineer" nor in the testimony found in this record from which there can be drawn any inference that the appellant's engineer actually possessed any authority whatever to treat for the corporation in the matter of withdrawal of its members; nor is there anything in this record from which it can be inferred that by the course of appellant's dealings with respondent any such authority had been ostensibly conferred. The mere fact that, when respondent's president attempted to contact the appellant's general manager and secretary by calling appellant's office on the telephone, the call was answered by the engineer, no more warrants an inference that because the engineer was there and answered the telephone he was thereby in some way held out as capable of dealing with respondent in respect of its inquiry than would be the case had the telephone been answered by a typist employed by appellant or a janitor likewise employed who happened to be in the office cleaning the floors. What we have said concerning waiver applies equally to the claim of estoppel, for estoppel arises when one party to a transaction intentionally leads another to believe in a particular thing as being true under such circumstances as to make it inequitable thereafter for such party to defeat a justifiable reliance upon the thing believed to be true. Nothing of the sort is made to appear in this record for, as we have said, all that occurred between respondent's president and appellant's engineer was upon a subject matter which respondent's president must have known was entirely without the authority of the engineer.

The result is that the trial court's findings as to waiver and estoppel are without support in the evidence; and the judgment appealed from must be by reason thereof, and it is hereby, reversed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concur.

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112 Cal.App.2d 781

COMBS v. CALIFORNIA COTTON MILLS CO.

No. 15120.

District Court of Appeal, First District,
Division 1, California.
Aug. 22, 1952.

As Corrected Sept. 3, 1952.

Action by E. T. Combs against California Cotton Mills Company, for reasonable value of services rendered. The Superior Court, County of Alameda, A. T. Shine, J., rendered judgment awarding plaintiff $10,000, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence showed express contract between employee and employer's general manager for preparation by employee of wage and bonus incentive plan and for payment of extra compensation to employee for the extra work involved.

Affirmed.

1. Master and Servant 🔑80(9)

In action by employee for reasonable value of services rendered in preparing wage and bonus incentive plan for employer, evidence sustained finding that three work sheets which were printed forms upon which employee made certain entries on December 6, 1945, were printed prior to use by employee on date alleged.

2. Master and Servant 🔑80(13)

Even if employee, in action for reasonable value of services rendered in preparing wage and bonus incentive plan for employer, had failed to prove that three work sheets which were printed forms upon which employee made certain entries on December 6, 1945, were printed prior to use by employee on date alleged, it would not follow as matter of law that all other evidence favorable to employee as to volume of work done by him as reflected by the work sheets should be rejected but it would be for trier of facts to determine how much of employee's other testimony was true and how much untrue.

3. Master and Servant 🔑80(6)

In action by employee for reasonable value of services rendered in preparing wage and bonus incentive plan for employer, trial court properly placed burden on employee to prove that printed work sheets were printed prior to use by employee on date alleged.

4. Master and Servant 🔑80(10)

In action by employee for reasonable value of services rendered in preparing wage and bonus incentive plan for employer in addition to employee's regular work, evidence showed express contract between employee and employer's general manager to pay employee compensation for the extra work in addition to employee's regular salary.

5. Master and Servant 🔑72

Where agreement for extra services of superintendent in preparing wage and bonus incentive plan for employer did not fix extra compensation, superintendent was entitled to reasonable worth of the wage and bonus incentive plan. Civ.Code, § 1611.

6. Principal and Agent 🔑123(8)

In action by employee for reasonable value of services rendered in preparing wage and bonus incentive plan for employer, evidence showed that defendant's general manager had authority to make contract with employee for preparation of wage and bonus incentive plan for employer.

7. Master and Servant 🔑80(10)

In action by employee for reasonable value of services rendered in preparing wage and bonus incentive plan for employer, evidence sustained finding that employee had not been compensated for his services, notwithstanding periodic salary increases and payment of 3 months salary when employee left defendant's employ.

Marshall P. Madison, Francis N. Marshall, James Michael, Thomas E. Haven, San Francisco, for appellant.

Leroy R. Goodrich, Oakland, for respondent.

FRED B. WOOD, Justice.

Defendant has appealed from a judgment awarding plaintiff $10,000 as the reasonable value of his services in preparing for defendant a wage and bonus incentive plan covering the work of all of its employees in the several departments of its textile plant.

The only issues presented by defendant upon this appeal pertain to the sufficiency of the evidence to support the findings of fact.

The trial court found: immediately prior to June, 1945, plaintiff had for a number of years been employed by defendant as superintendent of its textile plant, an employment which continued without interruption until September, 1946. About June 15, 1945, defendant, acting by and through its general manager, Burton A. Olsen, orally asked plaintiff to undertake, wholly outside of the scope of his regular employment as superintendent and on plaintiff's own time and entirely outside of his regular hours of work, the preparation of a comprehensive and adequate wage and bonus incentive plan covering the work of all of its employees in the several departments of its textile plant and under the varying and intricate types and methods of handling and manufacture of its products in the plant, and orally agreed to pay plaintiff the reasonable value of his services in the preparation of such plan for the defendant. In accordance with this agreement plaintiff immediately began the preparation of such a plan which was completed by plaintiff in stages for the several departments of defendant's business and was installed for each department as completed, beginning with the card room of defendant's plant about September 30, 1945. The entire plan was completed and installed in all departments on or about April 30, 1946. It was satisfactory to and accepted by defendant and defendant's employees and was thereafter used, maintained and operated by defendant until May, 1947. It involved a system for evaluating the production or services of each individual worker in each department depending in its application to each individual upon the nature of the work of the department and of the individual, the materials used and the textiles produced, and upon the varying rates of pay for the workers in different tasks and different conditions. It provided for a minimum pay for a fixed standard of production and a bonus for excess production for each individual worker. In accordance with the agreement, plaintiff prepared and produced the plan by devoting thereto his own time outside of his regular hours and duties as superintendent of defendant's plant and outside of and in addition to the full performance of his duties as superintendent during the period from about June 15, 1945, to April 30, 1946. $10,000 is the reasonable value of the services so rendered by plaintiff.

Defendant concedes that "plaintiff did produce an incentive plan * * * comprising a sizable volume of figures and computations," that this "plan was completed piecemeal and was put into effect department by department as completed," and was used until May, 1947, when "the union finally and unconditionally rejected the plan and it was discarded." By these statements in its opening brief, defendant admits that plaintiff prepared an incentive plan which defendant installed and used until rejected by its employees.

Despite that admission defendant claims that plaintiff failed to prove that he performed the alleged contract. Plaintiff testified that the figures set forth in the plan as finally prepared and approved were based upon extensive studies of operations in each department of the plant, and a great number of calculations, in a study which he made extending from June 22, 1945, to April 30, 1946; that he worked on a regular schedule every night from 6 to 12, and sometimes later, Monday through Friday of each week; on Saturdays from 7 a. m. to 6 p. m. and at night; and on Sundays from 7:30 to 11:00. He did this in addition to adhering to his regular daily hours of work and fulfilling all his usual duties as superintendent, except for two weeks in November, when he made a trip east for the company to buy equipment, and two days at Christmas time. He stated the aggregate time devoted to the work was the equivalent of 279 days of 8 hours each. He estimated the value of the services rendered at $125 per day. Soon after completing the plan, he told defendant's manager he should get between $10,000 and $20,000; at that time he was willing, if the matter could be settled amicably, to settle for $10,000.

[1, 2] As an example, of the kind of studies he made, plaintiff introduced in evidence, as Exhibit B, three work sheets, printed forms upon which he made certain entries on December 6, 1945. After the cause had been submitted and the court had made an order that plaintiff was entitled to judgment in the sum of $10,000, defendant moved to reopen the case upon the ground claimed by it that Exhibit B was a fabrication and fraud upon the court. The case was reopened and evidence was adduced by the respective parties upon that issue. After consideration thereof the court again concluded that plaintiff was entitled to recover.

Defendant insists that the proof indisputably shows that Exhibit B could not have been made until after December, 1945, undoubtedly was fabricated by plaintiff, probably in 1948, when preparing for trial. This claim is predicated, principally, upon the similarity between the three sheets of Exhibit B and certain printed forms used by Dan River Mills, Incorporated, of Danville, Virginia, coupled with evidence tending to show that Dan River Mills had no such forms until after 1945, and the fact that plaintiff was in the employ of that company and made a time study there, in 1948, similar to that exemplified by Exhibit B. Defendant's expert witness, E. O. Heinrich, was of the opinion that the three sheets of Exhibit B were printed from the same plate as was defendant's Exhibit 31. There was testimony that the first printing from that plate occurred in May, 1947.

However, there was evidence that the forms used in Exhibit B were printed and in use at Dan River Mills in 1945. Henry W. Hopkins, Jr., testified that in the latter part of 1944 he entered the employ of Dan River Mills, took charge of its print shop and continued in that capacity until the end of January, 1946. During that time he printed forms for engineers who were conducting time and motion studies for the company, did so by the multilith process. During all of that period, 1943–46, a tabular form known as S–1130, such as appears in Exhibit B, was in existence and in use at Dan River. It was originally a hand-set form but the witness printed it on a multilith, making a negative of the earlier printed form. He also printed form S–1130–A in the spring of 1945 for the Standards Department of the Dan River Company. It was like form S–1130 but without the first three columns, to give a wider margin. That form became standard and more copies were printed. The witness identified another form in evidence as a later printing of S–1130–A. Plaintiff produced an expert witness, Dr. Paul L. Kirk of the University of California faculty, who made a detailed microscopic study of the several forms involved, noting their similarities and dissimilarities. He concluded that Exhibits B and 31 were not made from the same plate; also, that one of the sheets of Exhibit B represented a different printing and possibly a different plate than the other two sheets of that exhibit. He was of the opinion that the various errors and deviations in the various forms had been derived over a period of time from some older and common form.

Here we have a conflict in evidence which the trial court resolved in favor of the plaintiff. When refusing to make a specific finding as to the authenticity of Exhibit B, because not an ultimate fact, the trial judge said he had concluded that the testimony showed that Exhibit B was prepared at the time claimed by plaintiff. We see nothing incredible about that view of the testimony. Under these circumstances, a reviewing court cannot say as a matter of law that plaintiff failed to prove that he made the entries on Exhibit B at the time claimed by him. Even if there were a failure of proof in that regard, it would not follow as a matter of law that all of the other evidence favorable to plaintiff must be rejected. In such an event, it would be for the trier of the facts to determine how much of the other testimony of plaintiff was true and how much untrue. See Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 780, 117 P.2d 850, and cases cited.

[3] In this connection we note that defendant makes an assignment of error predicated upon a claim that the trial court imposed upon defendant the burden of disproving the authenticity of Exhibit B, instead of holding plaintiff to the burden of proving it. Such a claim is not supported by the record. During the discussion of proposed findings, defendant's counsel asked the judge: "If I understand your Honor correctly, the burden of proof with respect to Exhibit B, in your Honor's eyes, has been shifted to defendant in this case?" The court answered, "No."

[4, 5] Defendant contends that plaintiff failed to prove an express contract for extra compensation, claiming that the services in question were a part of his duties as superintendent and assistant general manager and that the evidence shows no contract to pay plaintiff anything in addition to his salary. Here again defendant invokes the evidence most favorable to it. Plaintiff testified that his duties did not embrace services of the kind involved in preparing the incentive plan. Plaintiff's successor as defendant's superintendent testified that normally the work of installing such a plan in a small plant, such as defendant's, would be done by the superintendent unless he is tied up and cannot spare the time. The evidence here indicates that plaintiff had been assigned several extra jobs which together with his work as superintendent fully occupied his working time. Also, it appears that Mr. Olsen, defendant's general manager, negotiated with independent engineering firms for the doing of this job before turning to plaintiff to get it done. Plaintiff testified that Olsen said they couldn't get anybody to do the work and Olsen asked plaintiff if he could do it, and plaintiff told him "no," because he had a full time job as it was and had taken on several extra jobs besides being superintendent. Later Olsen said maybe plaintiff could do it on his own time outside of the superintendent's hours. Plaintiff told him it could be done but would entail a lot of hard work and a lot of extra time. Asked if there was any discussion in that conversation as to whether or how he would be paid, plaintiff said, "No, there wasn't any question about how it was to be paid but he would treat me right if I would do the work and he would see that I would be given a satisfactory settlement" for the work that plaintiff would do outside of his regular hours; and that plaintiff agreed to do it. There is evidence that in December, 1945, Miller, chairman of defendant's board and a member of its management committee, told plaintiff that if the incentive plan was adopted and satisfactory, plaintiff would be paid for it. Plaintiff has now done the work. Defendant has accepted and installed the product. That leaves only the price or compensation to be ascertained. The parties have not specified it. The law supplies the means of measurement, declares it to be the "reasonable worth" of the product of plaintiff's services. "When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth." Civ.Code, § 1611. See also Hunter v. Sparling, 87 Cal.App.2d 711, 724–725, 197 P.2d 807.

[6] Defendant next contends there was no showing that Olsen, defendant's manager, had authority to make such a contract for defendant. It appeared that compensation of officers who were also members of the board of directors was fixed by defendant's board of directors; of other officers, by a committee consisting of Olsen, Miller and Hamilton. Plaintiff was not a member of the board of directors. There is evidence indicating that as superintendent plaintiff was not an "officer" of defendant, and that his added title of "assistant general manager" gave him no additional or different status. He worked under the direction of Olsen, and, in Olsen's absence, under the direction of Hamilton. It would also appear that the formulating of an incentive plan was not the function of an officer of defendant, but, as in this case, the subject of a special contract for the rendition of a technical service. Olsen arranged with Douglas Sterling Company and with Bennorth & Company to make preliminary studies concerning an incentive plan. Olsen testified that his duties as general manager had to do with the operation of the plant, the employment of the personnel and the direction of operations generally. In making the contract with plaintiff, Olsen was acting within the scope of his powers as general manager of defendant, in the absence of any proof to the contrary. See Marsh v. Arch Rib Truss Co., 56 Cal.App. 2d 811, 813, 133 P.2d 412, and cases cited in 6A Cal.Jur. 1155–1159, Corporations, § 656.

[7] Finally, defendant claims that various salary increases received by plaintiff compensated him for his services in formulating the incentive plan. A brief summary of salary increases will indicate sufficient support for the finding that plaintiff has not been paid. The following increases in

plaintiff's salary were more or less in line with salary increases given the other principal employees of defendant during the same period: In 1943, increased from $500 to $625 a month; to $675 in July, 1945; and to $833.32 in May, 1946. Oregon Flax Textiles, a subsidiary of defendant, paid him $200 from June 1, 1945, to September, 1946, for work done for the subsidiary, not for defendant. When he left defendant's employ in September, 1946, defendant paid him three months' salary, which plaintiff testified was separation pay, agreed upon when he entered the defendant's employ in 1937. We see no basis for disturbing the finding that no part of the $10,000 due plaintiff has been paid.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

112 Cal.App.2d 829

PEOPLE v. ANDERSON.

Cr. 2749.

District Court of Appeal, First District,
Division 2, California.
Aug. 25, 1952.

Defendant was convicted in Superior Court, City and County of San Francisco, William T. Sweigert, J., of unlawful possession of narcotics, and he appealed. The District Court of Appeal, Nourse, P. J., held that the evidence was sufficient to sustain the verdict.

Judgment affirmed.

Poisons 🔑9

Evidence sustained conviction for unlawful possession of narcotics. Health and Safety Code, § 11500.

Nathan Cohn, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant was tried to a jury on two counts—one charging a violation of section 11500, Health and Safety Code—possession of narcotics, the other charging transportation of same. The second count was dismissed on motion. A conviction was had on the first count and the appeal is from the judgment and from the order denying the motion for a new trial.

The appeal rests solely on the question of the sufficiency of the evidence. At about midnight of August 7, 1950, two police officers picked up an "informer" who volunteered to phone the defendant presumably for the purpose of purchasing narcotics. A few minutes later the defendant drove his car down Montgomery Street across Market Street to the side entrance to the Palace Hotel. There he was stopped by the informer and the two officers who took from his possession a package containing four glass vials and two loose tablets all of which when tested proved to contain morphine. One of the officers thereupon placed his initials on the package. He also wrote down the control numbers on the four vials —numbers required to be placed on the vial by a manufacturer of narcotics. A subsequent examination of the two loose tablets and of two of the four vials showed that they contained morphine. The arresting officer, after copying the manufacturer's numbers from the vials, placed them with the loose tablets in a sealed envelope and delivered them to the State Narcotic Chemist. The latter made a scientific examination and testified that the loose tablets and the two vials examined all contained morphine. These loose tablets and two of the sealed vials were received in evidence.

This evidence was sufficient to support the verdict. Appellant's attack is that the testimony of identification of the exhibits should not have been believed by the jury. That is not a question for a reviewing court.

The judgment and order are affirmed.

GOODELL and DOOLING, JJ., concur.

112 Cal.App.2d 871

PEOPLE v. WALTON.

Cr. 853.

District Court of Appeal, Fourth District, California.

Aug. 25, 1952.

Rehearing Denied Sept. 5, 1952.

Conviction in the Superior Court of Kings County, Clark Clement, J., of burglary of the first degree and assault with intent to commit rape, and from the judgment of conviction and order denying a new trial, defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evidence sustained conviction.

Order and judgment affirmed.

1. Criminal Law 🔑553

Testimony is not inherently improbable unless it appears that the things related could not have occurred.

2. Criminal Law 🔑260(11)

Inconsistencies and contradictions in the testimony of a witness present questions of fact for trial court, where portions of the testimony may be believed and other portions disbelieved, and on appeal, the portion which supports the judgment must be accepted.

3. Burglary 🔑41(1)

Rape 🔑53(2)

Evidence sustained conviction of burglary of the first degree and assault with intent to commit rape.

4. Witnesses 🔑280, 282½

Insisting that repetition and purely argumentative questions should be discontinued did not constitute improper restriction on cross-examination of complaining witness.

5. Criminal Law 🔑1119(4)

Record on appeal from conviction of first degree burglary and assault with intent to commit rape failed to disclose any misconduct of district attorney.

◆

William M. Martin, Hanford, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., A. Hugo Pearson, Jr., Dist. Atty., Hanford, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with burglary and with rape. A jury found him guilty of burglary of the first degree, and of assault with intent to commit rape. He has appealed from an order denying his motion for a new trial and from the judgment.

The complaining witness, Mrs. Mustin, lived at the intersection of two roads about ten miles west of Lemoore. Her husband was employed as an irrigator in a field some distance away, working nights from 7 p. m. to 7 a. m. Her husband's cousin, with his family, lived in a house about 100 yards to the rear of complainant's home.

On the night of Monday, July 16, 1951, Mrs. Mustin was in bed with her three children, aged 3 years, 2 years, and 4 months, respectively. The baby lay with its head beside the mother and the other two children were at the foot of the bed. About 3 a. m. Mrs. Mustin was awakened and found a man standing beside the bed with a knife in his hand. This man, threatening to kill her and choking her, overcame her struggles and raped her. During the struggle the older child and the baby woke up and cried, but the 2-year old did not awaken. The man was barefooted and left through a window on the west side of the house, going out to a car which was parked on the road in front. It was a clear moonlight night and there were no curtains on the windows. Mrs. Mustin was able to see her assailant in the room, and after he left she saw him go by her window and out to the car. She saw him get in the car and drive away without turning on its lights. She saw that the car was one which "sloped off the back", and she testified that it started off with a roar as if it had one of those "smitties" on it. She immediately went to the home of her husband's cousin about 100 yards away, arriving there about 3:15 a. m. She had bruises on both sides of her neck. He took her to town where they reported to the officers about 4 a. m.

The next morning the officers found bare foot-prints leading from the point where the car had been parked to a window at the southeast corner of complainant's home, which appeared to be the point of entry since that window had a defective screen on it. These footprints indicated that the person making them had been walking on tiptoe. Another line of footprints, indicating that the person had walked flat-footed, led from the west window of the house, where the attacker had emerged, back to the point where the car had been parked. The officers took a plaster impression of some of the footprints.

The defendant was arrested on July 25. Shortly thereafter he told a deputy district attorney that on the night of Monday, July 16 he had attended a double-header baseball game at Lemoore with a woman friend; that later that evening he went out into the country, pulled his car off the road and went to sleep, taking off his shoes; that he could not remember just where he slept; and that he then went on to his home at Kerman, 40 miles west of Lemoore, arriving there just before dawn on Tuesday morning. The defendant admitted that he had visited these premises about 6:15 or 6:30 a. m. on Monday, July 16. He stated that he did not have his shoes on when he first got out of his automobile, but claimed that he went back and put his shoes on when he saw some one was living in the house. At that time, he went past the complainant's house and to the house occupied by the cousin. When the cousin came out and asked what he wanted, he asked who owned the car standing at the complainant's home. The cousin replied that it belonged to his cousin, who was working nights, and that he would be off work at 7 a. m., if he wanted to see him. The defendant did not wait to see him. On Thursday, July 19, the defendant drove to Willitts, some 300 miles away, where he traded his 1949 car for a 1940 model of the same make. As he was returning home the next Sunday the 1940 car broke down near Sacramento, and he hitchhiked home and returned for the car later.

At the trial six months later, the defendant testified that he had gone to a show in Kerman on the night of Monday, July 16, and that he had checked up on what the show was that night "so I know by that it was Monday night I seen the show." He also stated that he did not know where he was that night; that "I might have been in the show in Kerman"; and that "I didn't know I was going to be picked up on this mess, I wouldn't have been picked up without an alibi."

The appellant first contends that the evidence is insufficient to support the judgment. It is argued that the story of the attack told by Mrs. Mustin is inherently improbable, and that it could not have occurred in the manner and with the struggle she described, especially with three children in the bed. It is further contended that he was not sufficiently identified as the assailant, and that the evidence as a whole proves that he was not the man in question, if it be assumed that an attack occurred.

[1–3] The argument that the story of Mrs. Mustin is inherently improbable is based on portions of her story and on conflicting inferences which it is claimed might be drawn. Mrs. Mustin was an uneducated woman and, in view of her natural fright at the time, it is not surprising that some inconsistencies appear and that she did not observe some things which might well have been observed at a calmer moment. Testimony is not inherently improbable unless it appears that the things related could not have occurred. Inconsistencies and contradictions present questions of fact for the trial court, where portions of the testimony may be believed and other portions disbelieved. On appeal, the portion which supports the judgment must be accepted. People v. Thomas, 103 Cal.App.2d 669, 229 P. 2d 836. The evidence is entirely sufficient in this regard.

There is ample evidence supporting the jury's finding with respect to the identity of the appellant as the one who committed these offenses. Mrs. Mustin identified his picture and identified his voice before she saw him. She then picked him from a line-up of several men with somewhat similar general appearance. She positively identified him at the preliminary and at the trial. This result is in no way affected by the fact that at one time she tentatively identified the appellant's brother, and said that his voice "sounds a lot like it." The jury had an opportunity to observe the brother, and no more than a conflict appears at best. The description given by Mrs. Mustin of the looks and sound of appellant's car were shown to be applicable to the car he was then driving. Disregarding conflicts, the evidence indicates that the tire tracks, found where the car was parked in front of the complainant's house, were made by the appellant's car. One smooth tire had been changed from the front to the rear, but the appellant's mother testified that he changed a rear tire on his car on July 17. The fact that the appellant traveled a long distance and traded his car for a poorer car shortly after the occurrence, with the explanation he gave therefor, is extremely suggestive. The footprints leading from where his car was parked to one window of the house and from another window back to the car strongly support the jury's verdict. The evidence, while conflicting, is such as to leave little room for doubt that these tracks were made by the appellant. The appellant admitted that he slept for a time that night in what must have been this general area, and that he took his shoes off. He admittedly went to these premises the morning before, he observed that the house was occupied and had an opportunity to see the woman on the bed, and he was told that the man living there worked nights and would not return until after 7 a. m. His story of why he went to these houses, and what he did there, would naturally tax the credulity of any juror. It is perfectly apparent that he did not tell the truth on the witness stand, and this fact must have been obvious to the jury. The conflicting evidence and inferences relied upon by the appellant must be disregarded. We have read the entire record, and the evidence amply sustains the judgment.

[4] It is next contended that the court erred in restricting appellant's cross-examination of Mrs. Mustin. This contention is without merit. The cross-examination of her takes up more than 85 pages of the transcript, and all of the matters complained of were fully brought out in evidence. The court was too patient in this regard and, at the times complained of, was merely insisting that repetition and purely argumentative questions should be discontinued.

[5] It is finally contended that the district attorney was guilty of prejudicial misconduct. This contention is without merit. The matters referred to are trivial and disclose no misconduct, prejudicial or otherwise.

The order and judgment are affirmed.

MUSSELL, J., concurs.

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112 Cal.App.2d 859

DE ROODE v. PLACER COUNTY.

Civ. 8145.

District Court of Appeal, Third District, California.

Aug. 25, 1952.

Action by Trimble De Roode and Trimble DeRoode, as executor of the last will and testament of Kate T. Woolsey, deceased, against the County of Placer, wherein original complaint was filed March 6, 1946 and third amended complaint was filed February 24, 1951. The Superior Court, Placer County, James Snell, J., granted defendant's motion, filed March 6, 1951, to dismiss for failure to prosecute, and plaintiff appealed. The District Court of Appeal, Schottky, J. pro tem., held that under the Code of Civil Procedure, dismissal of the action was mandatory.

Judgment affirmed.

1. Dismissal and Nonsuit 🔑60(2)

Under statutory provision for dismissal of any suit not brought to trial within five years after plaintiff filed action, the statutory period commences to run from the filing of the original complaint and not from the filing of any subsequent amended complaint. Code Civ. Proc. § 583.

2. Dismissal and Nonsuit ⚷60(2)

Where plaintiff filed complaint on March 6, 1946, and filed third amended complaint on February 24, 1951, the granting of defendant's motion, filed March 6, 1951, to dismiss for failure to prosecute, was mandatory. Code Civ.Proc. § 583.

◆

Albert L. Johnson, Nevada City, for appellant.

Al. B. Broyer, Dist. Atty., Auburn, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from an order dismissing an action for failure to bring it to trial within five years.

The record shows that on March 6, 1946, plaintiff and appellant filed a complaint in Nevada County against the County of Placer to recover damages alleged to have been caused to a tunnel and water supply by the removal of bedrock.

On April 13, 1946 the County of Placer filed a demurrer and a notice of motion for change of place of trial from the County of Nevada to the County of Placer. On April 19, 1946 the motion for change of place of trial was granted. On June 26, 1946 plaintiff filed his first amended complaint for same relief. On July 6, 1946 the county demurred to the amended complaint. On September 18, 1946 the demurrer to the first amended complaint was sustained and ten days granted to amend. On November 8, 1946 plaintiff filed his second amended complaint for the same relief. On November 18, 1946 the county again demurred to the second amended complaint and also gave notice of a motion to strike portions of the second amended complaint. On April 2, 1947 the court again sustained the demurrer and granted plaintiff "15 days, after notice, within which to file an amended complaint." On February 24, 1951, nearly four years after the demurrer was sustained to the second amended complaint, plaintiff, by his present attorney, filed a third amended complaint. On March 6, 1951 the county demurred to the third amended complaint, gave notice of motion to strike and to dismiss the action for failure to prosecute. On August 7, 1951 the motion to dismiss was granted, and this appeal followed.

The portion of section 583 of the Code of Civil Procedure applicable to the instant appeal reads as follows:

> "* * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended and except where it be shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be a part of said five-year period."

The record shows that the action was not brought to trial within the five-year period, and it is not contended that there was any stipulation extending time.

Appellant argues that "the five year period prescribed by Code of Civil Procedure Section 583 begins to date from the filing of the last answer or pleading", but the decisions cited by appellant deal with the section as it read prior to the 1933 amendment. Prior to that amendment the five years began with the date of the filing of the last answer rather than with the date of the filing of the action.

Appellant contends also that the five year period was suspended by the order sustaining the demurrer to the second amended complaint, which order states that plaintiff is "allowed fifteen days after notice within which to amend the Second Amended Complaint." That order was made May 6, 1947 and appellant argues that since he was given no notice of the order, and did not file his third amended complaint until February 24, 1951, nearly four years after the order was made, that the nearly four years should be deducted from the five-year period, and that the trial court should have exercised its discretion to deny the motions to dismiss.

The difficulty with appellant's argument is that it overlooks the obvious purpose of the 1933 amendment which was to expedite the disposition of litigation and to do away with the long delays that had been caused by the former language which gave a plaintiff five years from the date of the last answer in which to bring an action to trial. The instant case shows the wisdom of the 1933 amendment. Here the record shows that the demurrer to appellant's second amended complaint was sustained on April 2, 1947, and yet appellant waited nearly four years before he filed his third amended complaint. Appellant knew he had filed his original complaint on April 13, 1946, and he knew that a demurrer to his second amended complaint was filed on November 18, 1946, and he knew what the statute provided. The portion of said section 583 here involved would be of little effect if a mandatory dismissal were not required in the instant case.

We need refer to only a few of the many authorities that could be cited.

In Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, at page 124, 47 P.2d 716, at page 718, the court said:

> "Respondents advance the further argument that by stipulation of the parties, an amended complaint was filed March 16, 1933, which extended the time of mandatory dismissal to five years after its filing. The case of Mercantile Investment Co. v. Superior Court, 218 Cal. 770, 25 P.2d 12, is cited in this connection. That case arose under the former statute, the period dating from the filing of the defendant's answer. The plaintiff filed an amended complaint, and it was stipulated that the answers already on file should be deemed answers to the amended complaint. We held that the period began to run on that date, which was considered to be the date of defendants' last answers. This interpretation of the old statute, making the period run from the last *pleading* of the defendant, was permissible under the language of the section, namely, 'within five years after the defendant has filed his *answer*.' But the present law reads: 'Within five years after the plaintiff has filed his *action*.' The action is commenced when the complaint is filed. Code Civ.Proc. §§ 350, 405. To sustain respondents' view, we should have to restate the section so as to substitute for the word 'action' the words 'last amended complaint.' This would not be a construction of the statute, but a revision thereof, in direct conflict with its present meaning. Whatever may be the considerations of policy, in its legal effect the new statute cannot be held to mean what respondents urge in this connection. If it is desired to prolong the period in which the action must be brought to trial, it is necessary to stipulate to that effect, and we cannot hold that the filing of the amended complaint is a substitute for such a stipulation."

[1, 2] In Douglas v. Superior Court, 94 Cal.App.2d 395, at page 398, 210 P.2d 853, at page 854, the court said:

> "* * * It is settled that the statutory period commences to run from the filing of the original complaint and not from the filing of any subsequent amended complaint. Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 124, 47 P.2d 716; Smith v. Wiget, 75 Cal.App.2d 591, 593, 171 P.2d 563. The filing of an amended or supplemental complaint does not have the effect of extending the time of mandatory dismissal to five years after its filing. Rosefield Packing Co. v. Superior Court, supra, 4 Cal.2d 120, 124, 125, 47 P.2d 716. The holdings in these cases with respect to the effect of the filing of an amended or supplemental complaint are equally applicable to the filing of an amended or supplemental cross-complaint; it does not

> have the effect of extending the time of mandatory dismissal to five years after its filing. The law says that the action shall be dismissed 'unless such action [the action on the cross-complaint] is brought to trial within five years after the plaintiff [cross-complainant] has filed his action.' The action on the cross-complaint is commenced when the cross-complaint is filed. To sustain respondent's view we would have to recast the section so as to substitute for the word 'action' the words 'last amended complaint [cross-complaint],' or 'last supplemental complaint [cross-complaint].' We may not so revise the statute. If the statutory period could be extended by the filing of an amended or supplemental cross-complaint a party could keep an action alive indefinitely."

See also Tomales Bay etc. Corp. v. Superior Court, 35 Cal.2d 389, 217 P.2d 968.

From the foregoing authorities it is clear that the provisions of section 583 required the dismissal of the instant action.

The judgment of dismissal is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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112 Cal.App.2d 830

PEOPLE v. McCLINTON.

Cr. 2791.

District Court of Appeal, First District, Division 2, California.

Aug. 25, 1952.

Prosecution for burglary and attempt to commit burglary. The Superior Court, County of Alameda, Charles Wade Snook, J., entered judgments on conviction, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that objections which were interposed for the obvious purpose of confusing the state's expert fingerprint witness were properly overruled.

Affirmed.

1. Criminal Law 🔑695½

In prosecution for burglary, objections which were interposed for the obvious purpose of confusing the state's expert fingerprint witness were properly overruled.

2. Criminal Law 🔑1030(1)

Claims of bias or misconduct which were not interposed at trial could not be raised for first time on appeal.

3. Witnesses 🔑282½

Restriction by trial court of cross-examination of state's expert fingerprint witness because of repetition was proper.

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Benjamin F. Marlowe, Oakland, for appellant.

Edmund G. Brown, Atty. Gen. of the State, Clarence A. Linn, Asst. Atty. Gen., Leo J. Vander Lans, Deputy Atty. Gen., J. F. Coakley, Dist. Atty. of Alameda County, Richard C. Lynch, Deputy Dist. Atty., Oakland, for respondent.

NOURSE, Presiding Justice.

Defendant was tried to a jury on four counts—three charging burglary and one charging an attempt to commit burglary. He was convicted on all four counts. His appeal is from the judgments.

Proof was made that the three dwellings had been entered in the night time as alleged in the first three counts and that the occupant of the fourth dwelling observed a man's arms and shoulders partly through her kitchen window at about 3 a.m. She told him to leave, and he went. The case of the prosecution consisted of proof of defendant's finger prints which were found in all four dwellings. The only defense was an ineffectual attempt to prove an alibi.

The appellant raises two grounds for a reversal—failure to accord him a fair and impartial trial, and abuse of discretion in the restriction of his cross-examination of the state's expert witness.

[1, 2] As no witness was able to identify appellant as the one who had made the entries the state relied on numerous cards,

prints and charts, with enlargements of these, showing the prints taken from the four premises burglarized and the prints taken from appellant after his arrest. The criminologist of the local police department was called by the state as an expert witness to explain these charts and prints as they were on exhibition to the jury. This explanation was long and contained many scientific dissertations on the system of fingerprinting and the method of comparing the latent prints with those taken from the individual, but it was all in answer to the question of the prosecution requesting such explanation. The "objections" were interposed for the obvious purpose of confusing the witness and were properly overruled. The fact that the trial court was unusually fast in making its rulings is no ground for complaint. It merely indicates that the trial court considered the objections frivolous—a fact which cannot be denied. Furthermore no claim of bias or misconduct was made at any stage of the proceedings and such a claim cannot be raised for the first time on appeal.

It should be noted that, during the examination of the expert witness, the court suggested a stipulation that defendant's objection go to all the testimony of the expert witness. Counsel for the prosecution offered to so stipulate, but counsel for the defendant refused.

[3] The second ground urged—that counsel for appellant was unduly restricted in his cross-examination of the expert witness—is wholly without merit. The witness when called was identified as a criminologist in the local police department. Nothing had been done by the prosecution to conceal that relation. The restriction in the cross-examination of which the appellant now complains went to the oft repeated questions by counsel designed to convince the jury that, because he was a public official, he must be prejudiced and should not be believed. The constant repetition of these questions was stopped by the trial court—and properly so.

There is no debatable issue raised on the appeal. The appellant was fairly tried and fairly convicted. The defendant did not take the stand as a witness. He does not question the sufficiency of the evidence to sustain any one of the verdicts.

The judgments are affirmed.

GOODELL and DOOLING, JJ., concur.

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112 Cal.App.2d 788

GILMAN v. NORDIN.

No. 15192.

District Court of Appeal, First District, Division 1, California.

Aug. 22, 1952.

Hearing Denied Oct. 21, 1952.

Action by Allan W. Gilman against Andrew Nordin for dissolution of partnership and accounting. The partnership agreement was to be performed in San Francisco. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., denied defendant's motion for change of venue to Los Angeles County, which was defendant's place of residence, and defendant appealed. The District Court of Appeal, Bray, J., held that action was one on contract, and that defendant was not entitled to change of venue.

Order affirmed.

1. Venue 🔑16½

If defendant is entitled to trial in county of his residence on any one of several causes of action in a complaint, he is entitled to change of venue to that county notwithstanding that on all the other causes he would not be entitled to such changes. Code Civ.Proc. § 395.

2. Venue 🔑7

Action for dissolution of partnership and an accounting was one founded on contract within venue statute, and defendant was not entitled to transfer of case from county where contract was to be performed to county of defendant's residence. Code Civ.Proc. § 395.

3. Venue ⚷65

Affidavits are proper in determining questions of venue. Code Civ.Proc. § 395.

4. Venue ⚷53

In action for dissolution of partnership and an accounting, where plaintiff alleged that obligation of partnership agreement was to be performed in San Francisco, defendant's failure to deny such allegation constituted an admission thereof, and, therefore, upon issue of venue, defendant was estopped from contending that the agreement was not entered into there. Code Civ.Proc. § 395.

5. Venue ⚷7

The county of defendant's residence is not a preferred place of trial over the county where the contract is entered into or is to be performed. Code Civ.Proc. § 395.

6. Appeal and Error ⚷854(1)

Where order denying motion for change of venue did not specify the grounds on which it was based, the order would be sustained on appeal, if it was proper to deny the motion on any ground presented. Code Civ.Proc. § 395.

7. Venue ⚷69

Unless the answer has been filed at time demand for change of venue is made, a counter motion to retain case on ground of convenience of witnesses will not lie, since, until issues of fact are settled by answer, the court cannot determine what testimony will be material. Code Civ.Proc. § 395.

◆

Walter G. Danielson, H. Spencer St. Clair, Los Angeles, Garvin F. Shallenberger, Los Angeles, for appellant.

Evans, O'Gara & McGuire, San Francisco, Cal., for respondent.

BRAY, Justice.

In an action brought in San Francisco, the court denied defendant's motion for change of venue to Los Angeles, the county of defendant's residence. Defendant appeals.

Questions Presented.

(1) Is an action for dissolution of a partnership and an accounting one founded on a contract within the meaning of section 395 of the Code of Civil Procedure? (2) Does that section apply where there is no showing in what county the contract was entered into?

Record.

The complaint contains four counts. The first alleges an oral agreement between the parties to be performed in San Francisco forming a partnership with its sole place of business located in San Francisco, breach of the agreement by defendant, and asks for the dissolution of the partnership and an accounting. The other three counts are on alleged contracts. Defendant demurred and moved for change of venue to the county of his residence, accompanying his motion with an affidavit of residence. Plaintiff then filed an affidavit stating that the complaint shows on its face that the copartnership agreement was to be performed in San Francisco and that the agreements in all four counts were agreed to be performed there, and that all of the transactions and all the business of the copartnership were carried on there. He also set up facts purporting to show that the action should be tried in San Francisco for the convenience of witnesses. There was no allegation as to where the partnership contract was entered into. There was no denial by defendant of plaintiff's allegations that the partnership agreement and the other contracts were to be performed in San Francisco.

1. Contract Action.

[1, 2] It is conceded that the determination of defendant's right to a change of venue depends upon the construction of the first count, as under the other three counts he would not be entitled to a change. If a defendant is entitled to a trial in the county of his residence on any one of several causes of action in a complaint, he is entitled to a change of venue to that county notwithstanding that on all the other causes he would not be entitled to such change. Goossen v. Clifton, 75 Cal.

App.2d 44, 170 P.2d 104; Keithly v. Lacey, 77 Cal.App.2d 339, 175 P.2d 235.

Section 395 of the Code of Civil Procedure provides: "When a defendant has contracted to perform an obligation in a particular county, either *the county where such obligation is to be performed,* or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a *proper county for the trial of an action founded on such obligation,* and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."[1] It also provides that in all other cases the county in which the defendant resides is the proper county for the trial of the action.

If, then, the first count is an action founded on an obligation contracted to be performed in San Francisco (as alleged in the complaint and plaintiff's affidavit) defendant is not entitled to a transfer of the case to his residence county. Logically, it would appear that it is an action founded on a contract. Plaintiff alleged the partnership contract, its breach by defendant, and asks that the partnership formed by that contract be dissolved. In determining the truth of that allegation the court must determine whether there was such contract, what its terms were, and in what respect, if any, defendant breached it, and whether the partnership formed by it should be dissolved. In the accounting which is asked the court must determine what the assets of the partnership are, if any, and divide those assets in accordance with the contract. The cases which defendant cites in support of his contention that the action is not on the contract, do not support him. Averill v. Lincoln, 52 Cal.App.2d 398, 126 P.2d 398, was an action to dissolve a partnership entered into *due to the fraud* of appellants. Thus, the action sought to prove that because of such fraud there was no contract. While the court there used language that might indicate that an action for a partnership dissolution and accounting is a transitory one, such language must be considered in the light of the type of action there being considered, an action in fraud. In Postin v. Griggs, 66 Cal.App.2d 147, 151 P.2d 887, Mr. Presiding Justice Peters cited the Averill case for the proposition that an action, the gravamen of which is fraud, is triable in the county of the residence of the defendant, and expressly held that an action based on fraud is not founded on the contract sought to be cancelled. O'Brien v. O'Brien, 16 Cal.App. 103, 116 P. 692, cited by defendant, although a partnership accounting action, did not discuss the problem involved here for the reason that the provision in section 395 providing for the trial in the county where the contract was to be performed was not added until 1939. The O'Brien case was decided in 1911. The only question considered in that case was whether as a matter of fact defendant's residence was in the county to which he desired the case transferred. In Bybee v. Fairchild, 75 Cal.App.2d 35, 170 P.2d 54, the count which the court held entitled the case to be transferred was based upon fraud.

Defendant cites Liberal Catholic Church v. Rogers, 65 Cal.App.2d 196, 150 P.2d 486, and Cate v. Stapleton, 43 Cal.App.2d 492, 111 P.2d 437. Both of these cases involved obligations created by law and not by contract. Smith v. Smith, 1891, 88 Cal. 572, 26 P. 356, decided before the change in the venue section, was an action brought to declare a conveyance of real and personal property absolute on its face to be a mortgage and seeking an accounting of profits received by the creditor in the management of the property, which profits it was claimed exceeded the amount of the indebtedness. The sole question passed on was whether the fact that real property was involved prevented a transfer to the county of defendant's residence.

Peterson v. Sherman, 68 Cal.App.2d 706, 157 P.2d 863, is almost on all fours with our case. There two actions were filed. One "seeks the recovery of money due as a result of a partnership accounting." The other was "an action to recover the possession of certain farm machinery or its value and for damages by way of rental for its use during the period of its wrongful detention", 68 Cal.App.2d at page 708, 157 P.2d at page 864, pursuant to the terms of a written contract. The court said, 68 Cal. App.2d at page 710, 157 P.2d at page 866: "The question here presented is whether or not these two actions were 'founded' on an 'obligation' contracted to be performed in, or which in fact was entered into in Kings County." "The complaint in the accounting case (No. 3177) does not set forth the written agreement referred to but alleges its contents and that it was made and entered into and was to be performed in Kings County. Assuming the truth of the allegations of the complaint, plaintiff has brought himself strictly within the provisions of section 395 of the Code of Civil Procedure. Therefore, under the pleadings, Kings County is a proper county for the trial of that action." 68 Cal.App. 2d at pages 711–712, 157 P.2d at page 866. While there the plaintiff did not ask for a dissolution of the partnership, and the plaintiff does here, that does not affect the fact that both actions are on a contract. The partnership agreement is the very essence of the case of action here, and hence the action is founded on that contract.

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[1] All italics added, unless otherwise noted.

[3–5] 2. Must the place of entry into the contract be alleged?

Defendant in his reply brief for the first time contends that as section 395 provides "the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary," there must be an allegation of where the contract was entered into or an allegation of "a special contract in writing to the contary" before the court can deprive defendant of the right of trial at his residence. Both in his complaint and his affidavit[2] plaintiff alleges that the obligation was to be performed in San Francisco. This is not denied. Thus it is admitted. Such admission necessarily includes all the elements covered by the allegation. One of those elements is that it being admittedly an oral contract it was entered into in San Francisco. Or, to put it another way, by his admission that the contract was to be performed in San Francisco defendant is estopped to contend that it was not entered into here. Caffrey v. Tilton, 38 Cal.2d 371, 240 P.2d 273, does not apply. There the defendant's residence and the place in which the contract was made was Los Angeles. The action was filed in San Francisco, and as pointed out by the court there was no special writing to the effect that the contract was to be performed in San Francisco. The court held in effect that since the section prescribes that in the absence of a writing to the contrary, the place of performance is deemed to be the county of contract, the pleadings showed on their face that the place of performance must be deemed to be Los Angeles, even though it is alleged that the performance actually occurred elsewhere. Here, had defendant denied that the agreement was to be performed in San Francisco or alleged that it was entered into in some other county, plaintiff's allegations might not have been sufficient. But, in view of defendant's admissions, he cannot contend that the action cannot be tried in San Francisco. As pointed out in Turner v. Simpson, 91 Cal.App.2d 590, 205 P.2d 423, the county of a defendant's residence is not a preferred place of trial over the county where the contract is entered into *or* is to be performed.

[6, 7] 3. Convenience of Witnesses.

The order denying the motion for change of venue does not specify the grounds on which it is based. If it is proper to deny the motion on any ground presented we must sustain the order. The court would have erred if it denied the motion solely on the ground of convenience of witnesses. "The law is well settled that unless answer has been filed at the time the demand for change of venue is made, a counter motion to retain the case on the ground of convenience of witnesses will not lie, for the obvious reason that until the issues of fact are settled by answer the court cannot determine what testimony will be material. [Citations.]" Jansing v. Bowen, 117 Cal. App. 31, 3 P.2d 327, 328. As we have pointed out, the motion was properly denied on the ground that the contract was to be performed in San Francisco. Therefore, it would be immaterial if the trial court also erroneously denied it on the additional ground of convenience of witnesses.

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[2] Affidavits are proper in determining questions of venue. Turner v. Simpson, supra, 91 Cal.App.2d 590, 205 P.2d 423; Rench v. Harris, 76 Cal.App.2d 113, 172 P.2d 576.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; **SCHAUER, J., dissenting.**

112 Cal.App.2d 863

PEOPLE v. GERUNDO.

Cr. 2335.

District Court of Appeal, Third District, California.

Aug. 25, 1952.

Rehearing Denied Sept. 4, 1952.

Hearing Denied Sept. 18, 1952.

Prosecution for forging and counterfeiting checks. The Superior Court, Napa County, Chas. J. McGoldrick, J., entered judgment of conviction, and defendant appealed from an order denying his motion for a new trial. The District Court of Appeal, Adams, P. J., held that evidence that defendant forged or counterfeited the checks in the county in which the indictment was drawn was sufficient to give the Superior Court of that county jurisdiction, notwithstanding that the checks had been deposited in a bank in another county for collection.

Affirmed.

1. Criminal Law 🔑112(5)

In prosecution for forging and counterfeiting checks, evidence that defendant forged or counterfeited the checks in county in which indictment was drawn was sufficient to give superior court of that county jurisdiction, notwithstanding that checks had been deposited in bank of another county for collection. Pen.Code, § 781.

2. Criminal Law 🔑446

In prosecution for forging and counterfeiting checks, where the checks bore dates subsequent to time at which defendant alleged he had left county in which indictment was drawn, jury was not bound to accept the dates thereon as dates on which the checks were actually written.

3. Criminal Law 🔑112(1)

County in which preliminary arrangements for the commission of a crime are made is a proper county in which to prosecute for the completed offense.

4. Criminal Law 🔑112(1)

Venue may extend to any county in which the effects of an offense extend.

5. Forgery 🔑44

Evidence sustained conviction for forging and counterfeiting checks.

6. Criminal Law 🔑1172(6)

In prosecution for forging and counterfeiting checks, giving of instruction as to consideration of evidence showing defendant had committed other acts of forgery when record showed no such evidence had been introduced was not reversible error.

7. Criminal Law 🔑1160

The weight of the evidence is a matter for the jury and the trial court.

8. Criminal Law 🔑1169(1)

In prosecution for forging and counterfeiting checks, admission of evidence which had been removed from defendant's trailer and which defendant claimed was incompetent, irrelevant, and immaterial, but which defendant had not shown had injured him, was not reversible error.

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Clarence N. Riggins, Napa, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Wallace G. Colthurst, Deputy Attys. Gen., for respondent.

ADAMS, Presiding Justice.

On October 8, 1951 an information was filed in Napa County in four separate counts. The first charged that defendant, in Napa County, on or about May 1, 1950, did "wilfully, unlawfully, fraudulently and feloniously make, forge and counterfeit a certain check and order in writing for the payment of money, and did then and there utter, publish and pass the same, knowing that said check was false, forged and counterfeited as aforesaid, with the intent" to cheat and defraud V. C. Fitzwater and Bank of America, the said check reading as follows:

"90–226 First Napa Branch 90–226
"Bank of America National Trust & Savings Association No.——
Napa, Calif. May 1, 1950
"Pay to the order of Masonic Trestle Board $30.00
100
"Thirty ....Dollars
"V. C. Fitzwater
"Endorsement: Pay to the order of Anglo-California Trust Company
Market-Jones Branch
Masonic Trestle Board, 83 McAllister
"Vito Gerundo"

The second count contained a charge in similar language regarding a check for $7.50 dated at Napa, March 24, 1950, purporting to have been signed by V. C. Fitzwater, payable to cash and endorsed by Gerundo.

The third count charged, in the same language, the writing, etc. of a check for $7.50 dated in Napa, April 5, 1950, payable to Masonic Trestle Board purporting to have been signed by Roger F. Goodnow and endorsed "Masonic Trestle Board By V. Gerundo," and a second endorsement by the Plaza Hotel.

The fourth count charged in similar language the writing, etc. of a check for $50, dated Napa, April 29, payable to Masonic Trestle Board, purporting to have been signed "Ransford Printing Co. Jess R. Ransford", and endorsed by Masonic Trestle Board.

After trial by a jury defendant was convicted on all four counts. The court sentenced him for the term provided by law on each count with sentences to run concurrently and to run concurrently with any other judgment rendered against defendant. A motion for a new trial was denied and defendant has appealed, both from the judgment and from the order denying the motion, contending, first, that the Superior Court of Napa County did not have jurisdiction of the first and fourth counts, second, that the trial court erred in instructing the jury, and, third, erred in receiving in evidence certain papers claimed to have been found among defendant's effects.

Regarding the first and fourth counts, appellant urges that the evidence showed that the offenses charged therein were committed in San Francisco and no part of them was committed in Napa County.

M. P. Brown, publisher of the Masonic Trestle Board, testified that in March, 1950 defendant called upon him in San Francisco and sought the privilege of selling advertising in the Trestle Board in Napa and Fairfield. Brown acceded and it was agreed that Gerundo was to be paid 50% of any fees for advertising which he secured, to be paid when the advertising was paid for. In the first part of May, 1950, defendant gave Brown two subscriptions for advertising together with the two checks referred to in counts 1 and 4 of the information, the check in the sum of $30 purportedly signed by V. C. Fitzwater and the other check in the sum of $50 purportedly signed by Jess R. Ransford. He also gave him a subscription signed by Roger F. Goodnow, dated April 5, 1950, payable on publication. Brown told defendant he would confirm the two checks by telephone before paying his commission, whereupon defendant said that he would return after lunch. Brown was unsuccessful in his attempt to confirm the checks by telephone and defendant never returned to Brown's office. Brown deposited the two checks with his San Francisco bank for collection and it presented them to the Napa bank upon which they were drawn, which latter bank dishonored them.

Fitzwater, a painting contractor in Napa, testified that Gerundo solicited him to place an advertisement in the Trestle Board and Fitzwater gave defendant a check for $7.50 with payee's name blank. This check he testified was the only one he ever gave to Gerundo and it was never cashed. On being shown another check payable to cash in the sum of $7.50, and the check for $30 purportedly signed by him payable to the Trestle Board, he testified he had never signed either. He was also shown seven blank checks purporting to be signed by him, but he denied that he had signed them. The check for $7.50, dated March 24th, purportedly signed by Fitzwater, was endorsed and cashed by defendant personally, in Napa.

Jess R. Ransford, who had formerly conducted a printing business in Napa which he had sold in 1948, testified that the $50 check referred to in Count 4, purportedly signed by him, was not signed by him, that he never had authorized any one to sign his name, had never subscribed to advertising in the Masonic Trestle Board and never had any business dealings with defendant and that he did not maintain a bank account in the company's name after selling out.

[1] As to the $30 and $50 checks above mentioned, while apparently conceding that these checks were forged, appellant argues that since they were delivered to Trestle Board in San Francisco and deposited in its bank there that, though they were subsequently forwarded to the Bank of America in Napa which dishonored them, no offense was committed in Napa County and that the City and County of San Francisco alone had jurisdiction of the offenses charged in counts 1 and 4. In this behalf he relies upon the case of People v. Ballas, 55 Cal.App. 748, 204 P. 401, decided by this Court in 1921. However, a perusal of that decision shows that what the court held was that the "uttering" of a forged check in San Francisco did not give the court of Yolo County jurisdiction of the offense; that the check was deposited in San Francisco for credit; and the fact that it was thereafter dishonored by the bank in Yolo County upon which it was drawn, did not confer jurisdiction upon the Yolo County court.

We are of the opinion that the facts in the case before us distinguish it definitely from the Ballas case. The checks referred to in counts 1 and 4 were deposited in a San Francisco bank for collection. As is hereinabove stated, the defendant Gerundo was charged with making, forging and counterfeiting the checks in Napa County, as well as with the uttering, publishing and passing same. Therefore, if there is evidence in the record before us which justified a conclusion that Gerundo made, forged or counterfeited the $30 and $50 checks in Napa County that court unquestionably had jurisdiction in view of the provisions of section 781 of the Penal Code, which provides:

> "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

People v. Megladdery, 40 Cal.App.2d 748, 106 P.2d 84, would seem to furnish ample authority for our conclusion regarding the charges against Gerundo. In this Court all intendments favor the judgment, and there is evidence in the record before us which we think is ample to show that the offenses charged in counts 1 and 4 were committed in part, at least, in Napa County. Defendant was residing in Napa in March when he solicited Brown for authority to sell advertising in Trestle Board, and he continued to reside there until after the middle of April when he claims that he left. There is evidence that about September 1, 1950, Gerundo rented a trailer in Stockton, paid two months rental, then left without giving notice (by his own testimony after staying a month and ten days), leaving some effects therein and the door unlocked. Some two months' rental was unpaid. Thereafter the owner of the trailer ordered that any effects left therein be removed and stored in a garage, which was done. These effects included a brief case and a box containing papers, some old clothes and a lot of old magazines. On March 21, 1951, Mr. Schoales, an investigator from the Department of Justice, was given access to the garage by the owner thereof, where he found the legitimate check for $7.50 which had been given to defendant by Fitzwater. He also found seven blank checks purporting to be signed by Fitzwater. There were also among these papers a check of Roger F. Goodnow, which had not been cashed, and seven blank checks of the Ransford Printing Company. There was also an operator's license issued by the Department of Motor Vehicles to Julius Benjamin Nathan (a name by which defendant admitted he was frequently known), a letterhead of the Tool & Production Engineering Company, dated June 30, 1949, containing the purported signature of J. B. Nathan as owner and the purported signature of defendant, forms of warrants of the City Treasurer of Napa and a number of miscellaneous canceled checks. There also were a group of Trestle Board billheads, stationery of Fitzwater, blank checks on all three Napa banks and several calling cards with the name "Ransford Printing Company" on them together with the names "Robert B. Oleson" and "Vito Gerundo". Oleson, according to testimony, was an owner of Ransford Printing Company from some time in March, 1950, until August, when he left for parts unknown.

Sherwood Morrill, examiner of questioned documents for the California State Bureau of Criminal Identification, testified that he secured numerous exemplars of defendant's handwriting and concluded therefrom that the $7.50 check cashed by defendant in Napa and the seven blank checks found in the Stockton garage bearing the purported signatures of Fitzwater had been traced from his legitimate check. As to the Jess R. Ransford check for $50 (which Gerundo had left with Mr. Brown of Trestle Board), Morrill testified that it did not even pictorially resemble the genuine signature of Mr. Ransford, but that such writing was the same as that on the forged checks; and that the hand printing on the $30 check and the $50 check was that of the same person and was the same as the hand printing on other writings identified as having been executed by defendant.

A. C. Salvadori, Assistant Cashier at the Napa branch of the Bank of America, testified that defendant on April 3rd deposited to the credit of his own account in that bank the forged Fitzwater check for $7.50. Henry Ehlen, Assistant Cashier in the Bank of America in Napa, testified that his bank cashed the $30 forged Fitzwater check, but that, when Fitzwater received his bank statement and the canceled check, he protested. Fitzwater testified that he gave Gerundo but one check, to wit, the $7.50 check which was uncashed and found among Gerundo's effects in the trailer in Stockton, and that he did not sign the $7.50 check which Gerundo cashed in Napa nor the check for $30 tendered to Brown, nor the blank checks purporting to be signed by him which were also found among Gerundo's effects. Roger F. Goodnow testified that in the early part of April, 1950, at Gerundo's solicitation he agreed to take an advertisement in the Trestle Board for which he gave defendant a check for $7.50 dated April 5th. He identified one check payable to the Trestle Board which was the one signed by him, but said that the second check which purported to be signed by him and which had been cashed by Gerundo had not been so signed. The forging of this check was the subject of the charge in the third count of the information.

[2-5] While it is true that the checks referred to in counts 1 and 4 bore dates subsequent to the time when, as defendant contends, he left Napa, these checks were shown to have been forged and the jury was not bound to accept the dates thereon as the dates when they were actually written; and the evidence above set forth fully justifies the inference that they were actually written in Napa County where the Fitzwater

check with the traced signature and the forged Goodnow check were cashed by defendant and where he obviously secured the Ransford Printing Company blank checks.

The evidence was sufficient to justify an inference that in Napa County defendant embarked upon a scheme to forge checks and to secure money for himself by cashing them or by tendering them to Brown and securing commissions for advertising which had not been purchased. All of the checks were drawn on Napa banks, and were titled "Napa, Calif." It was held in People v. Anderson, 90 Cal.App.2d 326, 202 P.2d 1044, and People v. Thorn, 138 Cal. App. 714, 732, 33 P.2d 5, that the county in which preliminary arrangements for the commission of a crime are made is a proper county in which to prosecute the completed offense; and in People v. Megladdery, supra, it was held that venue may extend into any county in which the effects of the offense extend.

[6] Defendant's next contention is that the trial court erred in instructing the jury as follows:

> "Evidence was offered for the purpose of showing that the defendant committed other acts of forgery than those alleged against him in the information and for which he is now on trial. Such evidence was received not to prove distinct offenses or continual criminality, but for limited purposes only. On the question whether or not the defendant possessed knowledge of any fact, knowledge of which would have been involved in committing the crime charged against him in the information, you may consider, for such bearing, if any, as it might have on the question, the evidence that was offered to prove that previously to the time of said alleged crime he had committed a similar offense, but you may not consider for that purpose evidence of any later offense.
>
> "On the question whether or not he was motivated by a fraudulent intent you may consider, for such bearing, if any, as it might have on the question, all admitted evidence of other forgeries, subsequent as well as prior to the offense charged in this case. But you are not permitted to consider such evidence for any purpose other than as I have stated; and as to these purposes, you will weigh the evidence as you do all other."

Appellant argues that this instruction was erroneous as no evidence of other forgeries was received. But even if that were so, the giving of the instruction was not reversible error. People v. Walker, 69 Cal. App. 475, 497, 231 P. 572.

Furthermore the court instructed the jury that:

> "The Court has given you instructions embodying such rules of law as may be necessary to assist you in arriving at a verdict. As to some of these instructions, their applicability depends upon the light in which you view the evidence.
>
> "The fact that the Court has given you instructions as to particular rules of law must not be taken by you as an indication that such rules are necessarily applicable to the cause on trial, or as indicating that the Court consider them necessarily applicable. Where there is a conflict of evidence, the question as to whether a particular rule of law is applicable depends frequently and solely upon the conclusion as to what the facts are, and the jury are the sole judges of the facts.
>
> "If any instruction is applicable only if a particular situation or state of facts exists, and if you find that no such situation or state of facts exists, then you should not take such instructions into consideration in your deliberations."

[7, 8] Defendant finally urges that the trial court erred in receiving some of the papers which had been removed from the trailer occupied by defendant. He urges that they were incompetent, irrelevant and immaterial, but he does not show that their admission resulted in any injury to him. His objection goes rather to their weight than to their admissibility—matters for the jury and the trial court. Also at the time

that they were admitted the court instructed the jury that mere possession of them did not constitute commission of a crime; that they were admitted for the sole purpose of proving fraudulent intent and design and no other purpose, and then said: "You will consider this testimony in view of that instruction. It will be up to you to determine whether or not this testimony is or is not, has any connection with the alleged fraudulent intent of the defendant in this case. * * *

"* * * When I refer to fraudulent intent or design I refer to the fraudulent intent that the defendant is alleged to have had in connection with the forgery of the four checks mentioned in the Information."

The evidence amply supports the verdicts, and we find no reversible error in the record.

The judgment and the order denying a new trial are both affirmed.

PEEK and VAN DYKE, JJ., concur.

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112 Cal.App.2d 739

VAN FLEET-DURKEE, Inc. v. OYSTER.

Civ. 15170.

District Court of Appeal, First District,
Division 1, California.
Aug. 18, 1952.

Action by Van Fleet-Durkee, Incorporated, against A. J. Oyster on notes upon which first partnership and defendant general partner were liable. Defendant was also liable for the notes under guarantee included in successor partnership agreement. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peters, P. J., held that findings that the notes were issued in return for loans made to the first corporation by plaintiff and not for plaintiff's contributions to its capital were sustained by evidence.

Judgment affirmed.

1. Partnership 🔑**121, 375**

In action by payee partner, who was both limited and general partner, against general partner, as maker or guarantor of notes sued on, evidence sustained finding that advances evidenced by the notes constituted loans to the partnership, rather than contributions to capital, by the payee partner.

2. Bills and Notes 🔑**499**

Guaranty 🔑**89**

In action by payee partner, who was both limited and general partner, against general partner as maker or guarantor of notes sued on, burden of showing payment was on general partner.

3. Bills and Notes 🔑**499**

Fact that notes were in possession of payee and bore no endorsement of payment raised at least an inference of nonpayment.

4. Bills and Notes 🔑**537(8)**

Where presumption or inference of nonpayment of note arises, and nonconclusive evidence of payment is introduced, question of payment becomes one of fact.

5. Appeal and Error 🔑**1011(1)**

In action by payee partner, who was both limited and general partner, against general partner as maker or guarantor of notes sued on, where evidence on issue of payment supported conflicting inferences, finding of nonpayment would not be disturbed on appeal.

6. Novation 🔑**1**

Where first partnership and general partner, but not successor partnership, were liable on notes given in return for loans made to first partnership by payee partner, and general partner was liable under guarantee included in successor partnership agreement, novation, which would have discharged the notes, did not take place when assets of first partnership were transferred to successor partnership. Civ.Code § 1530; Corporation Code, § 15036.

7. Novation ⚷1

Statute which recognizes that debtor of partnership may be discharged by novation and provides that such novation may be inferred from the course of dealing between the parties cannot be applied, as a matter of law, in favor of appellant where the course of dealing was not conclusive, but supports reasonable inferences both ways, and the trial court finds against appellant. Corporations Code, § 15036.

8. Partnership ⚷311(3)

Where partner purchases the interest of another, the transaction presumptively includes a final settlement of all partnership indebtedness, and amounts, in legal effect, to an accounting between the parties, and burden rests upon purchaser to rebut such presumption.

9. Partnership ⚷311(3), 376

Where first partnership and general partner, but not successor partnership, were liable on notes to payee partner, for loans made to first partnership, and general partner was liable under guarantee included in successor partnership agreement, upon transfer of assets of first partnership to successor partnership, if any duty to speak arose concerning the notes, both general partner and payee partner had such duty, and such transaction did not presumptively include a final settlement of all partnership indebtedness and amount to an accounting between the partners.

10. Partnership ⚷108

The general rule is that an accounting is a condition precedent to a suit by one partner against another except where no complex account involving a variety of partnership transactions is involved, and the giving of a promissory note constitutes an acknowledgment of a separate debt within such exception.

11. Partnership ⚷121, 375

In action by payee partner, who was both limited and general partner, against general partner who was maker or guarantor of notes sued on, even if general partner, in absence of complaining creditors, could raise affirmative defense under statute prohibiting limited partner from receiving payment for money lent to partnership while partnership assets are not sufficient to discharge partnership liabilities to third persons, general partner failed to sustain burden that was on him to establish such defense. Corporations Code, § 15513.

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Alden Ames, San Francisco, for appellant.

Frederick M. Fisk, W. Burleigh Pattee, H. P. Livermore, Chickering & Gregory, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Van Fleet-Durkee, Incorporated, as payee of certain promissory notes, brought this action against A. J. Oyster, as the maker or guarantor of such notes, and recovered a judgment totaling $42,103.10, plus costs of suit. From that judgment defendant appeals.

The litigation between these parties is of long standing. The original complaint was filed in October of 1943. After issue was joined the cause proceeded to trial. The trial court entered findings and conclusions on the merits in favor of defendant, and, in addition, sustained a demurrer to the complaint. Judgment was entered in favor of defendant, and plaintiff appealed. The judgment was reversed by Division Two of this court on the grounds that the complaint did state a good cause of action, and because the finding that the notes had been paid was based on erroneously admitted evidence. Van Fleet-Durkee, Inc. v. Oyster, 91 Cal.App.2d 411, 205 P.2d 32. A second trial was then had, resulting a judgment in favor of plaintiff, from which the present appeal has been taken.

The controversy grows out of the operation of a gold mine. Oyster started to operate this mine in 1934. As early as 1935 W. C. Van Fleet, president of respondent corporation, on behalf of his company, contributed various sums of money to the operation of this mine. Under date of December 30, 1938, a limited partnership known as Poverty Hill Mine was formed. In this partnership Oyster was the sole general partner with a 69 per cent interest, respondent was a limited partner with a 20 per cent interest, and C. C. Trowbridge, Jr., brother-in-law of Oyster, had an 11 per cent interest. In August of 1939 respondent contributed another $10,000 to this partnership, increasing its interest to 35 per cent. At this time respondent's total investment in the partnership, including contributions made prior to its formation, totaled $52,000.

Van Fleet testified that, during 1939 and 1940, in addition to these capital contributions, his corporation made various loans to the partnership and to Oyster, evidenced by five promissory notes totaling $32,500. The present action is predicated on these notes.

All five notes are payable to the order of respondent, carry provisions for attorney's fees in case of suit, and bear 5 per cent interest. The first one is dated December 11, 1939, is for $8,000, is payable one year after date, and is signed "Poverty Hill Mine By: A. J. Oyster." The second is dated February 19, 1940, is for $10,500, is payable one year after date, and is signed like the first one. The third note is dated May 27, 1940, is for $5,000, is payable 90 days from date, and is signed "A. J. Oyster." The fourth is also a 90-day note, is for $5,500, is dated July 8, 1940, and is signed "Poverty Hill Mine A. J. Oyster, General Partner." The fifth is a demand note for $3,500, is dated July 29, 1940, and is signed like the first two. Van Fleet testified that two payments had been made on these notes, one in September of 1940 of $2,625, and one in December of 1940 of $3,500, and that both payments, at the request of Oyster, were credited as principal payments on the first note. Thus, the total indebtedness, exclusive of interest, was reduced to $26,375.

The evidence shows that the money thus advanced by respondent went into the operation of the mine. Nevertheless, the mine continued to operate at a loss, and by 1941 there were unpaid bills totaling over $20,000, exclusive of these notes, outstanding. The partnership wanted to interest new capital and to buy a dredge, but found this impossible with its trade accounts unpaid. Van Fleet suggested that $20,000 to pay these bills be raised by each partner advancing his proportional share. Various meetings of the partners were held in March and April of 1941 at which the trade accounts payable were discussed, and at which no mention was made of the promissory notes. The parties finally agreed to the plan proposed by Van Fleet. Sometime prior to this time the Troy Placer Mines had purchased a 15 per cent interest in the partnership from Oyster. Respondent, who had a 35 per cent interest, promptly paid in its $7,000 contribution. Troy Placer Mines and Oyster were unable to make their proportional contributions. Respondent thereupon paid in an additional $9,000, and took an assignment of a 6 per cent interest from Oyster and a 3 per cent interest from Troy Placer Mines. Thus respondent's interest in the partnership was increased to 44 per cent. Apparently Oyster made up the balance of $4,000. With the $20,000 thus received, Oyster paid off all but $500 or $600 of the outstanding accounts, Oyster representing that the accounts in excess of $20,000 could and would be taken care of from current receipts.

At about this same time the members of the partnership, in an attempt to secure new operating capital, decided to sell the assets of the first partnership to a second partnership to be formed, the members of the first partnership to retain their proportional interests as compared with each other. A schedule of what purports to be the "assets" of the first partnership was prepared by the accountant of that company. This schedule purports to show the assets as valued at $219,534. Van Fleet testified that the values assigned in that list were entirely arbitrary and fictitious, and did not represent the true value of the assets of the first partnership. Included within the list of "assets" is $108,799.89 for "Cost heretofore paid for exploration and development," which certainly does not necessarily represent the present value of an asset. Van Fleet testified that he attempted to have the correctness of this schedule checked by his accountant but was informed that the figures could not be verified from the partnership books.

The second partnership was formed May 13, 1941, and was called Poverty Hill Properties. Additional capital was secured from new partners. The partners in the first partnership assigned their respective interests in that partnership to the second.

Included within the second partnership agreement was a guarantee on the part of Oyster to pay all unpaid obligations of the first partnership. This guarantee reads in part as follows: "Said partnership hereby created [the second partnership] shall not be responsible for any debts, liabilities or obligations of said partnership, Poverty Hill Mine [the first partnership] and all debts, liabilities and obligations of said Poverty Hill Mine [with certain exceptions not here pertinent] * * * shall have been paid and discharged before this agreement is executed; and the said A. J. Oyster, one of the partners herein named, and the general partner of said Poverty Hill Mine, hereby guarantees the payment of said debts, liabilities and obligations of said Poverty Hill Mine."

Attached to a certificate dated March 3, 1942, canceling the certificate of limited partnership of the second partnership, there is a copy of the certificate of limited partnership of the Poverty Hill Properties. Included therein is an enumeration of what purports to be the amount contributed by each partner to the second partnership. Respondent is there listed as having contributed $94,399.62 which is precisely 43 per cent of $219,534, the value fixed in the schedule as the total assets of the first partnership. It will be remembered that respondent's limited interest in the first partnership was 44 per cent. Respondent had taken a 1 per cent interest as general partner in the second partnership.

In September, 1943, the notes not having been paid, the respondent made written demand for their payment, and, upon this demand being ignored, commenced this action.

[1] The appellant testified that, during the life of the first partnership, when respondent advanced the sums represented by the promissory notes here involved, the other partners made contributions proportional to their interests. If this were the fact then it would appear that such advances were contributions to capital and not loans. But the trial court did not believe such testimony. Van Fleet denied that such was the fact. Moreover, appellant's testimony could not be verified by an examination of the books of the company, where such fact, if it were a fact, would normally appear. It is also true that no other partner received promissory notes as evidence of such advances. It will be remembered that respondent not only has the notes, but that two payments were made on one of the notes. Under these circumstances, the finding that respondent made these advances as loans is amply supported.

It is the basic contention of appellant that the notes in question were in fact paid when the second partnership was organized. He points out that the total assets of the first partnership as shown by the schedule totaled $219,534, and that respondent was assigned an interest in the second partnership of $94,399.62, which is 43 per cent of the total. The figure $94,399.62 adds up to approximately the sum of the capital contributions of respondent to the first partnership plus the amount unpaid on the notes which are the subject of this action. Thus, says appellant, by mathematical calculation, he has demonstrated that the notes have in fact been paid.

These figures and calculations would make out a good case of payment if the figure $219,534 actually represented the value of the assets of the first partnership, and if the value assigned to each partner's contributions to that partnership represented the actual amount contributed by him. Van Fleet testified that these figures were fictitious and arbitrary. This testimony was supported by evidence of the fact that the second partnership listed Trowbridge's contribution to the first partnership as $17,562.72, when in fact he had contributed less than $10,000. The same wide discrepancy appears as to the actual contribution of Troy Placer Mines, and the value assigned to it. Thus, although it happens that the value assigned to respondent's interest—$94,399.62—approximately amounts to the sum of its capital contributions and the amount unpaid on the notes, the trial court believed that such figure was arbitrarily selected and did not represent a proportional share of actual assets. That was a fact question, and, on conflicting evidence and inferences, it has been determined adversely to appellant by the trial court.

[2–5] It must be remembered that the burden of showing payment was on appellant. The notes were in the possession of the payee, and bear no endorsement of payment. These facts raise a presumption (or at least support an inference) of nonpayment. This was so held on the prior appeal in this case. Van Fleet-Durkee, Inc. v. Oyster, 91 Cal.App.2d 411 at page 413, 205 P.2d 32; see, also, Bank of Italy, etc., Ass'n v. Bettencourt, 214 Cal. 571, 7 P.2d 174, and Levy v. Henderson, 177 Cal. 21, 169 P. 673, there cited. Where a presumption or inference of nonpayment arises, and nonconclusive evidence of payment is introduced (but evidence that might support an inference of payment), the question of payment or nonpayment becomes one of fact. Inasmuch as the evidence on the issue supports conflicting inferences, the finding of nonpayment cannot be disturbed.

[6] The appellant also attempts to attack the finding that the notes had not been discharged by the contention that when the second partnership agreement was entered into and the assets of the first partnership transferred to the second, a novation took place as a matter of law, and the notes were thus discharged. This contention cannot stand the test of analysis. By definition, a novation "is the substitution of a new obligation for an existing one." (Civ.Code, § 1530.) The existing obligation was the liability of the first partnership and of Oyster on the notes. The second partnership did not assume that liability. Under the second partnership agreement the only person liable on the guarantee was Oyster. Unless the obligation on the notes was discharged by the interest granted respondent in the second partnership, and we have already held that the finding to the contrary is supported, there could not possibly be a novation of the type claimed by appellant.

[7] It is true that under subdivision 2 of section 15036 of the Corporations Code (formerly § 2430 of the Civ.Code), a section relating to partnerships, it is recognized that a debtor of a partnership may be discharged by a novation, and such novation "may be inferred from the course of dealing" between the parties. The subsection reads as follows: "A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business." This section, obviously, cannot be applied as a matter of law to the instant case where the "course of dealing" is not conclusive, supports reasonable inferences both ways, and the court has found against appellant.

[8, 9] Appellant contends that during the discussions preceding the creation of the second partnership Van Fleet did not mention the notes, and contends that he was under a duty to speak, that his failure to do so amounted to a breach of faith, and that respondent's consent to a novation must be inferred from such silence. Appellant quite properly contends that where there is a duty to speak, adverse inferences will arise by failure to speak. He cites, in particular, Barnes v. Moore, 80 Cal.App.2d 39, 180 P.2d 740, which involved the purchase by one partner of the other's entire interest. After the purchase was completed the purchasing partner attempted to recover from the selling partner a claimed shortage in the selling partner's original contribution. During the negotiations for the purchase of this interest the purchaser knew of this deficiency, but the agreement of sale and purchase was

silent on this issue. A judgment in favor of the purchasing partner was reversed. The court properly applied the rule that when one partner purchases the interest of another the transaction presumptively includes a final settlement of all partnership indebtedness, and amounts, in legal effect, to an accounting between the partners. The burden rests on the purchaser to rebut that presumption. That he did not do. The rule of that case is not here applicable. In the Barnes case there was the purchase of the entire interest of one partner by the other. The obligation involved was not represented by notes. The only reasonable inference was that this debt was paid as part of the purchase price. That is not so here. Here there were promissory notes evidencing the indebtedness. Appellant knew that these notes existed. Here there was a guarantee by Oyster to pay the obligations of the first partnership, which included the notes. If a duty to speak arose, under the circumstances, that was a two-way duty—on Oyster as well as on respondent. As already pointed out, unlike the Barnes case, conflicting inferences here exist, and the findings adverse to appellant are supported and cannot be disturbed.

Moreover, the evidence is not clear that respondent did keep entirely silent about the notes. At this trial Van Fleet testified that "prior" to the formation of the second partnership he made a "demand" upon Oyster that the notes be paid. On cross-examination he admitted that on the prior trial he had testified that this conversation, while taking place in May, 1941 (the second partnership agreement was signed May 13, 1941), was after the date the second partnership agreement was signed. This conflict was for the trial court.

[10] Appellant not only incorrectly contends that the financial set-up of the second partnership constituted in legal effect an accounting between the partners, a point already decided adversely to him, but also makes the contention that, if an accounting has not already occurred, this being a suit between partners, no action will lie until an accounting has been had. Undoubtedly the general rule is that an accounting is a condition precedent to a suit by one partner against another. Dukes v. Kellogg, 127 Cal. 563, 60 P. 44; Mosher v. Helfend, 7 Cal.App.2d 48, 44 P.2d 1050; Malott v. Seymour, 101 Cal.App.2d 245, 225 P.2d 310. But that rule is not without exceptions. There is a particularly thorough annotation on this subject in 168 A.L.R. 1088. (For earlier cases see 58 A.L.R. 621; 21 A.L.R. 21.) Starting at page 1098 some seven exceptions to the general rule are listed. Many cases, including cases from California, are there collected supporting the rule that where no complex account involving a variety of partnership transactions is involved, an accounting is not a prerequisite to suit. Thus, where the item involved is segregated by agreement from other partnership transactions, an accounting is not indispensable. The giving of a promissory note constitutes the acknowledgment of a separate debt within this exception.

An illustrative California case on this subject is Blee v. Lead Mountain Mines, 8 Cal.2d 550, 66 P.2d 646. In that case one partner advanced money to cover the partnership's liability in a lawsuit. He took back, as evidence of the advance and for security, a partnership note and chattel mortgage. He brought suit to foreclose the chattel mortgage and to secure a deficiency judgment against the other partners. The Supreme Court summarily dismissed the point now under discussion with the following language in 8 Cal.2d at page 552, in 66 P.2d at page 646: "Appellants also contend that the only action available to the plaintiff was one for an accounting and dissolution of the partnership; but the evidence shows and the court found that this advance of money was a transaction sufficiently segregated to permit a separate action on the obligation." See, also, Johnson v. Rosenstein, 132 Cal.App. 675, 23 P.2d 418; Collins v. Meis, 139 Cal.App. 233, 33 P.2d 472; Emerzian v. Emerzian, 6 Cal.App.2d 721, 44 P.2d 656.

The rule of these cases is here applicable. The evidence here is capable of the interpretation that the notes sued upon, and the execution of the guarantee by

Oyster, made these transactions separate and distinct from other partnership transactions.

It should also be pointed out that this point was at least partially passed upon on the prior appeal of this case. In that case, in addition to making findings and rendering judgment on the merits in favor of Oyster, the trial court, at the conclusion of the trial, sustained a general demurrer on the ground that the complaint failed to allege an accounting. This was reversed, the court pointing out that the complaint alleged that the suit was on the guarantee, and necessarily implied that in such cases an accounting is not necessary.

Appellant next refers to section 15513 of the Corporations Code (formerly § 2489 of the Civ.Code), a provision of the Uniform Limited Partnership Act, which, while permitting a limited partner to land money to the partnership, prohibits him from receiving "from a general partner of the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners." This section was pleaded as a special defense by appellant.

The appellant refers to testimony that when the second partnership was formed, the $20,000 contributed by the partners was insufficient to pay all the debts of the first partnership because the then indebtedness exceeded $20,000 by some $500 or $600. Whether this excess was or was not subsequently paid does not clearly appear. The trial court found that "all of the debts and obligations of said partnership known as Poverty Hill Mines, including all of its debts and obligations to persons not claiming as general partners or limited partners, have been paid in full, with the exception of the indebtedness evidenced by the promissory notes" here involved.

[11] If it be assumed that Oyster, as guarantor of the notes, can raise this affirmative defense (no creditor is complaining), the burden was on him to establish it. That he did not do. While the evidence shows that the debts of the first partnership exceeded $20,000 by some $500 or $600, there is no evidence that these excess debts have not been paid. There is evidence that Oyster represented to the partners, during the discussions preceding the creation of the second partnership, that this excess would and could be paid out of income. Moreover, Van Fleet testified that, after the second partnership was formed, these excess accounts were picked up by his company, sent to Oyster, and if he did not pay them, his company did. Under such circumstances, the finding of payment is supported, and the quoted statute has no application.

The other points raised by appellant are so lacking in substance that they need not be separately discussed.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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112 Cal.App.2d 732

Guardianship of PHIPPS.

ALLEN v. DEPARTMENT OF MENTAL HYGIENE.

No. 15142.

District Court of Appeal, First District,
Division 1, California.
Aug. 18, 1952.

Proceeding in the matter of the guardianship of the estate of Jesse Phipps, an incompetent person, by the Department of Mental Hygiene of the State of California against Clark Allen, guardian of the estate of Jesse Phipps, for order directing said guardian to pay expenses incurred for care, support and maintenance of the incompetent at a state mental hospital. The Superior Court, City and County of San Francisco, Timothy I. Fitzpatrick, J., granted the order petitioned for, and the guardian appealed. The District Court of Appeal, Bray, J., held that the estate of the incompetent was liable for the care furnished by the state hospital to the incompetent prior to the acquisition by the incompetent of his estate, but that the Department's recovery was limited by statute to four years care rather than the five years care sued for.

Judgment affirmed as modified.

1. Statutes ⚷223.2(23)

In determining intent of legislature, with regard to liability of estate of an incompetent for care given him by a state hospital prior to his receipt of the estate or property, court was required to read together all statutory provisions relating to support of incompetents. Welfare and Institutions Code §§ 6650–6653, 6657, 6658; Probate Code, § 1502; Civ.Code, § 38.

2. Insane Persons ⚷63

The estate of an insane person is liable for care, support and maintenance furnished to him by a state mental hospital prior to his acquisition of any estate or property. Welfare and Institutions Code, § 6650.

3. Insane persons ⚷54

Statute providing that guardian shall be liable for care in a state mental hospital of an insane person if the insane person has "sufficient estate for the purpose", does not limit liability to care provided during time that insane person has a sufficient estate. Welfare and Institutions Code, §§ 6650, 6655.

4. Insane Persons ⚷58

Suit by Department of Mental Hygiene for cost of care by a state mental hospital of an insane person is not limited to a situation where a judgment is collectible, and, thus, suit may be brought for care provided during time when insane person was indigent. Welfare and Institutions Code, § 6658.

5. Insane Persons ⚷63

In suit by Department of Mental Hygiene against guardian of incompetent for cost of care given said incompetent in state mental hospital prior to his acquisition of an estate, recovery by Department was limited by statute to care given for four years prior to the bringing of the action. Welfare and Institutions Code, §§ 6650, 6655; Code Civ.Proc. § 345.

Delany, Werchick, Fishgold & Minudri, Everett P. Rowe, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Palmer, Deputy Atty. Gen., for respondent.

BRAY, Justice.

The California Department of Mental Hygiene petitioned the probate court for an order directing the guardian to pay expenses incurred for care, support and maintenance of the incompetent at the Stockton State Hospital. From an order requiring him to do so, the guardian appeals.

Question Presented.

Can the estate of an incompetent be held liable for care at a state hospital furnished to an incompetent prior to the acquisition of any estate or property by such incompetent?

Agreed Facts.

July 14, 1910, the superior court duly declared Jesse Phipps insane and that he should be treated in a state hospital and committed him to the Stockton State Hospital where he has been ever since and now is. Phipps is presently 80 years of age. At the time of his commitment and until the distribution to him on April 21, 1950, of a legacy under the will of Mary E. Barry, the incompetent had no estate. On April 10 the guardian of his estate was appointed. The probate court ordered the guardian to pay the department $2400 for the incompetent's care, etc., for the five year period May 1, 1946, to April 30, 1951.

Is the Incompetent Liable for Care Prior to Acquisition of Estate?

Section 6655 of the Welfare and Institutions Code provides: "If any person committed to a State mental hospital *has sufficient estate for the purpose,* the guardian of his estate *shall pay for his care, support, maintenance, and necessary expenses at the mental hospital to the extent of the estate.* Such payment may be enforced by the order of the judge of the superior court where the guardianship proceedings are pending. * * *"[1] This section also provides that payment shall not be exacted if there is likelihood of the patient's recovery and release from the hospital if payment would reduce his estate to such an extent that he is likely to become a burden on the community in the event of his release. If, however, the medical superintendent files a certificate that the patient is suffering from a chronic form of insanity and that recovery is beyond reasonable hope, then the guardian shall pay for the patient's care out of any moneys of the estate in his possession.

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[1] All italics added, unless otherwise noted.

The guardian contends that "sufficient estate for the purpose" indicates an intent of the Legislature to limit the liability for care to a time contemporaneous with the acquisition of estate by the incompetent. However, a study of this and other sections of the code dealing with the subject does not support such contention. Section 6650 provides: "The husband, wife, father, mother, or children of a mentally ill person or inebriate, the estates of such persons, and the guardian and administrator of the estate of such mentally ill person or inebriate, shall cause him to be properly and suitably cared for and maintained, and shall pay the cost and charges of his transportation to a state institution for the mentally ill or inebriates. The husband, wife, father, mother, or children of a mentally ill person or inebriate, and the administrators of their estates, and the estate of such mentally ill person or inebriate, shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. The liability of such persons and estates shall be a joint and several liability * * *." Section 6651 provides that the monthly rate of care of inmates of the hospital shall be determined by the Director of Institutions and shall be payable in advance. The director, however, may reduce, cancel or remit the amount to be paid by the estate or relative on proof that the estate or relative is unable to pay. If any insane person dies while his estate is liable for his care, the claim for the amount due may be paid by the administrator of his estate as a *preferred* claim ranking with claims for expenses of last illness. Section 6652 provides that the department shall collect all the charges mentioned in section 6650 and take action therefor. The director, at his discretion, may refuse payment for care of any insane person who is eligible for deportation. Section 6653 requires the department, following admission of a patient, to investigate, and determine if he has any moneys or property and any relative responsible under section 6650 for payment of his care, and the financial condition of such relative. Section 6657 provides that if the amount in the patient's personal deposit fund exceeds $500, the excess may be applied to the payment of his care (no limitation as to when that care was supplied). Section 6658 provides for an alternative method of collecting the charges, see Estate of Gestner, 90 Cal.App.2d 680, 204 P.2d 77. Section 1502 of the Probate Code provides for the payment by the guardian from the estate of the incompetent for his suitable support and maintenance. Section 38 of the Civil Code provides that an incompetent person is liable for the reasonable value of things furnished to him necessary for his support.

[1, 2] Thus, reading together all of the statutory provisions, as we are required to do, see Guardianship of Thrasher, 105 Cal.App.2d 768, 776, 234 P.2d 230, it appears to be the policy of the Legislature as expressed in these sections, that care of an insane person must be paid for if his estate warrants it (and he is not likely to become a public charge on his release. If he is to be a patient permanently, then his estate, if any, is liable without regard to its sufficiency.) Also, certain relatives are liable for his care. There is nothing in the sections which limits the incompetent's liability to a period during which he owns estate. Nor is his relatives' liability so limited. The liability of both is there, although there may be no collectibility due to absence of estate or funds.

It is evident that section 6650 determines the obligation. Generally the other sections have to do with determining the amount and the method of collection. For the history of these sections of the Welfare and Institutions Code, see Estate of Perl, 110 Cal.App.2d 8, 242 P.2d 101.

There seems to be some question as to whether at common law the estate of an insane person was liable for his care in a public institution. See 32 C.J. 687, § 374; 44 C.J.S., Insane Persons, § 75. In Re Estate of Yturburru, 134 Cal. 567, 66 P. 729, the court stated that at common law an insane person was liable for necessaries furnished him by an individual, and "We see no reason why the same rule should not apply to a state hospital for the insane which does and furnishes for the insane person only those things required by the law of the state. Certainly those things which are required by law to be done and furnished for an insane person may safely be classed as necessaries." 134 Cal. at page 568, 66 P. at page 729. The court there said, 134 Cal. at page 569, 66 P. at page 729: "* * * it is not necessary to extend charity to those who are able to support themselves. Indeed, it would be unreasonable to do so" and "A law in effect requiring that patients at the hospitals for the insane shall be there supported out of their own estates is wise and reasonable * * *." This attitude towards patients in our state hospitals is not opposed to that of the court in Re Estate of Callen, 152 Cal. 769, 93 P. 1011, largely relied on by the guardian. There, it was held that the estate of an incompetent could not be held liable for the claim of the state hospital for his care, where the assets of the estate were less than the claims of private persons, which claims had accrued prior to his admission to the hospital. The court said in effect that being insolvent when admitted, his property equitably belonged to his creditors and hence the requirements of the then section 2176 of the Political Code that his estate be "sufficient for the purpose" of his care was not met. There is nothing in that case which even intimates that had there been in the estate a surplus of assets over those necessary to take care of the private creditors, the estate's liability would have been limited to care furnished after the acquisition of those assets. It might be pointed out that since the decision in that case section 6651 of the Welfare and Institutions Code has been adopted, allowing payment of state hospital care as a *preferred* claim. While such fact would not affect the decision in the Callen case, it is of some relevance in indicating the policy of the Legislature that state hospital care should be paid for.

In Watt v. Smith, 89 Cal. 602, 26 P. 1071, in holding a husband liable for the support of his indigent wife in a state hospital under the then statute requiring such payment, the court said: "Independently of the statute, he [the husband] is liable for the support of his wife." 89 Cal. at page 604, 26 P. at page 1072.

[3–5] It is interesting to note that after the decision in the Callen case and in 1909, the Legislature took out of section 2176 of the Political Code the provision that the mentioned relatives are liable "if of sufficient ability". Such language did not appear thereafter in that section, nor does it appear in its reenactment into section 6650 of the Welfare and Institutions Code. Reading section 6655, "If any person committed * * * has sufficient estate for the purpose, the guardian of his estate shall pay for his * * * support * * * to the extent of the estate", with the fact that section 2176 of the Political Code had taken from it the requirement that the liability of relatives was limited to their being "of sufficient ability" and that such limitation does not appear in its successor, section 6650 of the Welfare and Institutions Code, plus the fact that under section 6650 the guardian is required to cause the incompetent "to be properly and suitably cared for and maintained" and shall pay the charges for his transportation to the state hospital, it would appear that the words "has sufficient estate for the purpose" were not a limitation as to time of furnishing the care but a limitation to the effect that there should be no personal liability of the guardian. They are also intended as a limitation to the effect, as set forth in section 6651, that the estate must not be diminished so as to make the incompetent a public charge on his release. Section 6658, which provides that the department may bring an action to enforce payment for a patient's care against any person, guardian or relative, does not limit such action to a situation in which the judgment is collectible.

Authorities from other states are not much help, for the reason that they are based on the wording of their particular statutes. Because of these statutes "Ordinarily the liability extends to property acquired subsequently to the time the expenses were incurred" 44 C.J.S., Insane Persons, § 75, page 179, although there are jurisdictions where the statutes provided to the contrary. Thus in Wisconsin, at the time of the decisions in In re Angle, 183 Wis. 648, 198 N.W. 851, and In re Decker's Guardianship, 181 Wis. 484, 195 N.W. 316, cited by appellant, the statute expressly limited recovery by the state to situations where an incompetent " 'was at the time of receiving such relief, support, or maintenance the owner of property * * *.' " The statute has since been changed. In In re Hofmann's Estate, 261 App.Div. 556, 26 N.Y.S.2d 430, without any discussion of the statutes, nor of the reasoning on which its statement was based, the court said that the incompetent was obligated to pay the state for her care out of her own separate estate, "if one was in existence at the time the obligation to pay accrued." 26 N.Y.S.2d at page 432. Based on that decision and again without any discussion of the matter, the court in Petition of Cummings, Sup., 66 N.Y.S.2d 799, held to the same effect. Whatever the statute read at the time of the above New York decisions, in 1949 it expressly provided, " 'If the property of such patient or inmate is sufficient the committee shall pay for institutional maintenance incurred prior to the appointment of the committee.' " In re Tripp, 275 App.Div. 36, 87 N.Y.S.2d 137, 139. In a Missouri case, Barry County v. Glass, Mo.App., 160 S.W.2d 808, the statute provided for the recovery of public support from " 'any person who, by law, is bound to provide for the support and maintenance of such person [an incompetent], if there be any of *sufficient ability* to pay the same * * *.' " 160 S.W.2d at page 809. It was held that under that section the estate of the incompetent was liable for his care rendered prior to his inheritance from his mother's estate. State v. Thompson, 45 Wyo. 350, 18 P.2d 619, held that under a Wyoming statute providing generally that the care of an incompetent shall be a charge against his estate, such liability is not limited to such estate as he had at the time of commitment or at any other particular time.

In Guardianship of Giambastiani, 1 Cal. App.2d 639, 37 P.2d 142, it was held proper to reimburse from an incompetent's estate, moneys expended by his brother for the incompetent's care and support prior to the appointment of such brother as guardian on the theory that the brother was acting as a de facto guardian. While the incompetent had estate at the time his brother was providing for his care, and therefore is different from the situation in our case, the case indicates the liberality of the courts in requiring an incompetent who is able to do so, to pay for his own care. Section 19 of the Welfare and Institutions Code provides: "The purpose of this code is to provide for protection, care, and assistance to the people of the State in need thereof * * * It is the legislative intent * * * assistance shall be so administered as to encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society."

The same idea is expressed somewhat differently in In re Arnold's Estate, 253 Pa. 517, 98 A. 701. There when committed the insane person was an indigent. Approximately two years later he inherited a considerable estate. In requiring reimbursement to the state for his care prior to his inheritance the court said 98 A. at page 701: " 'Why should the recipient of the supplies under such circumstances escape payment when in funds? If he is compelled to pay, he simply does that which in good morals he ought to do voluntarily. His payment enables the county to enlarge its liberality in other needy cases. It is said that such repayment is in conflict with the policy of our poor laws and our idea of charity. But it seems to us there is something radically wrong with the theory that a patient may leave an institution with a large estate of his own in his pocket without any legal obligation resting upon him to pay for the food he consumed.

Such treatment of the patient is not calculated to stimulate his honesty or improve his citizenship. Nor does the demand for reimbursement under such circumstances detract from the charity. If the pauper receives the maintenance upon the condition that he shall pay when able, it answers his needs just as much as if there were no obligation to pay under any conditions.' "

Statute of Limitations.

[6] Respondent concedes that the limitation set forth in section 345, Code of Civil Procedure (the four-year statute) applies. Estate of Jacobson, 56 Cal.App.2d 255, 132 P.2d 229, so holds. The court allowed reimbursement for five years' care. It should be reduced to four years, or $1920. The judgment is reduced to $1920, and in all other respects affirmed. Respondent is awarded costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

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112 Cal.App.2d 821

WYENE et al. v. DURRINGTON et al.

Civ. 15042.

District Court of Appeal, First District, Division 2, California.

Aug. 25, 1952.

Hearing Denied Oct. 23, 1952.

Action by Mrs. Walter Wyene and another, against W. F. Durrington and another, and against Durrington's insurance carrier, for injuries sustained in collision with motor vehicle operated by Durrington, which occurred more than a year before suit was brought. The Superior Court, County of Alameda, Cecil Mosbacher, J., sustained insurance carrier's demurrer, which had been interposed on ground that carrier was not a proper party defendant, without leave to amend, and plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that insurance carrier was neither a necessary nor a proper party, notwithstanding allegations that defendants were estopped from pleading statute of limitations because of representations of a settlement without suit made by the insurance carrier.

Judgment affirmed.

Action 🔑50(4)

Insurance carrier was not proper party to suit for injuries received in automobile collision brought more than a year after collision, regardless of allegations that defendants were estopped from pleading statute of limitations because of representations of settlement without suit made by the insurance carrier.

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Belli, Ashe & Pinney, San Francisco, for appellants.

Crittenden, Jackson & Williams, Oakland, for respondents.

NOURSE, Presiding Justice.

The plaintiffs were injured in a collision with a motor vehicle operated by defendant Durrington. More than a year after the collision plaintiffs brought this action for damages joining with defendant Durrington his insurance carrier. This was predicated on allegations that defendants were barred from pleading the statute of limitations because of representations of a settlement without suit made by the insurance carrier. The carrier demurred on the ground that it was not a proper party defendant. This demurrer was sustained without leave to amend and plaintiffs have appealed from the ensuing judgment.

The whole appeal is based on a false premise—that the insurance carrier is a necessary or at least a proper party in order to prove an estoppel against the real party defendant. That theory was implicitly rejected by our supreme court in Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, where it was held that the county was estopped from pleading the statute because of representations leading to a settlement made to the plaintiff by an agent of the insurance carrier of the defendant county. The precise question raised here was not involved in the Placer County case because the insurance carrier was not joined as a party defendant, but the case is controlling here on the real issue involved—but not fully argued—that an insurance carrier is not a necessary party to permit the plaintiff to plead an estoppel against the real party defendant.

All the cases cited which appear to be contrary to this rule are based on an express provision in an ordinance or in the policy of insurance creating a primary liability on the part of the carrier. Thus in Van Derhoof v. Chambon, 121 Cal.App. 118, 131, 8 P.2d 925, 930, it is said: "In all the cases in California that we have been able to find which permit the joining of the insurance company, there was an express provision in the policy or an ordinance under which it was written providing that the policy should inure to the benefit of the public." In accord are Grier v. Ferrant, 62 Cal.App.2d 306, 310, 144 P.2d 631; Gugliemetti v. Graham, 50 Cal.App. 268, 270, 195 P. 64; Milliron v. Dittman, 180 Cal. 443, 446, 181 P. 779.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; CARTER, J., dissenting.

112 Cal.App.2d 704

McGUIGAN v. SOUTHERN PAC. CO.

Civ. 15118.

District Court of Appeal, First District, Division 1, California.

Aug. 18, 1952.

Rehearing Denied Sept. 17, 1952.

Hearing Denied Oct. 16, 1952.

Action by Lucille Helen McGuigan, as administratrix of the estate of James J. McGuigan, deceased, against Southern Pacific Company for death of yardman who had been given three months sick leave because of heart condition but, before end of sick leave, was returned to work as herder after railroad superintendent misrepresented duties involved to doctor who terminated leave. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., granted nonsuit, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that evidence of defendant's negligence and of proximate cause were for jury.

Judgment reversed.

1. Master and Servant 🔑285(1), 286(1)

In action against railroad for death of yardman who had been given three months sick leave because of heart condition but, before end of leave, was returned to work as herder after railroad superintendent misrepresented duties involved to doctor who terminated leave, evidence of railroad's negligence and of proximate cause were for jury. Railway Labor Act, 45 U.S.C.A. § 151 et seq.; Federal Employers' Liability Act, §§ 1 et seq., 3, 4, 6, 45 U.S.C.A. § 51 et seq., 53, 54, 56.

2. Master and Servant 🔑250, 250¼

Where Federal Employers' Liability Act is applicable, the federal remedies provided are exclusive, but, when action is filed in the state court, procedural matters are governed by state law. Federal Employers' Liability Act, §§ 1 et seq., 3, 4, 6, 45 U.S.C.A. §§ 51 et seq., 53, 54, 56.

3. Master and Servant 🔑250¼

In proceeding in state court under the Federal Employers' Liability Act, question whether evidence is sufficient to go to jury is one of substance and is governed by federal rather than state law. Federal Employers' Liability Act, §§ 1 et seq., 3, 4, 6, 45 U.S.C.A. §§ 51 et seq., 53, 54, 56.

4. Negligence 🔑136(14, 25)

In negligence action, if there is any substantial evidence or reasonable inferences therefrom that would sustain findings of negligence and proximate cause, it is error to grant nonsuit.

5. Appeal and Error 🔑989

Upon appeal from judgment of nonsuit, only evidence favorable to plaintiff need be considered.

6. Master and Servant 🔑90

No duty is imposed upon an employer to examine his employees to determine whether they are physically fit to do the job they seek.

7. Negligence ⚷2

The voluntary assumption of a duty by affirmative conduct creates duty to use due care in performing the assumed task.

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Cosgriff, Carr, McClellan & Ingersoll, Burlingame, Frank A. Dutton, San Mateo, for appellant.

Arthur B. Dunne, R. Mitchell, S. Boyd, Dunne, Dunne & Phelps, San Francisco, Robert L. Lamb, San Francisco, for respondent.

PETERS, Presiding Justice.

In this action, brought under the Federal Employers' Liability Act, the widow of James J. McGuigan seeks to recover damages for his wrongful death alleged to have been caused in interstate commerce by the negligence of the defendant employer, the Southern Pacific Company. At the conclusion of plaintiff's case, the trial court granted a non-suit. Plaintiff appeals.

The facts most favorable to appellant show the following: The decedent was 51 years old at the time of his death, which occurred on May 1, 1948. At that time he had worked for the S.P. at various jobs for some twenty-eight years.

On October 20, 1947, the decedent had entered the Southern Pacific Hospital and had remained there as an in-patient until November 8, 1947. Diagnosis and electrocardiograms disclosed that he was then suffering from obesity, auricular fibrillation (irregular contraction of the chambers of the heart), dyspnea (shortness of breath), cyanosis (purplish hue to lips and ears), high blood pressure, possible left coronary occlusion and a widespread coronary artery pathology, including arteriosclerosis. The heart specialist at the hospital testified that the decedent, while in the hospital, lost sixteen pounds and that, as a result, upon his discharge from the hospital, there was no longer a cardiac insufficiency, although the doctor had written on the discharge sheet that the "electrocardiogram shows evidence consistent with left coronary artery occlusion."

After his discharge from the hospital on November 8, 1947, decedent returned to work as a yardman. On February 13, 1948, one of the doctors in the hospital wrote to decedent informing him that, as a result of a review of his medical history, he should "report to General Hospital every 90 days for recheck" and should report to Dr. Kaufman, the heart specialist. Copies of this letter were sent to the general manager of the S.P. and to the superintendent of its coast division. Pursuant to this letter the decedent reported to the hospital on February 20, 1948, and remained there as an in-patient until March 19, 1948. During this period further electrocardiograms and X-rays were taken, disclosing a recurrence of the cardiac insufficiency. Hypertrophy of the heart muscle was disclosed, apparently high blood pressure causing an expansion of the heart muscle. Dr. Kaufman attempted to discount some of the symptoms then discovered by testimony to the effect that the cyanotic condition was somewhat less marked and the shortness of breath had improved. The record showed a fluctuating high blood pressure, which Dr. Kaufman discounted as not being of very great importance. But when decedent was discharged from the hospital on March 19, 1948, Dr. Kaufman refused to permit him to return to work, ordered the employee on three months' sick leave, and took the necessary and usual steps to preserve the decedent's seniority rights during his sick leave. Dr. Kaufman informed decedent that during this period he should keep down his weight and get as much rest as possible.

Dr. Kaufman terminated the sick leave before the ninety days had expired. He testified that he did this because a representative of decedent's brotherhood had come to see Dr. Washburn, the head of the hospital, and represented that because of decedent's seniority he could work at the main depot in San Francisco as a herder, a position with lighter duties than those formerly performed by decedent. According to Dr. Kaufman, it was also represented by the union representative that decedent was visiting the railroad yards daily and worrying himself sick because he was not working. Dr. Kaufman stated that, because of these representations, he agreed to terminate the sick leave. He admitted, however, that in making this recommendation he relied upon certain correspondence between the S.P. and the hospital relating to decedent's disability, and the nature of his duties upon his return to work. This correspondence is important because the evidence is to the effect that the rule of the S.P. is that the determination of fitness for duty is made by the hospital staff and not by the S.P. directly. An employee on sick leave cannot be taken back on the job without a release from the hospital, and sick leave is ordered by the medical staff.

The correspondence shows the following: Under date of March 26, 1948, the chief surgeon advised the superintendent of the coast division of the S.P. that decedent should be granted three months' sick leave, and then it would be determined if he could return to work. Under date of March 22, 1948, decedent was granted such leave, to expire June 22, 1948. Under date of April 14, 1948, the chief surgeon of the hospital wrote to the superintendent stating that he had been informed by the brotherhood representative that decedent, because of his seniority, could secure a job as herder in the San Francisco yard of the company, and had been informed that decedent's "duties as such would consist only of 'cutting off' locomotives as they arrive at the station and 'coupling' engines to passenger trains for departure; that he would have no physical effort to put forth, nor would he at any time have to jump on or off moving equipment.

"Before further considering him for such assignment I will appreciate your advising whether his duties would be limited to the extent cited."

The superintendent, who was quite familiar with the duties of a herder in the San Francisco yard, under date of April 20, 1948, replied to the above letter as follows: "If Mr. McGuigan were assigned as herder his duties would consist merely of cutting off inbound engines and coupling on outbound engines. There would be no mounting or dismounting of moving equipment involved, nor would there be any riding of equipment to be done."

There is another unsigned letter, dated April 23, 1948, probably an interoffice communication, addressed to J. W. Corbett, the general manager of the S.P., advising Corbett that decedent was not yet ready to return to his duties as a yardman, but that the doctor "advises he will be entirely safe in the position of herder * * * in which assignment he would have no great physical effort, nor be required to jump on and off moving equipment."

The chief surgeon sent to the superintendent a release dated April 29, 1948, authorizing the company to hire the decedent as a herder, and the general manager of the company authorized decedent's resumption of work "restricted to herder's duties under the conditions described."

Actually a herder's duties were substantially more strenuous than those described in these letters. Three operating employees of the S.P. testified that it was standard and customary procedure for a herder to ride moving equipment and to jump on and off such equipment. While the yardmaster testified that a herder may ride moving equipment or not in his own discretion, that testimony, at most, merely created a conflict. The extent of a herder's duties is also disclosed by the evidence of what decedent actually did when he reported for work on May 1, 1948. When he left home that morning he looked and acted normal. He arrived at Third and Townsend Streets at 6:30 a. m. Because of his seniority, he had the right to select his shift, and he had selected this particular shift. He told the yardmaster of the terminal that the new job was "duck soup" and that he could "last a long while doing this." He started to perform his normal duties. There are two herders on duty at the terminal, one coupling outgoing engines, the other uncoupling incoming engines. Decedent uncoupled incoming engines. The peak period for incoming trains at this station is between 7:30 and 9 a. m. During that period decedent uncoupled some twelve to fourteen engines from the commute trains as they arrived. This did not require him to walk more than 150 feet. The uncoupling operation consists of lifting and pulling the cutting lever located between the first car and the engine. This can be done by leaning over about three feet from the cement ramp adjoining the track and stooping down and pulling the lever, or it can be done by jumping down to track level and then pulling the lever. In the latter event, the lever would be about waist high for the herder. This lever will give easily if there is slack between the car and the engine, and the herder has the right to ask the engineer to move the engine so as to create such slack. Some herders, rather than make such a request, will exert considerable pressure with both hands to move the lever. Just how decedent performed his duties on the commute trains does not appear in the evidence, but there is considerable evidence as to how he performed his duties in connection with the Lark, a train admittedly engaged in interstate commerce. When that train arrived at about 9 a. m., decedent uncoupled the engine without requesting that the engineer give him some slack. The engineer testified that decedent then signalled that the uncoupled engine should move away, and, after the engine had started up, jumped on a step located on the moving equipment. This step, located a couple of feet from the ground, is about a foot wide. Decedent grasped with both hands a vertical "grab iron" located on the tank of the engine, one hand being at about chin level and the other above his head. Decedent, as part of his regular duties with the Lark, rode in this manner across Third Street. There the engine stopped and decedent, as part of his regular duties, was there required to throw a so-called "cellar" type switch. This switch is located below ground level and is covered with a hinged iron door. This door is at ground level, is between a half to three-quarters of an inch thick and is about three feet long and one foot wide. The testimony as to its weight is conflicting, there being some evidence that it weighs as much as fifty pounds, while other witnesses estimated its weight at about thirty-five pounds, or less. The herder is required to lift this cover, lean down below the surface of the ground, pull up a peg and lift the switch handle and throw it over. To reach this switch the herder has to cross the tracks behind the engine because the switch is located on the side opposite where the step on the engine is located. Decedent performed these operations, crossed behind the engine and signalled the engineer to back up on the track leading to the roundhouse, and then jumped on the engine in his former position. The engine then continued to back towards Fourth Street. The herder, in the performance of his normal duties, was required to ride towards Fourth Street because at that street there is another switch which it is his duty to see is properly adjusted so that the engine may proceed to the roundhouse. There is a target light on this switch that indicates how it is set, and this can be seen from some distance away. When the engine had proceeded about half way of the distance towards Fourth Street at a speed estimated at three to six miles per hour, the target light became visible, and indicated that the switch was set so that the engine could proceed to the roundhouse. Decedent thereupon jumped off the moving equipment. He took two or three quick steps, and then fell on his back. He never opened his eyes or spoke again. His lips turned blue, he gave several gasps, and quivered once or twice. He was dead when the ambulance arrived.

The autopsy surgeon testified by deposition. He fixed the cause of death as "Hypertensive arteriosclerotic heart disease with acute coronary thrombosis and nephrosclerosis." He testified, in elaboration, that the coronary arteries showed marked hardening, and that the left artery was occluded completely by a firm red thrombus. The heart was greatly enlarged, caused by increased resistance of the arteries to the blood flow in general. The hardening of the arteries of the type here existing, which he found to be widespread throughout the arterial system, interferes with the heart's functions, particularly when there is exertion. The immediate cause of death was a thrombus, or clot, which could have occurred within a few minutes of death, or up to several days before the death. He was quite sure that it had occurred within twelve hours of the death.

A qualified heart specialist was called as a witness for the plaintiff. She testified that hanging on to the engine as decedent did, put an extra strain on his diseased heart; that the various symptoms as disclosed by the hospital doctors and the records were all indicative of an embarrassed heart. In response to a hypothetical question outlining decedent's medical history and his activities on the fatal morning of May 1, 1948, the witness testified that, in her opinion, the activities of that morning were a contributory cause of the death. She pointed out how easily a hardened artery may be closed entirely when subjected to strain, and opined that riding on the locomotive in the manner disclosed by the evidence put a strain upon decedent's diseased and embarrassed heart "because the very act of grabbing increases the blood supply to the arms. It may decrease it to the heart, and he had a bad heart to begin with, and it is the kind of thing that you just don't let patients with that heart condition do." She also opined that lifting the switch box lid and throwing the cellar type switch put an extra strain on decedent's diseased heart and could have been a producing cause of the coronary thrombosis. She went on to explain that any activity decedent engaged in the day of his death could have contributed to his death, and that the strain of the work that morning could have formed the clot by slowing down the rate of the blood flow. She stated that decedent should not have been at work at all, that he should not have been doing the type of work that he did perform that morning, and that she was reasonably certain that his activities that morning "were a contributing factor to his death." She thought that he should not have been permitted to perform any but sedentary work, and that complete rest was called for. Under proper care, which primarily meant rest, decedent might well have lived another five to seven years.

It will be remembered that before the hospital doctors would release decedent from his sick leave they inquired in writing of decedent's superiors in the company as to the nature of the duties decedent would be required to perform as a herder, and were informed that he would merely couple and uncouple engines, and that he would not be required to mount on or dismount from moving equipment. Dr. Kaufman testified that he had this correspondence and the representations therein made as to the nature of the duties in mind when he released decedent to go back to work, and that such correspondence definitely had a bearing on that decision. He believed the representations there made. He further testified, however, that he knew, without asking, that a herder had to throw switches, but did not know that decedent would be required to throw a cellar type switch of the kind here involved. Nevertheless, he testified that in view of the nature of decedent's past work experience, he still would have permitted the decedent to go back to work even though he had known that decedent would have to operate the cellar type switch and would have to mount and dismount moving equipment as disclosed by the evidence. He then admitted that he might not have permitted decedent to return to work had he known that after decedent left the hospital on March 19, 1948, and until May 1, 1948, decedent had spent most of his time in bed and was not up and around.[1]

There is only one other phase of the evidence to which reference should be made, and that is to the relationship between the S.P., the hospital and decedent. It must be remembered that the S.P. is the sole defendant, and that any negligence of the doctors disclosed by the evidence is pertinent only if the S.P. is chargeable with such negligence.

The hospital here involved is referred to as the hospital department, which was created in 1945 pursuant to an arbitration award rendered under the Railway Labor Act, 45 U.S.C.A. § 151 et seq. This department is operated by a thirteen-member board of managers, six selected by the railroad brotherhoods, one by fourteen other unions, and six by the S.P. Under the award the S.P. is empowered to nominate the chief surgeon, but such nomination, before it is effective, must be approved by the board of managers. The board fixes the chief surgeon's salary. The chief surgeon makes rules and regulations for the operation of the hospital, and appoints and fixes the salaries of the professional staff, all subject to the approval of the board. The title to the lands and buildings involved is vested in the S.P., but the hospital department pays the taxes thereon.

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[1] The doctor had previously testified that the brotherhood representative had told him that during this period decedent was visting the yards daily. The plaintiff and her son testified that during this period, except for one trip to the yards, decedent never left the house, stayed in bed each day until noon, and would then relax on the chesterfield or return to bed in the afternoon.

The hospital gets its income from various sources. Each employee of the S.P. has deducted from his salary a fixed sum per month which goes to the hospital. This entitles the employee to medical care and hospitalization for non-industrial injuries or diseases. In addition, the S.P. pays the hospital for treating employees injured in the course and scope of their employment. Twenty other companies with payroll deduction plans also use and pay for the facilities of this hospital. From these sources the hospital department is operated. There is usually a small yearly cash surplus which is carried over for emergency purposes. The S.P. furnishes the hospital with transportation of its supplies, the use of its communication facilities, advice from its engineering and purchasing departments, and with some accounting services. The S.P. derives direct financial benefits from these arrangements. It obtains treatment for the S.P. employees, for whose injuries the company is liable, at about half the rate that is charged other companies, and, because the hospital makes the arrangements, it receives out-of-town treatment for on-duty injuries from local doctors at substantially a lower rate than it would pay did it deal directly with the local doctors. The hospital examines all employees whether engaged in interstate commerce or not, to ascertain their fitness for duty, and reports to the company. No charge is made by the hospital to the S.P. for this service. These examinations are of benefit to the employees as well as to the company. The chief surgeon believed that he was performing a service to the company, and to the employees and to the public, inasmuch as the S.P. is a public carrier, in determining whether an employee could, with safety to himself and to the public, perform his assigned duties.

[1] On this evidence the trial court granted a nonsuit. This, in our opinion, was clearly error.

As already pointed out, this action was brought under the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51 to 60. Section 51 of that act provides that:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow * * * of such employee; * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, * * *.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce * * * shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." [2]

Section 53 of the act provides that the contributory negligence of the employee shall not bar a recovery by him, but, except in certain limited cases, shall result in a proportional diminution of damages. Section 54 abolishes the common law doctrine of assumption of risk.

[2-4] Where this act is applicable, the federal remedies provided are exclusive. Hines v. Industrial Accident Comm., 184

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[2] This paragraph was added to section 51 by amendment in 1939.

Cal. 1, 192 P. 859, 14 A.L.R. 720. When the action is filed in the state courts, as it may be (§ 56) only procedural matters are governed by state law. On all matters of substance federal law governs. Ellis v. Union Pac. R. Co., 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572. Whether the evidence is sufficient to go to the jury or whether a nonsuit should be granted is clearly a matter of substance and so governed by federal rather than state law. Willis v. Pennsylvania R. Co., 2 Cir., 122 F.2d 248. An examination of the cases discloses that the federal law on the subject of nonsuits is substantially the same as that existing in this state, namely, that if there is any substantial evidence or reasonable inferences therefrom that would sustain findings of negligence and proximate cause, it is error to grant a nonsuit. While the so-called scintilla of evidence rule has been rejected by the federal courts, Brady v. Southern Ry. Co., 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239, they have almost uniformly interpreted the act liberally to the end that cases should be submitted to the jury whenever reasonably possible. Wilkerson v. McCarthy, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497; Bailey v. Central Vermont Ry., 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444.

In the instant case the defendant is indisputably a railroad common carrier. It admits in its pleadings that the Lark, the train upon which plaintiff was working at the time of his death, carried paying interstate passengers. Such train was, therefore, without question, engaged in interstate commerce. But defendant makes the general contention that the entire series of events disclosed by the record were so disconnected from interstate commerce that plaintiff has not proved any cause of action at all under the act. In this connection defendant cites several pre-1939 cases as to what constitutes interstate commerce. Delaware, L. & W. R. Co. v. Yurkonis, 238 U.S. 439, 35 S.Ct. 902, 59 L.Ed. 1397, decided in 1915, and Chicago & E. I. R. Co. v. Industrial Commission of Ill., 284 U.S. 296, 52 S.Ct. 151, 76 L.Ed. 304, decided in 1932. Obviously, the 1939 amendment was intended to and did liberalize the limited rule announced in these and other cases. Defendant places considerable reliance on Metzger v. Western Maryland Ry. Co., 4 Cir., 30 F.2d 50 (decided in 1929), where it was held that an employee treated by a company doctor has no cause of action under the act for injuries suffered as a result of the doctor's negligence, even though the injury for which treatment was given was an on-duty injury, because such treatment did not occur in interstate commerce.

In citing such cases, and in making the broad contention now under discussion, defendant not only fails to give any effect to the broadening of liability amendment to section 51 in 1939,[3] but apparently overlooks the fundamental fact that, in the instant case, at the precise moment of death the employee was engaged in interstate commerce in that he was working on an interstate train. Therefore, if there is any substantial evidence, or reasonable inferences therefrom, that would sustain a finding that the death was attributable to any negligence on the part of the employer it is obvious that such death occurred while the employee was working in interstate commerce.

The parties argue many interesting questions in their respective briefs. Much is said as to the legal relationship between the hospital and the employer and the employee. Defendant vigorously argues that it is not legally responsible for the negligence, if any, of the doctors in the hospital because such doctors are not its employees or agents. Plaintiff contends to the contrary, and also argues that the railroad assumed the duty of examining employees to determine whether they, with safety to themselves, to the employer and to the public, could return to work, that such duty was not delegable, and that it was negligence on the part of the company, under the circumstances, to return the decedent to work without a new examination. Much is said on the question as to whether the evidence shows negligence on the part of the hospital doctors, or a mere error in judgment. These, and some of the other questions argued, are all very interesting indeed, but they need not be discussed in this opinion, because we are of the view that there is substantial, credible, and reasonable evidence, and reasonable inferences therefrom, that would sustain findings that the S.P. was directly negligent in helping to induce the doctors to consent to terminate decedent's sick leave and to return him to work as a herder, and that such negligence was a direct and proximate cause of the death, which occurred in interstate commerce.

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[3] All that is now required is that "any part" of the employee's duties be in the "furtherance" of interstate commerce, or "in any way directly or closely and substantially, affect such commerce" to have injuries received as a result of the employer's negligence covered by the act.

The employer knew that decent had a diseased heart. The employer knew that twice decedent had been hospitalized for that condition. In April of 1948 the employer knew that decedent was on sick leave and that such sick leave would not terminate until June 22, 1948. The employer knew that under the customary procedure it had adopted, the decedent, even after the termination of his sick leave, could not return to work without a medical clearance. Certainly, the employer knew that under customary procedure the sick leave could not be terminated without a medical clearance. It knew all this, and also knew that the doctors at the hospital, whose duty it was to grant or to deny requests for termination of sick leave, were trying to find out the nature of the job that decedent would occupy if he returned to work so that they could determine whether he could, with safety to himself, his employer and to the public, return to work. The employer knew, when its superintendent of the coast division received the letter of April 14, 1948, from the chief surgeon, that that letter was written in order to ascertain whether the job of herder could safely be performed by decedent. The employer knew, because the letter said so, that the chief surgeon had been informed that the duties of such a herder would consist solely of coupling and uncoupling engines, and "that he would have no physical effort to put forth, nor would he at any time have to jump on or off moving equipment." Then the letter concluded that before the doctor would consider decedent for such an assignment he wanted to know if the "duties would be limited to the extent cited." This letter is perfectly clear. Its purpose was fully disclosed. There is no ambiguity. Nor is there any ambiguity in the reply of the superintendent of April 20, 1948. The superintendent directly and unequivocally stated that if decedent were permitted to return as herder "his duties would consist merely" of coupling and uncoupling engines. Then he stated "There would be no mounting or dismounting of moving equipment involved," and then to make his meaning doubly clear, concluded "nor would there be any riding of equipment to be done." When he made these representations the superintendent knew that the duties of herder were more strenuous than he had represented. He knew that herders at the Third and Townsend Streets yard customarily rode on some of the trains, and customarily mounted and dismounted from them while they were moving. He knew that herders had to throw switches, and knew that if decedent started to work on this job he would have to throw the cellar switch at Third Street. His failure to disclose this information was undoubtedly negligence.

Defendant argues that there were no misrepresentations made because all concerned were railroad men and they knew what the general duties of herders were. It is argued that the mounting and dismounting of equipment, and the other activities here disclosed, were not the type of activity referred to in the letters. On this appeal, from a judgment of nonsuit, this contention is untenable. The letters are clear and unambiguous. The doctor wanted to know if decedent would have to ride equipment and mount or dismount therefrom. The superintendent said "no." The evidence shows that decedent was required to ride equipment and mount and dismount from it while it was moving.

[5] But, says the defendant, the doctor testified that he would have terminated the sick leave even had he known of these

duties that had been misrepresented to him, so that the misrepresentations could not have been the proximate cause of the subsequent death. This argument, too, is untenable. This is an appeal from a judgment of nonsuit. Only that evidence favorable to the plaintiff need be considered. Had this case gone to the jury it could have disbelieved this testimony of the doctor for the reason that this portion of the doctor's testimony is inherently improbable. Here was a doctor writing to an employee's superior officer to ascertain the nature of the employee's proposed duties. In that connection he wanted to know certain specific things—would the employee have to ride equipment and mount and dismount from such equipment while it was moving? The doctor gets his answer—the employee will only have to couple and uncouple engines. No other exertion required, and, in particular, the employee won't have to mount and dismount moving equipment. The doctor testified that he relied on the superintendent's representations in terminating decedent's sick leave. But then he testified that, even had he known the true facts, he would still have terminated the sick leave. If this last evidence is true, then why did he ask the questions in the first place? Why did he send the letter? It is, to say the least, a reasonable if not an inevitable inference that he wrote because he wanted certain information, and that when he got that information, he relied upon it. It is a reasonable inference that the doctor relied on the information negligently given by the superintendent, and that such negligence was a proximate cause of terminating the sick leave and putting decedent on a job too strenuous for his embarrassed heart.

[6, 7] It is perfectly true that there is no duty imposed on an employer to examine his employees to ascertain if they are physically fit to do the job they seek. The case of Potter Title & Trust Co. v. Ohio Barge Line, D.C., 81 F.Supp. 108, which imposed such a duty was reversed—3 Cir., 184 F.2d 432, certiorari denied, 340 U.S. 955, 71 S.Ct. 567, 95 L.Ed. 689. But here the employer not only voluntarily assumed the duty, but, much more important, took it upon itself to describe the duties decedent would assume, and did so negligently. Even if the employer was under no duty to examine decedent before permitting him to return to work, and even if it had been under no duty to answer the letter of inquiry of the chief surgeon, it assumed that duty and then performed it negligently. It is elementary law that the voluntary assumption of a duty by affirmative conduct creates the duty to use due care in performing the assumed task. Prosser on Torts, pp. 194–197.

Thus we have a duty—a duty to use due care in describing the duties to be assumed. We have a violation of that duty, a negligent and incorrect description of the duties. Do we have enough to go to the jury on the issue of proximate cause? As already pointed out, it is reasonable to infer that the doctors relied on the letter of the superintendent and that, had the duties been described accurately, the sick leave would not have been terminated. We have medical evidence that decedent should not have been returned to work to perform the duties that he was required to perform, and which were misrepresented in the superintendent's letter. We must assume that the hospital doctors were reasonably competent and would not have returned decedent to work had they known the true facts. We have medical evidence that these duties contributed to the occlusion resulting in death. Thus, independent of any question of malpractice on the part of the doctors, or of the employer's liability for such negligence, we have evidence which, if believed, would sustain a finding of negligence on the part of the employer, and a finding that such negligence was a contributing cause of the death which occurred while decedent was working in interstate commerce. That made out a prima facie case under the Federal Employers Liability Act. It was, therefore, error to have granted the nonsuit.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.

112 Cal.App.2d 890

GOULD v. EXECUTIVE POWER.

Civ. 4295.

District Court of Appeal, Fourth District, California.

Aug. 28, 1952.

Rehearing Denied Sept. 19, 1952.

Hearing Denied Oct. 23, 1952.

Action against Executive Power of the State of California for alleged slander on part of State Personnel Board and for injuries allegedly inflicted by unnamed state employees. The governor appeared specially and moved for order quashing summons and dismissing the action. The Superior Court of San Diego County, C. M. Monroe, J., dismissed action and quashed summons served on governor, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that action would not lie in view of fact that plaintiff had not complied with statute authorizing suit against state.

Affirmed.

1. States ⚷191(1.5)

The state may not be sued without its consent. Government Code, §§ 16021, 16022, 16041 et seq., 16044, 16047.

2. States ⚷197

Action against the state for alleged slander on part of state personnel board and for injuries allegedly inflicted by state employees would not lie where plaintiff failed to present claim to State Board of Control or to file statutory undertaking. Government Code, §§ 16021, 16022, 16041 et seq., 16044, 16047.

Tom Sherrard, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Plaintiff appeals from a judgment and order dismissing her action and quashing the summons served upon the Governor of the State of California. The "Executive Power of the State of California" is designated as the sole defendant in plaintiff's complaint, in which she attempts to state a cause of action for damages for alleged slander on the part of the State Personnel Board and claims damages for personal injuries alleged to have been inflicted upon her by unnamed employees of the defendant.

[1] Governor Earl Warren appeared specially in the action and moved for an order quashing the summons and dismissing the action on the ground that the court had no jurisdiction over his person. The motion was granted and plaintiff appeals from the judgment and order thereupon entered. The defense of sovereign immunity from suit presents a jurisdictional question and the State of California may not be sued without its consent. People v. Superior Court, 29 Cal.2d 754, 756, 757, 178 P.2d 1; McPheeters v. Board of Medical Examiners, 74 Cal.App.2d 46, 49, 168 P.2d 65.

[2] Section 16041 of the Government Code provides that a claimant may bring an action against the State where the claim is based upon an express contract for negligence, or for the taking or damaging of private property for public use, but this section does not authorize the filing of a suit against the State for alleged wrongful acts of state employees. Walker v. Department of Public Works, 108 Cal.App. 508, 516, 291 P. 907. Moreover, Section 16044 of the Government Code requires a claimant to present his claim to the State Board of Control before suit is brought thereon and Section 16047 of the same code requires the filing of an undertaking at the time of the commencement of the action in any suit against the State. There is no attempt here to comply with these provisions of the state statutes. No action for negligence can be maintained against the State except in compliance with these sections. In Parker v. County of Los Angeles, 62 Cal.App.2d 130, 134, 144 P.2d 70, in an action against the county and state for negligence and false imprisonment, it was held that an action for negligence cannot be brought against the State except in compliance with sections 667 and 688 of the Political Code. These sections have been superseded by sections 16021, 16022, 16041 et seq., of the Govern-

ment Code and the rule there stated is applicable in the instant case.

We find no error in the order and judgment. Judgment and order affirmed.

BARNARD, P. J., concurs.

112 Cal.App.2d 812

SAUSALITO SHIPBUILDING CO. v. LA ROCCA et al.

Civ. 14862.

District Court of Appeal, First District, Division 2, California.

Aug. 25, 1952.

Action by Sausalito Shipbuilding Co. against Alphonse C. LaRocca, individually and as doing business under the firm name and style of LaRocca & Sons, a copartnership, and others to recover balance allegedly owing for labor and materials supplied in repairing defendants' fishing boats. The Superior Court, Marin County, Edward I. Butler, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Goodell, J., held that whether compromise agreement to pay $2,500 was intended to settle all bills outstanding, aggregating approximately $12,000, or only bills totalling approximately $6,000, was a question of fact for trial court.

Judgment affirmed.

1. Appeal and Error 🔑991

In action to recover balance allegedly owing for labor and materials supplied in repairing defendants' fishing boats, whether compromise agreement to pay $2,500 was intended to settle all bills which had then been rendered for such labor and materials, aggregating approximately $12,000, on which nothing had been paid, or only bills totalling $6,000, as contended by plaintiff, was a question of fact for trial court under conflicting evidence.

2. Shipping 🔑76

In action to recover balance allegedly owing shipbuilding company for labor and materials supplied in repairing defendants' fishing boats, testimony of company's general manager that hourly labor charge for such work was the usual and regular rate charged by company at the time and that such rate had been charged defendants on other jobs for which defendants had paid was tantamount to testimony that such charge was the reasonable value of the labor involved.

3. Shipping 🔑76

Evidence as to reasonableness of charges made for labor and that materials supplied were billed at their wholesale cost plus a 25 per cent mark-up, together with other facts and circumstances before the court, was sufficient to support a judgment for reasonable value of labor and materials supplied in repairing defendants' fishing boats, notwithstanding absence of expert testimony.

4. Evidence 🔑265(14)

Trial court was justified in refusing to accept routine check-up letter sent to customers by accountant over general manager's signature, requesting confirmation of amount therein stated as balance due on account, as a judicial admission limiting to approximately $2,400 maximum recovery for labor and materials supplied, aggregating approximately $9,000.

5. Payment 🔑76(6)

In action to recover balance allegedly owing for labor and materials supplied in repairing defendants' fishing boats, whether a payment made by defendants had been applied in part payment for such work or credited to other work being done for defendants was a question of fact for court.

Joseph L. Alioto, Robert J. Drewes, San Francisco, for appellants.

Sefton & Anderson, San Francisco, for respondent.

GOODELL, Justice.

Plaintiff sued for a balance of $12,108.70, claimed to be owing for work done and labor and materials supplied in the repairing and overhauling of two fishing boats owned by defendants. Judgment on the findings was entered for $8,793.97, interest and costs, from which defendants appeal.

The work extended over a period of about a year and involved 8 distinct jobs on the "Mary LaRocca" and the "Leonette". It is not necessary to summarize the numerous items; it suffices to say that no claim is made that the work was improperly done or that the materials were of inferior quality or defective. Defendant Alphonse LaRocca, under a Code Civ.Proc. § 2055 examination by plaintiff when asked "* * * did you have complaint to make as to the work done—forget about the price—the work, itself, on these various jobs?" frankly answered "The work was all right." This simplifies the case to some extent.

Appellants say in their brief: "It would be difficult indeed to conceive of a situation wherein the contentions of the disputants were as difficult to reconcile as is presented here." We might add that if reconciliation was difficult at the trial, where the litigants were before the court as witnesses and there was every opportunity to interrogate them exhaustively with the job sheets and bills lying on top of the table, the difficulties are by no means lessened on appeal where the matter is presented on a cold record of 115 pages of typewritten transcript and 37 exhibits. This is but another way of saying that this is a fact case if ever there was one.

The principal controversy at the trial was with respect to a compromise reached on December 6, 1946. The defendants pleaded that in December, 1947 (meaning 1946) plaintiff demanded the sum prayed for in the complaint which defendants refused to pay because a disagreement existed as to the amount owing. They then alleged that the parties entered into a compromise whereby defendants promised to pay, and plaintiff promised to accept, $2,500 in full satisfaction of plaintiff's claim, and that defendants thereupon paid plaintiff $1,250 "and would have paid the balance forthwith had not the plaintiff breached the compromise agreement, and thereby the claim alleged in the complaint was satisfied; that the defendant is ready and will[ing] to pay to the plaintiff" the $1,250 remaining due under the compromise.

On December 6, 1946 a luncheon meeting was held at the La Rocca home attended by defendants Alphonse and Pasquale La Rocca and their mother, and Robert Rich who represented the plaintiff. After lunch they got down to business and discussed the unpaid bills, as a result of which both sides agreed on a compromise figure of $2,500. The dispute was as to just what that amount was intended to settle. Then and there Alphonse La Rocca delivered to Rich a check for $1,250 and agreed to pay the remaining $1,250 after the first of the year. The remaining $1,250 was never paid, and it is included within the $8,793.97 judgment. At the time of the meeting four bills were in the hands of the defendants, to wit:

One dated March 31, 1946, for job 204	$2,340.27,
" " April 30, " " " 197	3,474.46,
" " " " " " " 197–A	5,668.85, and
" " " " " " " 197–S	282.23
making a total of	$11,765.81

on which nothing had been paid.

On December 6 work was still under way on the "Leonette" for which no bills had been rendered or payments made on account, and on January 31, 1947, almost 2 months after the compromise, four bills were rendered (i. e. $38.28, $44.89, $511.37 and $1,558.35) aggregating $2,152.89.

[1] It was and is appellants' contention that the $2,500 was to settle all the bills then outstanding, which, as we have seen, came to $11,765.81. On the other hand it was and is respondent's contention that the compromise was intended to settle only the bills for jobs 197 and 204 which totalled $5,814.73. The court adopted the latter

view and so found. This amounted to a saving to appellants of exactly $3,314.73. Whether the parties intended the $2,500 settlement to wipe out almost $12,000 of labor and material bills, or only a part thereof, was, of course, a question of facts for the trial court. If, as appellants contend the $2,500 was to settle all the bills, it is difficult to understand why the remaining $1,250 was not paid. The judge interrogated Alphonse La Rocca closely and incisively on this point and his questions indicate that he was not convinced by the answers he received.

Defendants' answer pleaded that plaintiff had "breached the compromise agreement". Despite the fact that the court found inferentially that plaintiff had not breached it, and the fact that admittedly defendants had not lived up to it, the court held both sides to it, which reduced plaintiff's recovery by the substantial sum of $3,314.73.

In deciding the case the court held that the $1,250 was still owing and that all the bills sued on, except those for $2,340.27 and $3,474.46 should be paid, and thus the $8,793.97 judgment was arrived at. The court held also that the $1,250 should bear interest from January 1, 1947 when it was due.

Appellants contend that the evidence does not support the judgment for want of expert testimony.

The basis for this attack is that there was no competent evidence to establish the reasonable value of the labor and materials. This subject cannot be properly discussed without a consideration of the theory on which the case was tried. Appellants' counsel in his opening statement said: "We contend for the defendant there was an express oral contract on the basis of which the work was initially undertaken." That was the theory of the defense. He then added: "Apparently the work was a great deal more extensive than the plaintiffs had anticipated, and as a result of that, a discussion took place on the basis of which a compromise was entered into." At the conclusion of plaintiff's case defense counsel moved "that plaintiff's exhibits one through eight be stricken from the record as immaterial and irrelevant. The evidence shows a contract, an oral contract, between the parties. That contract is the measure of damages and *actual costs that might have been incurred by the plaintiff are immaterial and irrelevant.*" (Emphasis added.) The motion was denied.

The remarks of the court at the end of the trial demonstrate that the case was tried by the defense on the theory (a) that there were express oral contracts, and (b) that the $2,500 compromise disposed of *all* the outstanding bills approximating $12,000 for labor and material. In rejecting both theories the court said:

> "Well, I don't think there is hardly any question but what the preponderance of the evidence shows that there was no express oral contract. I recollect [the] way business affairs were in 1946 and 1947. Labor was scarce, material was scarce, and I know that no building contractor engaged in building houses * * * or contractor engaged in building roads or highways, would give a bid unless there were the strictest specifications. Nearly all work was done under cost plus, and even in the case of building houses, I never heard, in those days, of a contract being made that was not made on a cost plus basis. Shipyards went on a cost plus basis. Everything was done around that time in that way. There was no way of telling how labor conditions would be or what material costs would be or whether materials could be furnished or not.
>
> "We have such a departure from that custom that was in vogue at that time, said to be an oral contract, that I will do such work for $1100, or installing a winch for $500, and it is stated here uncontradicted by a man who I think, knows what he is talking of, a winch of that type would cost four or five thousand dollars new. I don't know whether that is an extravagant estimate or not. It would seem to me a winch, the installing of a winch of the type necessary on a drag boat, would be far in excess of $500 and no man

> that knew what he was talking about would ever expect to be able to install a winch there, buy it and install it, for $500—I think that is out of the question. As to this memorial [memorable?] meeting in December at Mr. LaRocca's home: the testimony by Mr. LaRocca, especially by the last one on the stand, was 90% of his conclusion. He said all obligations due were included in the compromise. Of course, it is manifest he didn't know at the time just how many obligations were due or how much they amounted to. He isn't a mechanic and his ideas what repairs are or what installation costs would be, would be mostly disregarded. So far as the compromise is concerned, even though it was not entirely lived up to, yet, I am inclined to allow the compromise to stand. There wouldn't be much damage coming to the Sausalito Shipbuilding Company by not having it met, according to its terms, even if it were to be the first of January, which Mr. Al LaRocca testified to, in his first day's testimony, as I recall. In fact, I wrote a note on it. The first $1250 was to be paid then and the net was to be paid right after the first of the year. It never has been paid, but, nevertheless, the most that could be said, would be, perhaps interest would be due on it.
>
> "So, taking that into consideration, this $5,700 job owing, and these two jobs aggregating about that amount, I am willing to let that stand, and I think all the rest of the bills should be paid."

The meeting of December 6 was for the purpose of discussing four bills which had been rendered to defendants 7 or 8 months before, aggregating $11,765.81 *upon which no payments whatever had been made* and as to the size of which defendants were complaining. At that meeting a compromise was reached whereby $3,314.73 was lopped off that sum (two bills aggregating $5,814.73 were settled for $2,500). In other words, the amount in dispute, which defendants claimed was too high, was voluntarily reduced by over 28%, a very considerable reduction. The record is susceptible of the interpretation that the trial court viewed this compromise, whereby defendants had accomplished a reduction of their obligation by this substantial sum, as a tacit agreement that the remaining bills which had been under fire would be ultimately paid in the amounts rendered without further challenge of their reasonableness. Such an inference would be a reasonable one and wholly consonant with the very concept of compromise. It would make it mutual and bi-lateral instead of one-sided, a compromise in the true sense.

This much is clear in any event: that when appellants make the point that respondent did not produce competent expert evidence as to the reasonable value of the labor and materials the figure involved is not the $12,108.70 prayed for but that figure *reduced by the $3,314.73 thrown off by the compromise.*

Respondent, after all, in proving its debits against appellants, did not pursue the orthodox methods of proof. The job sheets were introduced in evidence under the testimony of Ernest Collins, who was then general manager of respondent corporation and had formerly been its assistant general manager. These sheets contained the details of time consumed on the several jobs and materials furnished. Collins testified as follows:

> "Mr. Sefton: Q. In connection with all these jobs you have had a labor charge of $2.85 an hour. Was that your usual rate, your regular rate you charged on repair jobs in 1946 and 1947? A. Yes.
>
> "Q. You charged the same rate to Mr. LaRocca on other jobs, too? A. Yes.
>
> "Q. *And he paid those other bills, is that correct?* A. *Yes.* [Emphasis added.]
>
> "Q. You also added on the labor 5% compensation insurance? A. Yes.
>
> "Q. That was the usual and standard charge? A. Yes.
>
> "Q. In connection with the material prices you charged Mr. LaRocca, how

were those figures arrived at? A. Our material charges are arrived at—our cost plus 25%.

"Q. Is that lower than the regular retail price Mr. LaRocca would have to pay on the outside? A. I don't know, but in my estimation, I believe it is.

"Mr. Drewes: I object to that on the ground it is incompetent, irrelevant, and immaterial. * * *

"The Court: I think I will allow the record to stand as it is.

"Mr. Sefton: Q. The prices you pay for materials is the wholesale price, is that correct? A. Yes."

[2] His testimony that $2.85 an hour was the usual and regular rate charged by respondent in 1946 and 1947 and that that rate had been charged to appellants on other jobs for which they had paid the bills was, in our opinion, tantamount to testimony that it was the reasonable value of the labor involved. His testimony that the materials supplied were billed at their wholesale cost plus a write-up of 25% gave a frank explanation of those items and, we think, a reasonable one. Appellants, as we have said before, tried this case on the theory that express oral contracts had been made for fixed prices, and not on the theory that a 25% write-up was excessive. The court found against them on that theory, and it is to be implied from the conclusion reached by the court that the charges were considered reasonable and fair by the court —after, we repeat with emphasis, the *allowance of the substantial sum of $3,314.73.*

The case of Nylund v. Madsen, 94 Cal. App. 441, 271 P. 374, on which appellants place most reliance does not lay down a hard-and-fast rule on this subject. At page 445 of 94 Cal.App., at page 376 of 271 P., the court says: "In actions based on *quantum meruit* for the value of services, the value of the services rendered is for the jury. In this case, for the trial court, and while opinion evidence is admissible, where the facts constituting the service and all the circumstances relating thereto are placed before the trial court, the court or the jury, as the case may be, has before it sufficient upon which to determine the fact of value." And at page 447 of 94 Cal.App., at page 376 of 271 P., it says: "While it is now held in practically all jurisdictions that opinion evidence is admissible as to value, where the witness has knowledge of the same, it is likewise held in practically all of the jurisdictions that such opinion evidence may be disregarded."

[3] In the instant case the court had before it sufficient facts and circumstances relating to the labor furnished and materials supplied upon which to form a judgment. Moreover, the record shows that the experienced judge who tried the case was characteristically painstaking and fair to both sides.

[4] Appellants contend that "The judicial admission of the plaintiff's witness Rich limits its maximum recovery to the sum of $2387.16."

On May 1, 1947 plaintiff wrote to appellants a letter reading as follows: "Gentlemen: For the purposes of a regular examination of our accounts at March 31, 1947, please confirm the balance due by you at that date of $2,387.16. Your reply should be sent directly to Harold A. Kuhn, C.P.A., Russ Building, San Francisco 4, California. A stamped addressed envelope is enclosed. Sincerely yours, Sausalito Shipbuilding Company, R. E. Rich, General Manager."

The last job was completed about January 5, 1947, hence almost 4 months had elapsed before this letter was written. From this it is arguable that by that time plaintiff and its accountants should have known exactly what was owing. However, the language of the letter shows that it was an accountant's routine check-up letter, although signed by the company's general manager. Rich testified that it was sent out with a "bunch" of other letters to their customers. Incidentally, the letter was never answered by appellants.

Although this claimed admission was not pleaded, it was nevertheless one of the facts in the case and the court had to decide whether the letter, either by itself or when taken in connection with Rich's testimony, had the finality of a "judicial admission". In deciding that question the court had before it the following facts; four bills had been rendered as of January 31, 1947 almost 2 months after the $2,500 compromise, ($38.28, $44.89, $511.37 and $1,558.35) aggregating $2,152.89. The remaining $1,250 on the compromise had not been paid. The bills of April 30, 1946 for $5,668.85 and $282.23 had not been paid. The $30 cash advanced by plaintiff had not been paid. These items add up to $9,383.97, and appellants were entitled to a credit of $590 (not in controversy). The net amount unpaid, according to the evidence before the court was $8,793.97. The contention that $2,387.16 was intended to settle an $8,793.97 obligation is almost as extreme a position as the contention heretofore discussed that the $2,500 compromise was intended to settle the $11,765.81 of debits. The trial court simply did not see it that way and apparently concluded that a mistake had been made by the accountants and by Rich, however inexplicable it may have been.

One of the factors which must have influenced the court in deciding this case as it did was that for a year, all through 1946, plaintiff's employees had put in their time on the repairing and overhauling of appellants' boats and plaintiff had also laid out its own money in the purchase of the materials and equipment which went into them without the payment by appellants of anything whatever save the $1,250 on account of the $2,500 compromise. It may fairly be said that if either of appellants' contentions just mentioned were to be sustained plaintiff would be in the position of not only working for appellants for nothing, but would be making an outright gift to appellants of the materials and equipment for which plaintiff had laid out its own money.

In the case of Weingetz v. Cheverton, 102 Cal.App.2d 67, 78, 226 P.2d 742, cited by appellants in connection with Rich's testimony respecting the letter of May 1, 1947, the court quoted the following from IX Wigmore on Evidence, 3d ed., p. 601, § 2594a: "Testimony in court is an elusive matter of mental operations. It is the culmination of much talk and reflection and memory-stirring between all concerned. It is full of surprises at the trial. The truth of the case depends upon a comparison of what all the witnesses say and all the circumstances indicate. A rule which binds a party to a particular statement uttered on the stand becomes an artificial rule. It is out of place in dealing with testimony. Let the judge test each case by itself."

[5] On May 8, 1946 a check for $1,000 was given by appellants to plaintiff which was not applied by plaintiff against the work now in litigation but was apparently credited to other work which was being done for appellants. The application of this payment was another one of the factual questions which the trial court had to settle, and it was decided against the appellants' present contention.

Finally appellants argue that the testimony of Robert Rich "is inherently improbable and demonstrably false." We repeat the quotation from appellants' brief that "It would be difficult indeed to conceive of a situation wherein the contentions of the disputants were as difficult to reconcile as is presented here." Enough has been said herein, we think, to demonstrate that this is an understatement. The task of such reconciliation, however difficult, was for the trial judge and with such conflicts as this record presents it would be just as wrong for this court to brand Rich's testimony as either improbable or false as it would be to so brand the testimony of the defendants.

The judgment is affirmed.

NOURSE, P. J., and JONES, J. pro tem., concur.

THOMAS v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.

S. F. 18333.

Supreme Court of California, in Bank.

Aug. 27, 1952.

Rehearing and Modification Denied

Sept. 25, 1952.

Mandate proceeding by James F. Thomas against California Employment Stabilization Commission, and others, to require unemployment insurance benefits to be paid to employees who were discharged after they had refused to cross the picket line around employer's plant. The Unemployment Insurance Appeals Board had previously denied such benefits. The Superior Court, San Francisco County, W. T. Belieu, J., annulled Board's decision and granted writ of mandate directing payment of benefits accruing after date of discharge, and defendants appealed. The Supreme Court, Gibson, C. J., held that refusal to cross picket lines, rather than discharge, was reason employees remained out of work, and, therefore, employees were not entitled to benefits under the Act.

Judgment reversed.

Carter, J., dissented.

Prior opinion, 224 P.2d 411.

1. Social Security and Public Welfare ⟹539, 658

The Unemployment Insurance Appeals Board is a statutory agency with statewide jurisdiction but without constitutional authority to make final determinations of fact, and the benefits provided for by the Unemployment Insurance Act are "property rights," and, therefore, any one deprived of a property right by such administrative body is entitled to a limited trial de novo in the Superior Court. Gen.Laws, Act 8780d, §§ 1, 54, 56, 67, 72, 77 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Property Rights".

2. Social Security and Public Welfare ⟹723

Under the Unemployment Insurance Act, the administrative authorities have no discretion to withhold benefits from any particular claimant once it is determined that facts support his claim and condition of fund permits payment. Gen.Laws, Act 8780d, §§ 1, 54, 56, 67, 72, 77 et seq.

3. Mandamus ⟹174

In mandate proceeding to require unemployment insurance benefits to be paid employees who were discharged after they had refused to cross a picket line around employer's plant, the trial court properly exercised its independent judgment in making determinations of fact even though the Unemployment Insurance Appeals Board had determined that employees were out of work because of trade dispute, and, therefore, were disqualified from receiving the benefits. Gen.Laws, Act 8780d, §§ 1, 77 et seq.

4. Social Security and Public Welfare ⟹437

Where, upon employees' refusal to go through picket line around employer's plant, employer gave employees notices of employment termination, under Unemployment Insurance Act provision denying benefits to one who remains out of work due to trade dispute, employees were discharged as of the date of termination in notice, but employees' refusal to cross picket lines, rather than their discharge, was reason employees remained out of work thereafter, and, therefore, employees were not entitled to benefits of the Act. Gen.Laws, Act 8780d, §§ 1, 54, 56, 67, 72, 77 et seq.

◆

Fred N. Howser and Edmund G. Brown, Attys. Gen., Irving H. Perluss, William L. Shaw and Chas. W. Johnson, Deputy Attys. Gen., for California Employment Stabilization Commission, et al., appellants.

Pillsbury, Madison & Sutro, Marshall P. Madison, Francis N. Marshall and Fredrick H. Hawkins, San Francisco, for Pacific Lumber Co., appellant.

Todd & Todd, Clarence E. Todd, Henry C. Todd, San Francisco, George E. Flood, Seattle, Wash., and Gordon W. Mallatratt, San Francisco, for respondent.

GIBSON, Chief Justice.

Defendants appeal from a judgment which granted a writ of mandate ordering benefits to be paid to plaintiff and 190 other employees of defendant Pacific Lumber

Company under the Unemployment Insurance Act. Stats. 1935, p. 1226, as amended; 3 Deering's Gen.Laws [1937], Act 8780d; 3 Deering's Gen.Laws [1944], Act 8780d. The judgment set aside a decision of the California Unemployment Insurance Appeals Board which denied such benefits to the claimants.

The logging employees of the company struck and set up a picket line around the company's sawmill. Claimants, who were plant or mill employees, refused to go through the picket line. The company closed the plant and gave claimants notices of "employment termination." The appeals board determined that claimants were out of work because of a trade dispute and therefore were disqualified by section 56 of the act from receiving unemployment benefits.[1] This proceeding for a writ of mandate was then instituted in the superior court, and the matter was presented on the record before the board. The court, after holding that it was entitled to exercise independent judgment on the evidence, found that claimants had been discharged and concluded, in effect, that this removed their disqualification. It annulled the decision of the board and granted a writ of mandate directing the commission to pay benefits accruing after the date of discharge.

Defendants contend that the trial court was without power to reweigh the evidence and that, in any event, the judgment must be reversed because the undisputed facts show as a matter of law that claimants are disqualified under section 56 of the Unemployment Insurance Act.

[1-3] The appeals board is a statutory agency with statewide jurisdiction, and it does not have constitutional authority to make final determinations of fact. For general statutory provisions see Unemp. Ins. Act, Deering's Gen.Laws [1944], Act 8780d, §§ 1, 77 et seq. Any person deprived of a property right by such an administrative body is entitled to a limited trial de novo in the superior court. Laisne v. Cal. State Bd. of Optometry, 19 Cal.2d 831, 123 P.2d 457; Moran v. Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20; Dare v. Bd. of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304. In our opinion the benefits provided for by the Unemployment Insurance Act are property rights within the meaning of the term as used in the cases requiring a trial de novo. When a claimant has met all requirements of the act, and all contingencies have taken place under its terms, he then has a statutory right to a fixed or definitely ascertainable sum of money. See, for example, §§ 54, 67 [now in 68], and 72 as amended in 1945, Stats. 1945, pp. 1108, 2558, 2559-2560. The determination of the exact amounts due is essentially a mathematical and mechanical process, and the administrative authorities have no discretion to withhold benefits from any particular claimant once it is determined that the facts support his claim and the condition of the fund permits payment. Benefit claims, accordingly, are not comparable to applications for business and professional licenses such as those considered in McDonough v. Goodcell, 13 Cal.2d 741, 746-749, 91 P.2d 1035, 123 A.L.R. 1205, and Southern California Jockey Club v. Cal. etc. Racing Bd., 36 Cal.2d 167, 174-175, 223 P.2d 1, where we held that a denial of the licenses did not interfere with property rights. There, as the court pointed out, the administrative officers were given broad discretionary powers to deny applications, subject to review only for disregard of the law, arbitrary action, or other abuse of discretion. We conclude, therefore, that in the present case the trial court acted correctly in exercising its independent judgment on the evidence.

[4] The next question is whether the evidence is sufficient to support the determination of the trial court that the claimants are entitled to receive unemployment

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[1] Section 56, as amended in 1945, Stats. 1945, p. 2225, provides: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: (a) If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

insurance benefits. They refused to cross the picket line which was set up by the logging workers on January 14, 1946, and the company closed its plant on January 18 because of the absence of certain unidentified "key men" necessary to the operation of the mill. Some of the claimants participated in the picket line both before and after the plant was closed. It is undisputed that claimants' refusal to cross the picket line resulted in their being out of work because of a trade dispute, within the meaning of section 56 of the act, supra, Stats. 1945, p. 2225, from January 14 to and including January 17, and, therefore, that they were disqualified from receiving benefits for this period. See Matson Terminals, Inc. v. Cal. Emp. Com., 24 Cal.2d 695, 151 P.2d 202, and companion cases.

After the plant was closed each of the claimants received from the company a notice entitled "employment termination," which was signed by the company's foreman and stated that the "date terminated" was January 18, 1946. The trial court found and concluded that these notices were used by the company for the purpose of discharging claimants, that the company terminated and discharged each claimant on January 18, 1946, and that the discharge was the direct and proximate cause of unemployment after that date.

The evidence is sufficient to support the trial court's finding that claimants were discharged as of January 18. They were employees of the company until that date, since their refusal to cross the picket line did not terminate the employer-employee relationship. See Mark Hopkins, Inc. v. Cal. Emp. Com., 24 Cal.2d 744, 749, 751, 151 P.2d 229, 154 A.L.R. 1081. The "employment termination" notices were unqualified and indicated that there was a discharge as of the designated date, and there is other evidence, which need not be set forth here, that tends to support the finding. Testimony, relied upon by defendants, that the company did not intend to discharge claimants but only to terminate their "continuous employment period" for purposes of the company's bonus plan merely presented a conflict in the evidence which was resolved in favor of claimants.

A more difficult question is presented as to whether there is any substantial evidence which supports the determination of the trial court that the discharge of claimants by the company was the direct and proximate cause of each claimant being unemployed after January 18, 1946. There appears to be no conflict in the evidence with respect to the events which transpired insofar as this phase of the case is concerned. Claimants refused to pass the picket line which the logging employees established around the company's sawmill, and, as we have seen, it is undisputed that this refusal operated to disqualify claimants from receiving benefits for the period of their unemployment prior to January 18. The picket line, as well as the trade dispute between the logging employees and the company, continued after that date and during the entire period for which claimants seek benefits. Four of the six claimants who testified in the administrative proceeding admitted that they participated in the picket line after they were discharged.

There is no evidence in the record indicating that the termination notices caused claimants to remain out of work after January 18 or had anything to do with their determination to remain away from their jobs. None of the claimants who appeared as witnesses testified that he would have returned to work if he had not been discharged or that he would have been willing to cross the picket line. To the contrary, claimants did not respond to two notices given by the company to all employees on or about January 21 and February 18 requesting that they return to work immediately or as soon as strike conditions cease to exist.

Under the circumstances presented by the record in this case the only reasonable conclusion is that claimants remained out of work after January 18 as well as before that date because they were unwilling to cross the picket line which was maintained by the logging employees in their trade dispute with the company. Accordingly, claimants were disqualified under section 56 of the act from receiving unemployment insurance benefits.

The judgment is reversed.

SHENK, SCHAUER, and SPENCE, JJ., concur.

TRAYNOR, Justice.

I concur in the judgment.

It is undisputed that claimants left their work because of a trade dispute within the meaning of section 56(a) of the Unemployment Insurance Act. See, Matson Terminals, Inc. v. Cal. Emp. Com., 24 Cal.2d 695, 702–704, 151 P.2d 202; Bodinson Mfg. Co. v. California Emp. Com., 17 Cal.2d 321, 328, 109 P.2d 935. The only question presented, therefore, is whether or not they remained out of work by reason of the fact that the trade dispute was still in active progress in the establishment in which they were employed. For the reasons set forth in the dissenting opinion in Southern California Jockey Club v. California etc. Racing Board, 36 Cal.2d 167, 178, 223 P.2d 1, and the dissenting opinion cited therein, it is my opinion that claimants were not entitled to a limited trial de novo on this issue; whether or not the right to unemployment insurance benefits is a property right. Accordingly, the only issue properly before the trial court and now before this court is whether the findings of the appeals board are supported by substantial evidence.

In Mark Hopkins, Inc. v. Cal. Emp. Com., 24 Cal.2d 744, 151 P.2d 229, 154 A.L.R. 1081, this court said regarding the tests for determining the duration of the disqualification under section 56(a), when the original unemployment had been superseded by new employment: "A claimant is thus ineligible for benefits if the trade dispute is the direct cause of his continuing out of work. If a claimant who leaves his work because of a trade dispute subsequently obtains a permanent full-time job, however, he is no longer out of work and the continuity of his unemployment is broken. If he loses his new job for reasons unrelated to the dispute, he is unemployed by reason, not of the trade dispute, but of the loss of the new employment. [Citations.] The trade dispute that caused him to leave his original employment is not the cause of his subsequent unemployment, and he would no more be disqualified from receiving benefits for such unemployment than if he had not been previously employed in the struck establishment.

> "The termination of a claimant's disqualification by subsequent employment thus depends on whether it breaks the continuity of the claimant's unemployment and the causal connection between his unemployment and the trade dispute."

In the present case the appeals board was of the opinion that an unequivocal discharge would also break the causal connection between the unemployment and the trade dispute. It found, however, that by issuing the employment termination notices the employer did not unequivocally terminate the employment relationship.

There is evidence that the employer customarily used the employment termination notices not only when an employee resigned or was discharged, but for the purpose of terminating an employee's continuous service record under the "Continuous Service Compensation Plan" when he was absent without leave for more than three days. Accordingly, the purpose for which the notices were used in the present case cannot be determined from their provisions alone.

During the period the employer issued the termination notices it also sent to all employees and former employees the following notice:

> "All Employees and former Employees not working because of the strike or strike conditions are requested and urged to return to work immediately or as soon as such conditions cease to exist.
>
> "Failure to comply with this request may result in other persons being employed in your place."

It may reasonably be inferred that the employer was not discharging employees it was urging to return to work, and that the termination notices were therefore neither intended to sever nor understood by claimants as severing the employer-employee relationship. Moreover, the notice urging the employees to return to work itself indicated that they would retain their status until other persons were employed in their place.

Since the determination of the appeals board was supported by substantial evidence, I concur in the reversal of the judgment.

EDMONDS, J., concurs.

CARTER, Justice.

I dissent.

The evidence supports the trial court's conclusion that the claimants were out of work because of a discharge by the employer rather than a trade dispute.

After January 17, 1946, is the crucial period, for the employer closed the plant. After the plant was closed each of the claimants received from the company a notice which was in form as follows:

> "The Pacific Lumber Company   Form 2105
> "Employment Termination
> "The employee must present this slip to the Employment Office at Scotia within two days from date of issue.
> "Employee ——No.——B——
> Working ——Occupation ——
> Rate——Date Last Worked——
> No. hours——
> Date Terminated——
> Signed ——Noted ——
> Foreman   Timekeeper
> Employee's Signature——"

The forms, signed by the company's foreman, were appropriately filled out with respect to each claimant, the "date terminated" being stated as January 18, 1946. The trial court found and concluded that the claimants were given the termination notices because they refused to go through the picket line; that the notices were used in this case for the purpose of terminating claimants' employment and amounted to an unequivocal discharge; and that this discharge interposed a new intervening cause for claimants' unemployment, relieving them after January 18, 1946, from any disqualification imposed by section 56 of the Unemployment Insurance Act.

It is conceded that the evidence is sufficient to support the trial court's finding that claimants were unequivocally discharged as of January 18th, and that they were employees of the company until that date, since their refusal to cross the picket line did not terminate the employer-employee relationship. See Mark Hopkins, Inc. v. Cal. Emp. Com., 24 Cal.2d 744, 749, 751, 151 P.2d 229, 154 A.L.R. 1081. This is clear for the "employment termination" notices were unqualified and plainly indicated that there was a discharge as of the designated date. One claimant who refused to cross the picket line was told by his immediate supervisor that he was "through," that after the strike was over he would have no job, and that the supervisor would see to it that the claimant would not receive "compensation." Claimants were given their 1946 federal withholding tax statements, which, under the Internal Revenue Code, need not have been furnished until termination of employment or until January 31st of the succeeding year. 26 U.S.C.A. § 1625(a). Defendants rely on testimony that the company did not intend to discharge claimants but only to terminate their "continuous employment period" for purposes of the company's bonus plan. As the court found, however, no such limited purpose was indicated on any of the notices, and the testimony merely presented a conflict in the evidence which was resolved in favor of claimants.

The majority opinion holds, however, that the discharge was not the proximate cause of the unemployment after January 18th, contrary to the trial court's finding. With that I disagree. The record supports the determination of the trial court that the discharge of claimants on January 18, 1946, interposed a new, intervening cause for their unemployment. The fact that claimants were unemployed because of a trade dispute from January 14th through January 17th did not preclude them from becoming entitled to benefits after that date if continuation of their unemployment was due to factors other than their participation in the trade dispute. The disqualification exists only during the period in which the dispute remains the cause of the unemployment. Section 56 of the act; see Mark

Hopkins, Inc. v. Cal. Emp. Com., 24 Cal.2d 744, 748–750, 151 P.2d 229, 154 A.L.R. 1081.

The company's act of discharging claimants completely changed the nature of their unemployment, insofar as their status under section 56 is concerned. Disqualification under this statute depends upon the fact of voluntary action by the worker. See Matson Terminals, Inc. v. Cal. Emp. Com., 24 Cal.2d 695, 702–704, 151 P.2d 202; Bodinson Mfg. Co. v. California E. Com., 17 Cal.2d 321, 327–328, 109 P.2d 935; see also McKinley v. California Emp. Com., 34 Cal.2d 239, 242–245, 252, 209 P.2d 602. An employee who observes a picket line is disqualified on the theory that he has a free "choice" in determining whether to work in a plant in which certain of his fellow employees are on strike, and that his decision not to work is voluntary. Bodinson Mfg. Co. v. California E. Com., 17 Cal.2d 321, 327–328, 109 P.2d 935; Matson Terminals Inc. v. Cal. Emp. Com., 24 Cal.2d 695, 702–704, 151 P.2d 202. He nevertheless remains an employee, regardless of the strike and picketing, see Mark Hopkins, Inc. v. Cal. Emp. Com., 24 Cal.2d 744, 749, 751, 151 P.2d 229, 154 A.L.R. 1081, and he can return to work at any time he becomes willing to do so. Where, as here, however, the employer discharges some of its employees, such persons no longer have the choice of returning to their jobs, and it cannot be said that their subsequent unemployment is due to their voluntarily continuing out of work because of a picket line. Unlike persons who remain employees, they have no reasonable expectation of going back to work upon termination of the trade dispute, and if they do obtain work with the same employer, they will have to be rehired and will come in as new employees. It thus seems apparent that section 56 ceases to operate with respect to workers whose employment relationship has been wholly severed, and it can have no bearing on their right to benefits until they are reemployed, upon mutual agreement.

Defendants contend that two notices given by the company show that claimants voluntarily remained away from their jobs because of the trade dispute. One notice, dated January 21, 1946, requested "all Employees and former Employees not working because of the strike" to return to work immediately or as soon as strike conditions ceased to exist. The second notice, given about a month after the discharge, stated that "you are still employees of the Company" and repeated the request to return to work. These requests, however, did not alter the fact that claimants were discharged nor did they serve to restore the employment relationship, and, as we have seen, if anyone had returned to work in response to the requests, he would have done so as a new employee.

Unlike the situation presented in McKinley v. California Emp. Com., 34 Cal.2d 239, 209 P.2d 602, relied upon by defendants, the record does not establish that claimants engaged in any conduct which they knew would cause the company to retaliate by preventing their return to work. The court impliedly found, and the finding is based upon substantial evidence, that claimants did not know that refusal to cross the picket line would result in their discharge. Such conduct ordinarily suspends but does not terminate the employment relationship, and the company gave no warning that claimants would be discharged. The company had adopted a rule which provided that an employee who was absent for over three days without permission "shall be dropped from the Company's payroll and employment period terminated," but the rule was contained in a printed booklet entitled "Continuous Service Compensation Plan" and may reasonably be interpreted as pertaining only to that plan.

Further, it does not appear that claimants' conduct caused the plant to be closed on January 18, 1946, or to remain closed thereafter. The record supports the finding that the plant was closed by the absence of certain key men necessary to the operation of said mill, but does not establish that claimants were the key men. Even if we assume that the strike caused the absence of the key men, claimants were not members of the same local union to which the strikers belonged, and there is nothing to show that claimants voted for or authorized the strike or that the key men were absent because some of the claimants participated in the picketing.

I would, therefore, affirm the judgment.

Rehearing and modification denied; CARTER, J., dissenting.

39 Cal.2d 496

PEOPLE v. COOK.

Cr. 5305.

Supreme Court of California, in Bank.

Aug. 26, 1952.

Rehearing Denied Sept. 25, 1952.

Prosecution for murder. From a judgment of conviction in the Superior Court, Imperial County, L. J. Mouser, J., for first degree murder, defendant appealed. The Supreme Court, Gibson, C. J., held that the evidence supported the jury's verdict that defendant was sane at the time of the homicide.

Judgment affirmed.

1. Constitutional Law 🔑257

One pleading not guilty of murder because of insanity was not denied due process of law by examination of witnesses, without presence of defendant or his counsel, at extra-judicial hearing, held by arrangement of district attorney, before three alienists appointed by trial court, where district attorney was not present at alienists' interviews nor informed of their findings before they testified at trial, defendant was not prevented from examining witnesses interviewed nor denied access to documents considered by alienists and was afforded full opportunity to cross-examine them, and no objection to or motion to strike their testimony was made.

2. Criminal Law 🔑1035(3)

Where one charged with murder did not move for change of venue on ground that public speeches by district attorney aroused prejudice against defendant before trial, there was no evidence that any of trial jurors heard speeches, and defendant announced at conclusion of prospective jurors' examination that he was satisfied with jury and did not wish to exhaust his peremptory challenges, he was in no position to claim, as ground for reversal of conviction, that such speeches rendered fair trial by unbiased jury impossible. Pen. Code, § 1033.

3. Criminal Law 🔑1037(1)

In murder prosecution, district attorney's statement in argument to jury that defendant, who had been sentenced by federal court to five consecutive sixty year prison terms on convictions of kidnapping and murdering five persons, would be eligible for parole under federal law after serving fifteen years, was not prejudicial error warranting reversal of conviction of crime charged, even if statement was incorrect, in absence of objection by defendant to statement when made. 18 U.S.C.A. §§ 1201, 4202.

4. Homicide 🔑237

In murder prosecution, evidence supported jury's verdict that defendant was sane at time of homicide.

5. Homicide 🔑354

The Superior Court did not abuse his discretion in imposing death penalty on one convicted of first degree murder by killing in perpetration of robbery. Pen. Code, §§ 189, 190, 1026.

John Connolly, Oklahoma City, Okl., for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Don C. Bitler, Dist. Atty., El Centro, for respondent.

GIBSON, Chief Justice.

Defendant was indicted for the murder of Robert Dewey. He pleaded not guilty and not guilty by reason of insanity. Later he withdrew his plea of not guilty, and the sole issue at the trial was whether or not he was insane at the time he committed the homicide. The jury returned a verdict that he was sane. The court considered the evidence for the purpose of fixing the degree of the crime, found defendant guilty of murder in the first degree, and sentenced him to death. This appeal is taken automatically under section 1239(b) of the Penal Code.

On the day of the homicide defendant kidnapped a deputy sheriff, bound him, left him at the side of the road and stole his car. Defendant used the red light on the deputy's car to stop an automobile driven by Dewey, and, at the point of a gun, forced Dewey to give him a ride. While they were in the car, defendant shot Dewey in the side, pushed him out of the door and then shot him a second time. Dewey was left lying in the road, and his dead body was discovered by the deputy sheriff a few hours later. Defendant then took Dewey's car into Mexico where he stopped another automobile and forced its two occupants to drive him around for several days until he was apprehended by the Mexican police.

When defendant was returned to this country he was taken into custody by federal officials upon the charge that he had kidnapped a family of five, consisting of father, mother and three children, and had killed them after transporting them from Oklahoma to Arkansas. He was convicted of violation of the Lindbergh Kidnapping Law, 18 U.S.C.A. § 1201, given five consecutive sentences of sixty years, and incarcerated in Alcatraz Island Penitentiary, from which he was brought to Imperial County for the trial of the present case.

[1] Defendant contends on this appeal, as one ground for reversal of the judgment, that he was denied due process of law, and in support of this claim he asserts that by arrangement of the district attorney three alienists appointed by the trial court held "an extrajudicial hearing" at which various witnesses were examined without the presence of defendant or his counsel and that his right to be confronted with witnesses was abridged. The alienists were the superintendents of the state mental hospitals at Camarillo, Patton and Stockton, which are located at considerable distances from the place of trial. They were notified by the district attorney that certain witnesses and certain transcripts would be available on a specified date at El Centro, the county seat of Imperial County, and accordingly, as a matter of convenience, the doctors met at that time. They conducted the usual type of psychiatric examination which involved reading the grand jury transcript and Federal Bureau of Investigation reports, interviewing witnesses who had observed defendant's conduct, inquiring into his background and his behavior before and after the homicide, and then examining defendant. The district attorney informed the doctors of the nature of the case but did not discuss it with them in detail, neither he nor any one from his office was present at the interviews, and his office was not informed of the doctors' findings before they took the witness stand. There is no showing that defendant was prevented from examining any witnesses interviewed by the alienists or that he was denied access to any documents which they considered. He was afforded full opportunity to cross-examine the doctors as to the basis for their opinions, and their testimony disclosed the manner in which they made their examination for the purpose of determining defendant's sanity. No objection was made to their testimony, and there was no motion to strike it. The record does not support the claims made by defendant or show that there was any denial of due process.

[2] As another ground for reversal, defendant asserts that prior to the trial the district attorney aroused the prejudice of the people against him by making speeches about the case over the radio and at various civic meetings. Defendant did not move for a change of venue under section 1033 of the Penal Code, and he has not shown that he was unaware of the asserted facts upon which his claim is based at the time he might properly have made such a motion. Even if it be assumed that defendant has not waived his objection by his failure to move for a change of venue, the record does not support his position. There is no evidence that any of the jurors who tried the case heard the speeches which were assertedly made. See People v. Chapman, 93 Cal.App.2d 365, 372, 209 P.2d 121. In fact, defendant announced at the conclusion of the examination of

prospective jurors that he was satisfied with the jury and did not wish to exhaust his peremptory challenges. Cf. People v. Patterson, 58 Cal.App.2d 837, 844, 138 P.2d 341. Under all the circumstances he is in no position to claim that it was impossible for him to secure a fair trial by an unbiased jury.

[3] The next contention is that the district attorney committed prejudicial error in his argument to the jury. As noted above, defendant had previously been sentenced by a federal court to five consecutive terms of sixty years each for other offenses, and he complains that the district attorney erroneously stated that defendant would be eligible for parole under federal law after he has served fifteen years.[1] Defendant asserts that he will not be eligible for parole until he has served seventy-five years, but he did not object to the district attorney's statement when it was made and now raises the point for the first time on appeal. Even if we assume that the statement was incorrect, it is clear that any harmful effect could have been cured by a proper instruction if timely objection had been made, and the asserted misconduct does, not, therefore, furnish grounds for reversal. See People v. Sampsell, 34 Cal.2d 757, 763–764, 214 P.2d 813; People v. Berryman, 6 Cal.2d 331, 337, 57 P.2d 136.

[4, 5] There is a conflict in the evidence as to defendant's sanity at the time of the homicide. Testimony that he was insane was given by two psychiatrists and a witness who was acquainted with defendant for several years while she was working as a probation officer. On the other hand, three alienists appointed by the court testified that in their opinion he was sane. In addition, there was testimony by several witnesses as to defendant's declarations, acts and conduct before and after the killing from which the jury could infer that defendant knew what he was doing and knew the difference between right and wrong. The verdict that he was sane at the time of the homicide is amply supported by the evidence. The killing was committed in the perpetration of robbery, and, therefore, by the definition of the crime, was murder of the first degree, and we cannot say that there was any abuse of discretion in imposing the death penalty. See Pen. Code, §§ 189, 190, 1026.

The judgment and order denying a new trial are affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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112 Cal.App.2d 825

NEUSTADT v. SUPERIOR COURT OF STATE, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 15393.

District Court of Appeal, First District, Division 2, California.

Aug. 25, 1952.

Rehearing Denied Sept. 24, 1952.

Hearing Denied Oct. 23, 1952.

Original proceeding by Julius Neustadt against the Superior Court of the State of California in and for the City and County of San Francisco for a writ of mandate ordering the dismissal of an action in conversion commenced against him on August 11, 1944. The plaintiff in the conversion action opposed the petition on the ground that other litigation relating to some phases of the conversion action excused his failure to prosecute. The District Court of Appeal, Nourse, P. J., held that the trial court had discretion to accept the excuses of the plaintiff in the conversion action as being equitable and to deny the motion to dismiss, and that its judgment entered pursuant to its exercise of such discretion would not be disturbed.

Petition for writ of mandate denied; alternative writ discharged.

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[1] 18 U.S.C.A. § 4202, provides: "A Federal prisoner * * * serving a definite term or terms * * * may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years."

1. Dismissal and Nonsuit ⚿60(2)

Under statutory provision for dismissal of action which is not prosecuted for five years, implied exception, that time during which going to trial would be impossible, is to be excluded in computing the five year period, is applied to the extent that facts in any particular case fit the statement of the exception in the light of facts to which that statement is applied. Code Civ.Proc. § 583.

2. Appeal and Error ⚿1024(1)
Dismissal and Nonsuit ⚿73

Whether there has been ample opportunity to bring a case to trial is a question of fact to be determined by trial judge, and if there is any substantial evidence to support a decision denying or granting a motion to dismiss for failure to prosecute, it will be upheld. Code Civ.Proc. § 583.

3. Appeal and Error ⚿962
Dismissal and Nonsuit ⚿60(2)

Trial court had discretion to accept as equitable a plaintiff's excuses for failure to prosecute for seven years a conversion action, which was allegedly subject to abatement, by reason of appeals from decision in partition suit involving same property, and its exercise of such discretion to deny motion to dismiss conversion action for failure to prosecute would not be disturbed. Code Civ.Proc. § 583.

◆

Joseph A. Brown, San Francisco, for petitioner.

Marcel E. Cerf, Robinson & Leland, San Francisco, for respondent.

NOURSE, Presiding Justice.

Petitioner seeks a writ of mandate ordering the dismissal of an action in conversion commenced on August 11, 1944. He relies on section 583, Code Civ.Proc. Respondent defends on the ground that other litigation relating to some phases of the conversion action excuses his delay.

No service of process having been made the defendant Neustadt, on July 19, 1946 (almost two years after complaint filed) moved to dismiss on that ground. This motion was denied on April 14, 1947 (almost a year after motion made). An amended complaint was filed on December 22, 1949, and another on June 12, 1951. Demurrers were overruled and motions to strike were denied. The last order, made on February 11, 1952, is the basis of this application.

As excuse for these delays the respondent (we refer herein to the real party in interest, the defendant Skernswell, as respondent) relies on these facts. An action to establish a trust and to partition the trust property (which apparently consists of both real and personal property) and to appoint a receiver thereof was brought by Neustadt against Skernswell. The time when this action was filed does not appear though it appears from the decision on appeal from an adverse judgment by Skernswell, defendant therein, that judgment was entered therein on July 18, 1941. It was during the appeal from this judgment that the alleged acts of conversion (of the same personalty as in the partition suit) took place, and it was then that this action was filed; that is, between the time of judgment and remittitur. It is said that the action was then filed in order to prevent the running of the statute of limitations, although the foundation of the conversion action rested in the outcome of the partition suit. It is not entirely clear from the affidavits that, strictly speaking, the right of Skernswell in an action for conversion depends wholly on the judgment in the partition suit, but that much is at least implied. The appellate court in reversing the original action directed that plaintiff Neustadt be allowed to amend his complaint, Neusted v. Skernswell, 69 Cal.App. 2d 361, 371, 159 P.2d 49, and as a result the outcome of the partition action was further delayed. Because of the delay it is claimed that any attempt to bring this action to trial would have been futile, since at any time, until the partition suit was finally determined, Neustadt could have entered a plea in abatement, thereby nullifying the conversion action. In August 1949, a motion in the partition suit was made by Skernswell to have that action dismissed. This was based on that part of section 583 that requires an action to be dismissed when, after three years following filing of remittitur in the trial court, a cause remanded for a new trial is not again brought to trial. This motion was granted, but an appeal was then taken by Neustadt from the dismissal (thereby continuing the entire process) and was affirmed in August 1950 (hearing denied October 26, 1950). Neustadt v. Skernswell, 99 Cal.App.2d 293, 221 P.2d 694. It is also stated in the affidavits that there were extensions of time obtained by Neustadt, plaintiff, in the partition suit which added to the delay. A prima facie case is thus made out by the petition (almost eight years have passed since the filing of the complaint in this, the conversion, suit); an excuse is alleged by respondent, relying on the proposition that section 583 is not completely mandatory and a delay may be excused under certain circumstances not stated in the code section. Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665; Bank of America Nat. Trust & Savings Ass'n v. Superior Court, 84 Cal.App.2d 34, 189 P.2d 799; Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361; Westphal v. Westphal, 61 Cal. App.2d 544, 143 P.2d 405; City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 207 P.2d 17. The argument for excuse is simply that this action was at all times, prior to the final determination of the partition suit, subject to a plea in abatement.

[1] It is true that the later cases have read an implied exception into section 583 which is this, "* * * there is no question but that, in computing the five-year period, time during which 'for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile,' is to be excluded. * * *" Pacific Greyhound Lines v. Superior Court, supra, 28 Cal.2d 61, 64, 168 P.2d 665, 666; Christin v. Superior Court, supra, 9 Cal.2d 526, 71 P.2d 205. The extent of this exception is left undefined, and a review of the cases shows merely that it is utilized in more or less justifiable situations. Thus, the problem seems to be to determine whether the facts in any particular case fit the statement of the exception in the light of the facts to which that statement is applied, which, though it may be a truism, establishes reason for granting an alternative writ. This is especially so in the face of Rauer's Law, etc., Co. v. Higgins, 76 Cal.App.2d 854, 174 P.2d 450, where it was held proper for the trial court to refuse to dismiss an action after five years where the defendant could have, though he had not, applied for a stay of the action under the Soldier's and Sailor's Civil Relief Act, 50 U.S.C.A.Appendix, § 501 et seq. See Pacific Greyhound Lines v. Superior Court, supra, 28 Cal.2d 61, 168 P.2d 665. This, it would seem, would give some degree of efficacy to respondent's argument, for, assuming that his premise that a plea in abatement would have been upheld is correct, it would seem futile to serve the complaint and attempt to force an issue, and the fact that in fact no such plea was made would fall into the frame of decision in the Rauer's Law and Greyhound cases above.

[2] In the late case of Rose v. Knapp, 38 Cal.2d 114, 237 P.2d 981, it was held that where a plaintiff is faced with a judgment against her and that judgment cancels a deed on which she must rely in the delayed action the time between the judgment so cancelling and the remittitur reversing must be excluded. There are no generalizations in that case, but the extent of the decision is not clear, and whether it can be extended to this type of case is doubtful. Also, it has been held that the question of whether or not there has been an ample opportunity to bring the case to trial is a question of fact to be determined by the trial judge, and if there is any substantial evidence to support his decision it will be upheld. Ojeda v. Municipal Court, 73 Cal.App.2d 226, 166 P.2d 49.

[3] In essence the cited cases have accepted excuses for minor delays when the equities of the particular case appear to justify it. From the final disposition of

the appeal in the main action of Neusted v. Skernswell more than six years had elapsed. From the commencement of the second action nearly seven years had elapsed at the time of the denial of the motion to dismiss. Some delays may have been excusable while that appeal was pending. However this court is bound by the decisions of the supreme court and, for that reason, we must hold that, when the trial court denied the motion to dismiss, it accepted respondent's excuses as being equitable. Having the discretion to do so under the authorities cited above the judgment cannot be disturbed in this proceeding.

The petition for a writ of mandate is denied and the alternative writ is discharged.

GOODELL and DOOLING, JJ., concur.

113 Cal.App.2d 5

In re MANISCHEWITZ' ESTATE.

CURTIS v. REIDER.

No. 15153.

District Court of Appeal, First District, Division 1, California.

Sept. 2, 1952.

Rehearing Denied Oct. 2, 1952.

Hearing Denied Oct. 30, 1952.

Proceeding in the matter of the estate of Edith Manischewitz, etc., deceased, wherein Howard Curtis, etc., filed objections to the account of Louise Reider, as executrix of decedent's estate under a California will. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered orders settling the account and admitting to probate a New York will of decedent and appointing Louise Reider ancillary administratrix with will annexed, and Howard Curtis appealed. The District Court of Appeal, Wood, J., held that whether ancillary administratrix was incompetent to execute duties of such trust by reason of want of integrity was a question of fact for trial court.

Appeal from order settling account dismissed, and order appointing ancillary administratrix affirmed.

1. Executors and Administrators 🔑510(3)

Appeal from order settling account of executrix, which had been abandoned by appellant, would be dismissed.

2. Executors and Administrators 🔑15

Statute making incompetent to serve as executor any person adjudged incompetent to execute duties of trust by reason of want of "integrity" uses quoted word as a synonym for probity, honesty, and uprightness in business relations with others and as meaning soundness of moral principles and character, as shown by dealings with others in the making and performance of contracts and in fidelity and honesty in discharge of trusts. Probate Code, §§ 401, 420.

See publication Words and Phrases, for other judicial constructions and definitions of "Integrity".

3. Executors and Administrators 🔑21(2)

Whether ancillary administratrix with New York will annexed was incompetent by reason of want of integrity to execute duties of such trust because, while acting as executrix of earlier California will, she had entered into agreement of compromise and settlement of contest of New York will instituted by husband, by which she received more under New York will than she would have received thereunder without the settlement, was a question of fact for trial court. Probate Code, §§ 401, 420.

4. Compromise and Settlement 🔑2

The law favors settlement of will contests.

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Philip S. Ehrlich, Albert A. Axelrod, Irving Rovens, San Francisco, for appellant.

Heller, Ehrman, White & McAuliffe, San Francisco, Freed, Gebauer & Freed, Scott Fleming, San Francisco, for respondent.

FRED B. WOOD, Justice.

Howard Curtis, an heir and legatee, has appealed from (1) an order settling the account of Louise Reider, as executrix of the estate of Edith Manischewitz, deceased, under a California will dated September 3, 1948, and (2) an order admitting to probate a New York will of said deceased dated July 29, 1949, and appointing Louise Reider ancillary administratrix with the will annexed of the estate of the deceased. At the same time the trial court revoked the letters testamentary theretofore issued to Louise Reider upon probate of the California will. From that order no appeal has been taken.

[1] The appeal from the order settling the account has been abandoned and will be dismissed. In his opening brief, appellant states that "the question involved on this portion of the appeal appears to be moot by reason of that portion of the order" appealed from which expressly reserved determination of the issue which appellant presented at the hearing of the account.

[2] In support of his appeal from the order appointing Louise Reider ancillary administratrix, appellant's sole contention is that "the Probate Court erred in not adjudging the respondent incompetent to execute the duties of ancillary administratrix with the will annexed of the Estate of Edith Manischewitz, alias, deceased, by reason of her want of integrity, as demonstrated by her conduct while acting as Executrix of the last will and testament of Edith Manischewitz, alias, deceased." He invokes section 401 of the Probate Code which declares that "No person is competent to serve as an executor or executrix who is * * * adjudged by the court incompetent to execute the duties of the trust by reason of * * * want of * * * integrity", a provision which section 420 of the code makes applicable to an administrator or administratrix. Section 401 is a continuation without substantive change of the provisions of former section 1350 of the Code of Civil Procedure. As used in section 1350, the word integrity was defined as meaning "soundness of moral principle and character, as shown by one person's dealing with others in the making and performance of contracts, in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for probity, honesty, and uprightness in business relations with others." In re Bauquier's Estate, 88 Cal. 302, 307, 26 P. 178, 532. **In the Bauquier case,** the court said "[w]e do not think * * * that the mere fact that the appellant claims property as her own, which the other legatees insist belongs to the estate, would of itself, and without some reference to the honesty of her claim, show a want of integrity." 88 Cal. at page 307, 26 P. at page 178.

[3] The asserted "want of integrity" presented a question of fact which the trial court in our case decided adversely to appellant's contention. The sole issue upon this appeal is presented by the question aptly put by appellant in his closing brief: "does the record disclose undisputed facts which establish as a matter of law that respondent is incompetent to execute the duties of her trust by reason of her want of integrity?" Our examination of the record convinces us that this question must be answered in the negative.

The conduct of respondent which appellant claims establishes want of integrity may be briefly summarized:

Decedent executed a will on September 3, 1948, while in California and a resident of California. She died August 9, 1949, in the city of New York. August 28, 1949, respondent filed in San Francisco her petition for probate of the will of September 3, 1948, alleging that decedent was a resident of California at the time of her death. In that probate proceeding, Dr. Kurt Eissler (appearing specially to contest the jurisdiction) filed a notice to dismiss respondent's petition for asserted lack of jurisdiction, claiming that decedent died a resident of New York, made a later will, dated July 29, 1949, and that a proceeding for its probate was pending in the Surrogate's Court in New York. October 13, 1949, the California court denied Eissler's motion to dismiss and granted respondent's petition for probate of the California will, finding that decedent was a resident of California at the time of her death and that the will of September 3, 1948, was her last will. Respondent was appointed executrix of that will. Respondent's husband, Norman Reider (a beneficiary under the California but not under the New York will) filed in the New York court a contest of the New York will. Subsequently and on May 15, 1950, Eissler and Norman Reider entered into an agreement of compromise and settlement to which respondent was a party. By this agreement the parties stipulated that decedent died a resident of New York, Norman would withdraw his objections to the probate of the New York will, Eissler would assign to respondent his legacy (12.5% of the residue) under the New York will, Eissler would act as executor in New York, respondent would present the New York will for ancillary probate in California and become ancillary administratrix with the will annexed, and respondent would designate which articles of personal property she desired to have distributed to her pursuant to a clause of the New York will which gave the executor absolute discretion to distribute decedent's personal belongings among "Louise Reider, Beatrice Grant and Judith Sunshine, and such other of the legatees" named in the will as the executor might determine. In September, 1950, respondent executed an agreement with Beatrice Grant and Judith Sunshine to the effect that respondent should receive not more than half, and Beatrice and Judith, together, not more than half of decedent's personal belongings.

[4] By that settlement, it is true, respondent received more under the New York will than she would have received under that will without the settlement. This increase she received by agreement with the only New York legatees affected, Dr. Kurt Eissler, Beatrice Grant and Judith Sunhine. It also appears that under this settlement respondent and her husband received less than either of them would have received under the California will. She was to receive 26 per cent of the residue, and all furniture, furnishings, and all other personal effects under the California will. Under the settlement she will receive not exceeding one-half of the personal belongings and 12.5 per cent of the residue, subject to an abatement in the amount of $30,000 in view of advancements made during decedent's lifetime, and Eissler's 12.5 per cent of the residue. The California will gave her husband 6 per cent of the residue. Under the settlement he receives nothing. Appellant makes no showing that any legatee under the California will was prejudicially affected by that settlement. As concerns his own interest, appellant says he is not attacking either the California or the New York will, that he does not care which will is probated. Nor does appellant undertake to show that in the proceedings in the New York Surrogate's court for the probate and the contest of the probate of the New York will, and the settlement of that contest, there was any lack of notice to interested parties or any fraud of any kind practiced upon them or upon the court. His case, as stated by his counsel at the hearing in the trial court, rests solely upon the fact that while executrix of the California will she made a gainful contract recognizing the New York will: "All the testimony I need to justify my remarks is two facts: One, at the time this woman made that contract she was executrix of this estate; two, that she gained a great deal from that contract. That is my case, as a matter of law, the deductions arising from those two facts; that is constructive fraud on the face of it." This is appellant's claim despite his stipulation that, when presenting the California will for probate in 1949, respondent believed to be true the testimony she then gave concerning decedent's California residence and related facts. That claim did not convince the trial court that respondent is lacking in integrity. Nor do those "two facts" persuade us that the trial court committed any abuse of discretion. Those two facts are quite consistent with a finding that respondent made a reasonable settlement of a will contest which might have proved very expensive in time and money, and thereby furthered the interests of the estate and of the other beneficiaries as well as her own. The law favors settlements. Silver v. Shemanski, 89 Cal.App.2d 520, 550, 201 P.2d 418; In re Estate of Johanson, 62 Cal.App.2d 41, 56, 144 P.2d 72.

The order appointing respondent ancillary administratrix is affirmed. The appeal from the order settling the account is dismissed.

PETERS, P. J., and BRAY, J., concur.

113 Cal.App.2d 1

BENTLEY et al. v. CHAPMAN et al.

No. 15146.

District Court of Appeal, First District,
Division 1, California.
Sept. 2, 1952.

Action by Diana Bentley, a minor by her guardian ad litem, William H. Bentley, and others, against John Chapman, and others, for injuries received by plaintiff automobile passengers when host driver fell asleep at wheel and automobile collided with named defendant's parked truck. The Superior Court, County of San Mateo, A. R. Cotton, J., entered judgment on verdict for named defendant, and plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held that, even if overparking constituted violation of duty of care toward plaintiffs, such violation could not, as a matter of law, be deemed the proximate cause of plaintiffs' injuries.

Judgment affirmed.

1. Automobiles ⚷5(3)

City council was without power to make ordinance, providing that no person shall stop, stand, or park vehicles upon city streets for period longer than one hour between 1:30 and 6:00 a. m. of any day without permit from police department, applicable to a state highway in absence of sanction therefor by some provision of state law. Vehicle Code, §§ 458, 459, 588, 589.5.

2. Automobiles ⚷245(25, 62)

Even if city ordinance forbidding parking of vehicle for more than one hour between certain hours on city streets applied to section of state highway involved, mere over parking of truck would not constitute, as a matter of law, violation of a duty of care toward passengers in automobile which collided with rear of truck after host driver fell asleep, and, even if such violation existed, it could not, as a matter of law, be deemed the proximate cause of passengers' injuries. Vehicle Code, §§ 458, 459, 588, 589.5.

3. Appeal and Error ⚷843(2)

In action for injuries received by automobile passengers, where trial court instructed jury that negligence, if any, of host driver, who fell asleep at the wheel before automobile collided with parked truck, could not be attributed to passengers, passengers' point on appeal that negligence, if any, of their host, was not attributable to them did not present an issue.

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Pelton & Gunther, San Francisco (Reginald M. Watt, San Francisco (of counsel), for appellants.

Keith, Creede & Sedgwick, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiffs have appealed from a verdict and a judgment for defendant in an action for personal injuries sustained by plaintiffs while riding as guests in an automobile which collided with defendant's parked truck.

Plaintiffs' principal contention is that the trial court should have submitted to the jury only the question of the amount of the damages, claiming that defendant's liability was established as a matter of law; i. e., that defendant was negligent as a matter of law, by parking his truck, in violation of a city ordinance, and that such negligence was, as a matter of law, a contributing proximate cause of the accident. This argument is not persuasive. It rests on a false premise. The ordinance invoked was not applicable.

The accident occurred September 12, 1948, about 5:30 a. m., in Redwood City, on El Camino Real, a state highway. Plaintiffs' host, David Obera, was driving south along a section of the highway which had three lanes for southbound traffic. He was in the outer of these three lanes, to the west of which was a fourth or parking lane in which defendant had parked his truck about 6:00 p. m. the night before. About one block from the place of the accident, Obera fell asleep. When he woke up he was in the parking lane and the truck was directly in front of him. The front of his car struck the back of the truck. The truck was parked with its righthand wheels close to the curb. Hence, there was no proof of a violation of section 588 of the Vehicle Code as it then read, Stats.1947, ch. 875, p. 2054. Nor was there any evidence that the State Department of Public Works had adopted and posted any parking restrictions, applicable to this state highway, as authorized by section 589.5 of the Vehicle Code, Stats. 1947, ch. 875, p. 2054.

[1] A Redwood City ordinance adopted in 1943 provided that "No person shall stop, stand or park a vehicle upon any street in the City of Redwood City for a period of time longer than one (1) hour between the hours of 1:30 o'clock a. m. and 6:00 o'clock a. m. of any day without a permit from the Police Department of this city." Defendant did not have the indicated permit. Unless sanctioned by some provision of state law, the city council was without power to make this ordinance applicable to a state highway. See Veh.Code, § 458, and Pipoly v. Benson, 20 Cal.2d 366, 370–375, 125 P.2d 482, 147 A.L.R. 515. This ordinance was not within the scope of any of the sanctions accorded local authorities by section 459 of the Vehicle Code as it read in 1943 when the ordinance was enacted or in 1948 when the accident herein occurred, Stats. 1935, ch. 590, p. 1679. It was not until the addition of subdivision (j) in 1951 that section 459 for the first time dealt with this topic. Stats. 1951, ch. 1392, p. 3326. The only other statute which might have sanctioned such an ordinance was section 589.5 of the Vehicle Code. But that section was not added to the code until 1945, Stats. 1945, ch. 829, p. 1528, and apparently was not a continuation of any prior statute. Section 589.5 could not have validated this ordinance, to make it applicable here. Section 589.5 was not in the nature of a mere withdrawal of a state inhibition of the exercise of local powers. It was in the nature of a delegation of authority to local governing bodies to exercise state powers over a state instrumentality. As enacted in 1945 and amended in 1947, Stats.1947, ch. 875, p. 2054, this section applied to highways under the jurisdiction of the State Department of Public Works and authorized that department to place signs thereon prohibiting or restricting the parking of vehicles when by resolution or order it found that the proscribed parking was dangerous to users of the highway or would unduly interfere with the free movement of traffic. It further declared that where the maintenance of a state highway had been delegated by the department to a city "such city may by ordinance or resolution exercise as to such state highway the powers herein conferred on said department." Concerning the delegation of state powers to local governing bodies and the exercise of such powers by such bodies, see Housing Authority v. City of Los Angeles, 38 Cal.2d 853, 868, 243 P.2d 515; Kleiber v. City etc. of San Francisco, 18 Cal.2d 718, 117 P.2d 657; The Housing Authority v. Dockweiler, 14 Cal.2d 437, 457, 94 P.2d 794. It follows that the provisions of this ordinance were not applicable to the parking of defendant's truck upon this highway upon this occasion. It cannot be said that defendant was negligent as a matter of law.

[2] Even if the ordinance were applicable to the section of state highway here involved, it is doubtful if parking longer than the time permitted by the ordinance, one hour between 1:30 and 6:00 a. m.) should be deemed negligence as a matter of law. This is a parking limit per car. A given spot (such as that occupied by defendant's truck in this case) could legally, under this ordinance, be continuously occupied by parked cars in none of them remained longer than one hour between 1:30 and 6:00 a. m. Mere overparking of a particular car would not seem to constitute, as a matter of law, a violation of a duty of care toward the plaintiff in this case. Such violation certainly could not, as a matter of law, be deemed a proximate cause of plaintiffs' injuries.

[3] Plaintiffs' only other point is that the negligence, if any, of their host, Obera, is not attributable to them. This point really presents no issue. The trial court instructed the jury that the negligence, if any, of Obera, could not be attributed to the plaintiffs, and respondent concedes that the instruction was correct.

The judgment is affirmed. The appeal from the verdict is dismissed, there being no appeal from a verdict.

PETERS, P. J., and BRAY, J., concur.

112 Cal.App.2d 807

DORSA v. MacNEIL et al.

No. 15155.

District Court of Appeal, First District,
Division 1, California.

Aug. 25, 1952.

Hearing Denied Oct. 23, 1952.

Frances Dorsa sued Bruce MacNeil and another for personal injuries sustained in a collision between an automobile in which plaintiff was riding as a passenger and an automobile driven by named defendant. From an order of the Superior Court, Santa Clara County, John D. Foley, J., granting defendant a new trial after judgment on a verdict for plaintiff, she appealed. The District Court of Appeal, Fred B. Wood, J., held that whether defendant was guilty of negligence, proximately causing the collision, in moving into the middle lane of a three lane highway, without ascertaining whether such movement could be made safely, at a time and place when the roadway was not clearly visible because of a dense fog at night, was a fact issue for the jury on conflicting evidence.

Order affirmed.

1. Appeal and Error 🔑979(2)

An order granting new trial on ground of insufficiency of evidence to sustain judgment will not be disturbed on appeal, unless abuse of trial court's discretion is clearly shown.

2. Appeal and Error 🔑933(1)

All presumptions are in favor of order granting new trial and it will be affirmed on appeal, if sustainable on any ground.

3. New Trial 🔑71

In considering motion for new trial, trial court is not bound by conflict in evidence, and it does not abuse its discretion in granting motion when there is any evidence to support judgment for moving party.

4. New Trial 🔑71

On motion for new trial, trial judge may draw inferences contrary to those of jury from evidence, even if uncontradicted, and must resolve such conflicting inferences in determining whether issue should be retried.

5. Appeal and Error 🔑1015(3)

An appellate court may reverse trial court's order granting new trial for insufficiency of evidence to sustain judgment only when there is no substantial evidence to support contrary judgment as matter of law.

6. Automobiles 🔑245(60)

Whether motorist negligently moved into middle lane of three lane highway, without ascertaining whether such movement could be made safely, at time and place when roadway was not clearly visible and center lane not clear of traffic within safe distance because of dense fog at night, thereby proximately causing head-on collision with, and resulting injuries to passenger in, approaching automobile, was fact question for jury on conflicting evidence. Vehicle Code, § 526.

7. Automobiles 🔑245(15)

A motorist, moving into middle lane of three lane highway to pass automobile ahead of him on foggy night, was not negligent as matter of law in failing to anticipate presence in such lane of approaching automobile traveling without lights and needlessly driven into center lane when there was no automobile ahead of it to be passed. Vehicle Code, § 526.

8. Automobiles 🔑245(43)

Whether driver of automobile, colliding with approaching automobile after moving into center lane of three lane highway to pass automobile ahead of him, was driving at speed greater than was reasonable or prudent or speed endangering safety of persons or property in violation of basic speed law and was negligent under common law reasonable man standard were fact questions for jury. Vehicle Code, § 510.

9. Negligence 🔑93(14)

An automobile driver's negligence is not imputed to passenger in automobile.

10. Appeal and Error 🔑843(2)

Whether one suing for injuries sustained while riding as passenger in automobile, colliding with defendant's automobile, was contributorily negligent in continuing to ride in automobile with knowledge of hazardous circumstances under which it was being operated, was immaterial on her appeal from order granting defendant new trial after judgment on verdict for plaintiff, in absence of showing that defendant was guilty of negligence proximately causing plaintiff's injuries as matter of law.

11. Appeal and Error ⚷222

Failure of a defendant, moving for new trial after judgment on verdict for plaintiff, to serve and file memorandum of points and authorities, as required by Superior Court rule, did not warrant reversal of order granting motion, in absence of showing of how plaintiff was prejudiced by such failure, that she brought it to trial court's attention, or how it could furnish basis for reversal of order. Rules for Superior Courts, rule 3(b).

◆

Keesling & Keesling, Henry C. Clausen, San Francisco, for appellant.

Campbell, Hayes & Custer, San Jose, W. R. Dunn, Burlingame, for respondents.

FRED B. WOOD, Justice.

Plaintiff has appealed from an order granting a new trial, in an action for personal injuries sustained by plaintiff while riding as a passenger in an automobile, caused by a head-on collision with an automobile driven by the defendant, in the middle lane of a three-lane highway.

[1–5] The new trial was granted on the ground of insufficiency of the evidence to justify the verdict. "An order granting a new trial upon the ground of the insufficiency of the evidence to sustain the judgment will not be disturbed upon appeal, unless there be a clear showing of abuse of discretion. 'All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. [Citations.] The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party.' [Citation.] Even if the evidence is uncontradicted, the trial judge may draw inferences from it contrary to those made by the jury, and it is his duty to resolve such conflicts in determining whether the issues should be retried. Only when, as a matter of law, there is no substantial evidence to support a contrary judgment, may an appellate court reverse an order granting a new trial. [Citations.]" Williams v. Field Transportation Co., 28 Cal.2d 696, 698, 171 P.2d 722, 723.

Plaintiff claims that it appears as a matter of law that (1) defendant was negligent, (2) such negligence proximately caused plaintiff's injuries, and (3) plaintiff was not guilty of contributory negligence.

[6, 7] (1) As to negligence of the defendant, plaintiff claims the evidence demonstrates a violation of section 526 of the Vehicle Code upon the theory that defendant moved into the middle lane without ascertaining if such movement could be made with safety and at a time and place when the roadway was not clearly visible and the center lane not clear of traffic within a safe distance, a claim predicated principally upon evidence of lack of visibility (a dense fog in the nighttime) and that defendant was traveling at an excessive rate of speed, 55 miles an hour. The defect of this argument inheres in the fact that it ignores evidence favorable to the defendant.

The accident occurred about 11:30 p. m. January 18, 1947, on El Camino Real about six miles south of Palo Alto. The car in which plaintiff was riding was going in a southerly direction. There was evidence that this car's headlights were not on; also, that there was no car ahead of it in its lane, hence no occasion for that car to use the middle lane. It was a foggy night, quite thick in spots, not continuous. Defendant was driving north. He testified that he encountered clear sections and foggy sections; while traveling at a speed of 30 to 35 miles per hour he came up behind a car, honked his horn and started to pass at a speed of 20 to 25 miles per hour; the atmosphere was clear at the time he started to pass, though foggy at the place where the collision occurred; he did not see the car in which plaintiff was riding. The car which defendant was passing was driven by one Edward Fogarty who said he was traveling north in the right hand lane at 22 miles per hour; had his headlights on with his spotlight trained on the white line; the defendant came up behind Fogarty and blew his horn; Fogarty pulled over to the right; defendant was traveling about 5 miles per hour faster than Fogarty; defendant's car was in the center lane and about even with Fogarty's car when the accident occurred. The southbound car was about 40 feet away from Fogarty when he first observed it, approaching with no headlights burning. It was coming toward Fogarty's car at a slight angle, possibly crossing the white line between the southbound lane and the middle lane. It was intercepted by defendant's car. These facts do not justify the conclusion, as a matter of law, that defendant violated the provisions of section 526 of the Vehicle Code. At most, they present an issue of fact. For example, we cannot say that defendant was negligent in law for not anticipating the presence in the middle lane of a car traveling without lights or for not anticipating that a car, lighted or unlighted, was about to enter the middle lane without need, having no southbound car to pass. See Robbiano v. Bovet, 218 Cal. 589, 24 P.2d 466.

[8] For similar reasons, plaintiff's claim that the facts demonstrate a violation of the basic speed law, Veh.C., § 510, is without merit. Defendant's undertaking to pass the Fogarty car, under the circumstances described, was not, as a matter of law, the driving of a vehicle at a speed greater than reasonable or prudent or at a speed which endangered the safety of persons or property. Those, at most, were questions of fact.

Equally unsound is plaintiff's claim that the evidence demonstrates "negligence as a matter of law under the common law reasonable man standard."

(2) Plaintiff's claim that the evidence demonstrates, as a matter of law, that defendant's conduct was the proximate cause of plaintiff's injuries rests upon plaintiff's erroneous claim of negligence as a matter of law and falls with the latter claim.

[9] (3) It is true that the law does not impute to plaintiff the negligence, if any, of the driver of the vehicle in which she rode as a passenger.

[10] There was some evidence on the question whether or not plaintiff was aware of the hazardous circumstances under which her car was being operated and was, therefore, guilty of contributory negligence in continuing to ride under those conditions. We are not prepared to say that such evidence, as a matter of law, establishes or fails to establish negligence of the plaintiff in that regard. The question is not material to this appeal in the absence of a showing, as a matter of law, that defendant was negligent and that such negligence was a proximate cause of plaintiff's injuries.

[11] Plaintiff also invokes Rule 3(b) of the Rules for Superior Courts, which requires a party seeking a new trial to serve and file a memorandum of points and authorities and declares that "[e]xcept for good cause shown, the failure of the moving party to serve and file the prescribed memorandum shall be grounds for denial of the motion without a hearing on the merits." 33 Cal.2d 1, 3. Plaintiff claims but does not show how she was prejudiced by defendant's asserted failure to submit such a memorandum upon his motion for a new trial. In addition, plaintiff neither indicates that she brought such failure to the attention of the trial court, nor does she show how such failure could furnish the basis of a reversal of the trial court's order granting defendant's motion.

We conclude that the trial court committed no abuse of discretion and that its order granting a new trial should be affirmed.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

113 Cal.App.2d 37

In re DOELL'S ESTATE.

WOERNER v. BERNHARDT et al.

Civ. No. 15328.

District Court of Appeal, First District,
Division 2, California.

Sept. 5, 1952.

Hearing Denied Oct. 30, 1952.

Elice Bernhardt, also known as Elsa Bernhardt, and others, legatees under the will of Betta Doell, deceased, filed petition for partial distribution of her estate, which was opposed by Anthony Woerner, grandson of deceased, who claimed right to distribution as a pretermitted heir. The Superior Court, City and County of San Francisco, Timothy I. Fitzpatrick, J., decreed partial distribution to petitioners and objector appealed. The District Court of Appeal, Jones, J. pro tem., held that statement in will that testatrix had intentionally, with full knowledge, omitted to provide for her heirs, sufficiently designated objector as having been intentionally omitted, and objector was thereby disinherited.

Decree affirmed.

1. Wills ⚷506(4)

When used in a will to designate a class of persons for whom no provision is made, the term "heirs" includes children as well as those who take by right of representation.

See publication Words and Phrases, for other judicial constructions and definitions of "Heirs".

2. Descent and Distribution ⚷47(2)

Statement in will that testatrix had intentionally, with full knowledge, omitted to provide for her heirs, sufficiently designated son of deceased child of testatrix as having been intentionally omitted, and he was thereby disinherited. Probate Code, § 90.

◆

Mueller & McLeod, San Francisco, for appellant.

Erskine, Erskine & Tulley, San Francisco, for respondent Bank of America Natl. Trust & Savings Ass'n, executor.

Schofield, Hanson & Jenkins, San Francisco, for respondent Elice Bernhardt, Bernie Andrew Bernhardt and Walter John Bernhardt.

JONES, Justice pro tem.

To a petition for a partial distribution by named legatees under the will of Betta Doell, appellant filed his written opposition. The legatees seeking distribution are nieces and nephews of the decedent and named beneficiaries under the will. Appellant is the only child of a deceased son and is devised nothing. In his opposition to the petition for partial distribution he alleges that it does not appear from the will that the omission to provide for him was intentional. He claims that for this reason he is entitled to have the whole estate distributed to him—he being the only lineal descendant of Mrs. Doell. § 90, Probate Code.

The trial court found, however, that the omission was intentional, and decreed partial distribution to the petitioning legatees. It is from this decree that he has appealed.

That portion of the will pertinent to the principal question presented on appeal is: "Except as otherwise provided in this will, I have intentionally, with full knowledge, omitted to provide for my heirs and the heirs of my predeceased husband." Appellant contends that this language does not identify him and he was not, therefore, intentionally disinherited.

[1] In Estate of Hassell, 168 Cal. 287, 289, 142 P. 838, 839, the court said, "At law, while the word (heirs) may include others, it always includes the children of a decedent." And by the same token it necessarily includes the children of a deceased child. It was argued in Estate of Lombard, 16 Cal.App.2d 526, 528, 60 P.2d 1000, 1001, that the language "intentionally and with full knowledge omitted to provide for my heirs living at the time of my demise", should not be construed to mean and to include the testator's children. The court rejected this contention upon the authority of Estate of Hassell, supra, stating "We cannot put such a strained construction upon the word 'heirs.'"

When used in a will to designate a class of persons for whom no provision is made the term "heirs" includes children as well as those who take by right of representation. Here the will of the testatrix clearly and unequivocally states that, "I have intentionally, and with full knowledge, omitted to provide for my heirs" not otherwise mentioned. This statement in the will does not leave any room for the trial court to draw any conclusion other than that the testatrix had her grandson in mind at the time she made the will and intended to give him nothing. Her reason for not leaving any property to him is not material to the proceeding.

[2] Appellant contends that the expression, "I have intentionally * * * omitted to provide for my heirs and the heirs of my predeceased husband" is ambiguous and therefore ineffective. With this contention we cannot agree. The testatrix has simply and clearly designated two different classes of persons and has provided that neither class shall take under the will.

In support of his contention that he is not specifically designated as an omitted heir appellant relies strongly on Estate of Price, 56 Cal.App.2d 335, 132 P.2d 485, 486. In that case the clauses of the will material to the question of designation differ radically in language from the designation made by the testatrix in this case. In the Price case the testatrix said: "I give, devise and bequeath to my two sons, Arthur Benjamin Price and Walter William Price, all of my property, real, personal and mixed and wheresoever, situate, to be divided between them at my death, share and share alike.

"I purposely refrain from leaving anything by this my last will and testament to any other person or persons, and in the event that any other person or persons shall either directly or indirectly contest this my last will and testament I give to any such person or persons contesting said will the sum of $1 and no more, hereby declaring that I have only at this date two surviving children, to wit: my said two sons above named."

Mrs. Price in effect said that her only heirs were her two sons, and purposely refrained "from leaving anything * * * to any other person or persons." However, she did not state that she refrained from leaving anything to any of her other heirs. The court held in that case that the term "any other person or persons" was not equivalent to "any other heir or heirs," and consequently too general to designate a grandson.

On the other hand, in the will in this case the testatrix expressly states that she has intentionally, and with full knowledge, omitted to provide for *her heirs*. The term, "heirs", when so used is specific enough, according to the cases heretofore cited, not only to designate the children, but also the children of any deceased child of the testatrix.

The decree is affirmed.

NOURSE, P. J., and DOOLING. J., concur.

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112 Cal.App.2d 833

JANSEN et al. v. SOUTHERN PAC. CO. et al.

Civ. 8074.

District Court of Appeal, Third District, California.

Aug. 25, 1952.

Hearing Denied Oct. 23, 1952.

Carl V. Jansen, and his wife, sued Southern Pacific Company, and another, for injuries sustained as result of crossing collision between plaintiff's automobile and a switch engine. The Superior Court, Sacramento County, John Quincy Brown, J., rendered judgment on verdict for plaintiffs, and the named defendant appealed. The District Court of Appeal, Peek, J., held that evidence was sufficient to sustain verdict.

Judgment affirmed.

Prior opinion, 244 P.2d 929.

1. Appeal and Error 🔑989

When verdict is attacked as being unsupported, appellate court's power begins and ends with determination whether there is any substantial evidence, contradicted or uncontradicted, which will support jury's conclusion.

2. Appeal and Error ⚷996

Where two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

3. Railroads ⚷348(2)

In personal injury action arising out of crossing collision between plaintiffs' automobile and defendant's switch engine, where fireman failed to warn engineer of approaching automobile although he first saw it when it was 140 to 150 feet and engine was 25 feet from crossing, upon issue of defendant's negligence, evidence was sufficient to sustain verdict for plaintiffs. Civ.Code, § 486.

4. Railroads ⚷350(13)

In personal injury action arising out of crossing collision between plaintiffs' automibile and defendant's switch engine, where plaintiffs had been acquainted with crossing for number of years, but their view was obstructed, and track was unguarded, contained only cross-arm railroad sign at crossing, and was used only for occasional switching, question of plaintiffs' contributory negligence was for jury. Civ.Code, § 486.

5. Railroads ⚷312(4)

Fireman has duty to exercise same care that a reasonably prudent person in same circumstances would exercise in observing approaching automobiles and in warning engineer of their presence.

6. Appeal and Error ⚷882(12)

In personal injury action arising out of crossing collision between plaintiffs' automobile and defendant's switch engine, defendant could not complain of instruction, concerning warning signal required by law of engine's approach to crossing, given at plaintiffs' instance, when defendant had requested a substantially similar one. Civ. Code, § 486.

Devlin, Diepenbrock & Wulff, Sacramento, for appellant.

Thomas C. Perkins, Sacramento, for respondents.

PEEK, Justice.

Following the filing of the original opinion of this court, 244 P.2d 929, defendant company petitioned for a rehearing, which was granted. The contentions of appellant in support thereof are that the court "omitted from and/or incorrectly stated" material facts in the opinion, and that there was a failure to "specifically consider" certain issues raised. Counsel then concludes the petition with a statement that this court by its opinion has accomplished a reversal "of existing principles of law" by placing a "directly contrary construction upon the holdings of a multitude of cases." We shall consider the contentions of appellant as enumerated. However it would appear unnecessary to discuss the conclusion of counsel or the import contained therein.

[1, 2] Since it is so elementary, we did not believe it necessary in our original opinion to specifically refer to the oft-repeated but seldom-remembered rule that "* * * 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, 429, 45 P.2d 183)." In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690.

[3] With such rule in mind we reviewed the transcript at the outset of our original

opinion to determine if there was "substantial evidence" in support of the verdict. Our original conclusion has in nowise changed—the evidence amply supports the verdict of the jury. We shall again summarize the evidence in support of the verdict; however we shall necessarily omit some portions thereof as well as fail to mention other portions which defendant relies upon, but which, because of their contradictory nature, the jury could reject, as it quite apparently did.

So summarized, the record shows that the controversy here in question arose out of a collision between a switch engine owned and operated by the defendant company and an automobile being driven by the plaintiff Carl V. Jansen and in which his wife, Meryl Jansen, was riding. On December 17, 1949, some time between the hours of 6:30 and 7:30 o'clock p. m. plaintiffs were driving northerly on Thirty-ninth Street, a fairly well-traveled arterial street, in the City of Sacramento. The evening was cold, cloudy and dark. Mr. Jansen, who was driving, and his wife, who was riding in the front seat of their sedan with him, were as acquainted with the crossing in question as would persons be who had lived in a community for a number of years. Thirty-ninth Street at the point where it crosses over the privately owned right of way of the defendant company is approximately 36 feet in width. Rather than approximate the distances as we did in our first opinion, we will take the figures mentioned by appellant; that the center line of the right of way at that point is 57.5 feet from the southern boundary or 55.4 feet to the southern rail and 41.25 feet from the northern boundary of said right of way. A single track is maintained thereon. It is uncontradicted that no regularly scheduled trains operate on said track but that it is used occasionally for the sole purpose of switching. It is likewise uncontradicted that there is no mechanical warning device at the crossing; the only warning is the usual cross-arm railroad sign. The intersection is lighted by one 325 watt street light located approximately in the center of Thirty-ninth Street at a point 75 feet north of the center line of the railroad tracks and approximately 27 feet above the ground. Respondents' view of the right of way was obstructed to a degree by houses and trees along both sides of the street. To the east, the direction from which the engine was coming, Jansen's view as he progressed northerly on Thirty-ninth Street was intermittently obstructed by a hedge and trees in the yard of the house immediately adjacent to the right of way. Also in the right of way itself was a large oak tree approximately 87 or 88 feet east of the easterly boundary of Thirty-ninth Street and approximately 20 feet north of the south boundary of the right of way. A passenger in a car immediately to the rear of plaintiffs testified that just before the collision respondents were proceeding at a speed of approximately 15 miles per hour.

The evidence was sharply in conflict as to whether or not a bell, whistle or other warning was sounded and whether or not the headlight on the engine was lighted. However, both Mr. and Mrs. Jansen, as well as the passenger in the car which was following them, testified they noticed no light nor did they hear a whistle or bell. The testimony was also conflicting as to whether or not the window on the driver's side of the car was open. The plaintiff Carl Jansen testified that he looked to his left and then to his right before reaching the southerly boundary of the right of way, his speed remaining constant at the rate of approximately 15 to 20 miles per hour; that after entering the right of way area he again looked to the left and then to the right, looking lastly to the right just prior to the impact and just as he was moving on to the track. His wife further testified that she looked to the right and saw the engine just prior to the impact. The engineer was seated on the right side of the cab which was located at the rear of the engine. Thus the fireman who was seated on the left side of the cab was the only trainman who could observe traffic approaching from the south. He testified that he first saw plaintiffs' car when it was approximately 140 to 150 feet from the crossing and the engine was approximately 25 feet from the crossing; that he gave no warning to the engineer of the approaching automobile; that as the front of the engine was entering the crossing he realized respondent Jansen was not going to stop and that he then gave a warning to the engineer.

It is appellant's contention that the plaintiffs were guilty of contributory negligence as a matter of law, and in support thereof they rely primarily upon Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788, 789. The contentions made under this heading are two-fold, to wit: A. "The Physical Facts Themselves Establish That the Plaintiffs are Guilty of Contributory Negligence, as a Matter of Law", and B. "The Plaintiffs Did Not Take Every Reasonable Opportunity to Look."

In the Koster case the accident occurred at about 4:29 a. m. on June 18, 1926, at which time, although before sunrise, it was already "practically daylight". At that hour the crossing was "unguarded." Koster lived only three blocks from the crossing and crossed over it on his way to work every day between the hours of 4:00 a. m. and 5:00 a. m. The court said: "* * * it must be assumed that he was quite familiar with said crossing and was aware that a passenger train, traveling southerly, crossed said street at about 4:22 o'clock a. m. each morning." The noise at the crossing, due to industrial activity in the vicinity at all hours during the summer season, made it impossible for a person in a closed car to hear "an approaching train, or even its bell or whistle." The right of way was 60 feet in width, containing three tracks, the center one being a main line track. Koster's view of the right of way in the direction from which the train approached was obstructed by an American Can Company factory and a high board fence, these structures extending for the full block up to the line of the right of way (21½ feet from the crossing). It was further contended by plaintiff that the view was even more obstructed by reason of a box car being spotted on the near track close to the crossing. The only estimate of Koster's speed was as being from 30 to 40 miles per hour, which estimate was made by the fireman who adjudged it to be such because from the time of his first sight of the Koster car "the whole affair seemed like a flash."

Counsel for appellant also, in his opening brief, in contending the Koster case is here applicable, states:

> "This special duty of care to take every reasonable opportunity to look and listen is premised upon the existence of the following two conditions precedent:
>
> "1. That the crossing is an unguarded one, that is, a crossing where the railroad company does not maintain any flagman or automatic signal devices, such as gates, wigwags etc.
>
> "2. That the plaintiff is familiar with the crossing and knows its location, and hence the track itself is a warning of danger. * * *
>
> "Both of these two conditions precedent for the application of this doctrine are admittedly present in the case at bar, in that the crossing is unguarded and unprotected, and both plaintiffs admit that they were very familiar with this crossing." "Therefore," continues appellant's argument, "whether or not the plaintiffs were guilty of contributory negligence as a matter of law depends solely upon whether or not the record shows without conflict that the plaintiff Carl V. Jansen did not [quoting from the Koster case] 'take advantage of *every reasonable opportunity* to look and listen' for a train before attempting to negotiate this crossing, and upon the further question, as to whether he would have seen and heard the approach of said train if he had taken these precautions."

Attempts to reduce negligence to rigid rules have never been successful. Rarely, if ever, will the facts of any two cases be identical. Hence, "The effort should be to apply settled principles of law to the facts in the particular case as they existed at the scene of the injury, rather than determine the matter by matching cases." Antonian v. Southern Pacific Company, 9 Cal. App. 718, 734, 100 P. 877, 884.

As stated in Toschi v. Christian, 24 Cal. 2d 354, 360, 149 P.2d 848, 852, "the actor's conduct must always be gauged in relation to all the other material circumstances surrounding it and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law."

However, even if we resort to matching cases a complete answer to such argument is found in the case of Hinkle v. Southern Pacific Company, 12 Cal.2d 691, 87 P.2d 349, 352, which, of all the cases examined, appears to be most analogous to the case at bar. Counsel for defendants, however, does not agree that the Hinkle case is analogous—stating that the so-called Koster case rule has no application "when collisions occur with freight cars which are shunted or pushed across highway crossings without notice or lights." Nevertheless the facts set out in the opinion of that case (and which because of the similarity we will set forth in detail) disclose that the railroad tracks and the highway intersected at about right angles—the highway running in a northerly to southerly direction. Mr. and Mrs. Hinkle, with Mr. Hinkle driving, were proceeding in a southerly direction. The crossing which consisted of three tracks, the center one being the main line track, was approximately 20 feet in width, and large pine trees grew within eight or nine feet of the track on both sides of the crossing. It was a very dark night and there was no overhead artificial lighting at the crossing or any point west of the crossing, the direction from which the train was backing, although there was an overhead light 150 feet to the east of the highway.

The train, consisting of a locomotive and tender, a dark red box car and a dark colored oil-tank car, was backing toward the crossing, thus the oil-tank car, being the lead car, was first over the crossing and the one with which the Hinkle car collided. The Hinkles in their attempt to traverse the crossing came to a stop within four to eight feet of the northerly tracks and looked both to the right and left for any approaching train, but saw and heard nothing. They then proceeded across the tracks and when they were between the rails of the northerly track and the main line track, Mrs. Hinkle noticed the backing train to her right about 20 or 25 feet away and the next instant the impact took place. The Hinkles recovered judgment and an appeal was taken therefrom by the defendant company. The contentions there made were two: that the plaintiffs were guilty of contributory negligence as a matter of law for violating the "stop, look and listen" rule, and that the court gave certain erroneous instructions. The Supreme Court there said: "Having in mind the fact that the jury was at liberty to reject much of the evidence proffered in behalf of appellant, together with the circumstances that the accident happened on a very dark night at a narrow crossing where large pine trees were growing close to the tracks, and that the train was not approaching headon with its headlight lighting up the track ahead, but was backing toward the crossing, we cannot say as a matter of law that respondents were negligent in not seeing the backing train in time to avoid it. They were not, therefore guilty of contributory negligence as a matter of law." See also Alloggi v. Southern Pacific Company, 37 Cal. App. 72, 173 P. 1117; Lloyd v. Southern Pacific Company, 111 Cal.App.2d 626, 245 P.2d 583.

The similarities of that case and the instant case are apparent and, we feel, controlling. In both cases the same counsel make the same contention that plaintiffs were guilty of contributory negligence as a matter of law for violating what counsel terms the well-known stop, look and listen rule. In both cases the accident happened on a dark night at an "unguarded" crossing with which the parties were familiar. In both cases the "testimony of the witnesses for the appellant not being reconcilable with the testimony of the respondent and their witnesses, it was necessary for the jury as triers of fact to determine which of the contrary versions of the accident should be accepted as true. It is self-evident that the jury accepted as true the testimony of the respondents and necessarily rejected a portion, at least, of the evidence proffered by appellant. Hinkle v. Southern Pacific Company, supra. Furthermore in the light of such evidence it must be assumed that again in both cases the statutory sound signals were not given. In both cases there was no head lamp lighting the path ahead of the lead vehicle. Under these last two facts—no light and no warning signal—it would make no difference whether the engine was going forward or backward. Likewise, in both cases, although there was an artificial light near the crossings involved, the light in neither case was overhead nor in the direction from which the train approached. Hence it must follow here, as in the Hinkle case, that such factors make the question of contributory negligence a proper one for jury determination.

Although the evidence in the Hinkle case was that they came to a full stop, whereas the Jansens did not, this difference in the two cases does not appear sufficient to vary the conclusions above reached.

Of further interest in regard to appellant's first contention is the case of Hoffman v. Southern Pacific Company, 101 Cal. App. 218, 281 P. 681, 684, (petition for hearing in Supreme Court denied). The case was decided in 1929, approximately two months after the Koster case and again we find the same counsel making substantially the same contentions and citing many of the same cases. Nevertheless this court there held that although because of fog, visibility was lessened:

> "The law does not require the driver of a vehicle to actually stop under any and all circumstances, before crossing a railway track. There is no absolute duty on the part of one to first stop before he attempts to cross the track. * * * The test as to the existence of contributory negligence on the part of one who attempts to cross a railroad track ahead of an approaching train is the question as to whether under such circumstances a reasonably prudent person would have undertaken to do so. When the circumstances of a particular case are of such a nature that different conclusions may reasonably be drawn as to the prudence of a person in attempting to cross a railroad track, the question of contributory negligence becomes one for the determination of the jury. [Citing among other cases Koster v. S. P. Co.] It is self-evident that the plaintiff's vision down the track would be neither improved nor impaired by the mere stopping of his machine. His vision could penetrate the fog no farther from a stationary machine than from one which was in motion."

And if further contemporary or other support of our present holding be necessary, the recent case of Lloyd v. Southern Pacific Company, supra [111 Cal.App.2d 634, 245 P.2d 588] (hearing in the Supreme Court denied) may well be cited. There the court, quoting from what it termed the restatement of the rule as originally stated in Koch v. Southern California Ry. Co., 148 Cal. 677, 680, 84 P. 176, 4 L.R.A., N.S., 521, and quoted with approval in the recent case of Spendlove v. Pacific Electric Ry. Co., 30 Cal.2d 632, 641, 184 P.2d 873, stated: "'* * * where it is shown that a plaintiff has exercised some care, the question whether or not the care actually exercised was due and sufficient, will always be a matter for determination by the jury.'" Also in Andre v. Allynn, 84 Cal. App.2d 347, 190 P.2d 949, 953, the court, likewise speaking of the Spendlove case, said "This last decision illustrates the fact that in the last few years the tendency of the Supreme Court has been away from the stricter view of preceding years, where frequently contributory negligence was established as a matter of law, to the present situation in which such cases 'are rare.' See Anthony v. Hobbie, supra, 25 Cal.2d 814, 818, 155 P.2d 826."

Counsel's other contention under this head is that the plaintiff, Carl Jansen, did not "take advantage of every reasonable opportunity to look", as a matter of law, in that appellant "was driving his car from at least the south railroad right-of-way line to the crossing, a distance in excess of 55.4 feet, without looking to his right", and in support thereof relies upon Scherer v. Southern Pacific Company, 140 Cal.App. 528, 35 P.2d 356. Reger v. Southern Pacific Company, 59 Cal.App. 313, 210 P. 971. There is no factual similarity between the present case and those upon which appellant relies. In both the Scherer and Reger cases the accidents happened in broad daylight, and each of the drivers knew a scheduled train was due. The Koster case was similar to those cases in that respect.

In the present case the accident occurred in the dark of night on a spur track used only for sporadic switching; the car was proceeding slowly across the 55.4 foot distance from the south edge of the right of way area to the near rail; the train did not have its head lamp lighted so as to warn of its approach through direct observation of the light or of its reflection on the roadbed of said tracks; nor was the train giving the sound warnings prescribed by statute. Respondents looked first to the left and then to the right after entering the right of way area, and as appellant states, the last look to the right was just prior to the impact. But Jansen's peripheral vision would have alerted him to the presence of the train if the head lamp of the engine had been lighted. He would also have been alerted to the darkened train's approach if it were making the proper sound signals. In the circumstances of this case we do not think the Scherer or Reger cases are controlling but rather that the question was properly presented to the jury for their determination.

[4] For the above reasons we conclude appellant's two-fold specific contentions that respondents were guilty of contributory negligence as a matter of law are not well founded.

Appellant's remaining contention relates to an asserted error in the instructions given by the trial court. These contentions are that the court erred in (1) failing to instruct the jury that there was a special duty of care imposed upon the driver of a vehicle approaching a railroad crossing; (2) refusing to instruct the jury in particular language chosen by the defendant from the Koster case; (3) instructing the jury that the fireman on defendant's switch engine had a duty of care, not placed upon him by law, and (4) that the instruction given, predicated upon section 486 of the Civil Code, was erroneous in that the jury was informed it was the duty of defendant to ring a bell at the intersection.

Since the first two contentions are but a re-argument of appellant's first main contention, suffice it to say that the jury was instructed in accordance with the views herein expressed relative to that contention; and hence what has heretofore been said in that regard is equally applicable here.

[5] Appellant next argues that the court's instruction that "It was the duty of the fireman to exercise the same care that a reasonably prudent person in the same circumstances would in observing approaching automobiles and in warning the engineer of their presence", erroneously instructed the jury that the fireman had a duty not placed upon him by law, to wit, "to warn the engineer that automobiles are *approaching* the crossing", and that such a duty is contrary to law relative thereto as laid down in Billig v. Southern Pacific Company, 192 Cal. 357, 363, 219 P. 992.

Appellant further asserts that "the respondents make the same erroneous contention as to the subject matter under this heading as they do in all of the other points in their brief, that is, they contend that the reasonably prudent person rule is applicable, whereas the law lays down a specific standard of conduct." We cannot agree with this argument.

The jury was instructed that the fireman in acting as a lookout had the duty "to exercise the same care that a reasonably prudent person in the same circumstances would in observing approaching automobiles *and* in warning the engineer of their presence." (Emphasis added.)

The duty specified, as we read the instruction, was not "to warn the engineer that automobiles are *approaching* the crossing", but to *observe and* warn of approaching automobiles in the same manner as would a reasonably prudent person under the same circumstances. We find nothing in the Billig case to the contrary. The standard of conduct is always the same, that is, ordinary care under the circumstances. Cooper v. Southern Pacific Company, 43 Cal.App.2d 693, 703, 111 P.2d 689, 693. The Billig case is merely an exposition of what conduct on the part of the fireman would constitute reasonable care under the circumstances.

[6] Appellant's final contention relates to an instruction given at the request of respondents relative to the duty of defendant under the provision of section 486 of the Civil Code. The court first instructed the jury in the precise language of said section and then continued with the instruction which defendant now attacks, and which is as follows:

> "You are instructed therefore that it was the duty of the defendants traversing the intersection of its tracks with 39th Street and for a distance of at least 1,320 feet before reaching 39th Street to ring a bell as required by the Statute, and if you find that the defendants failed to comply with said section 486 of the California Civil Code, just read to you, and that the failure to so comply was the proximate cause of the collision and of the plaintiffs' resulting damage, and that plaintiffs were not guilty of contributory negligence you must return a verdict for the plaintiffs."

However, that was not the only instruction on that subject; in fact there were two more which the court gave. The following instruction, which respondents state was given at the request of appellant, and which statement appellant has not denied, was as follows:

> "I have stated to you heretofore that it was the duty of the defendants to give statutory signals, and I desire to instruct you further that the obligation to give satisfactory signals is necessarily controlled by our statutes and in cities the said statute provides 'that a bell of at least twenty pound weight must be placed on each locomotive engine and must be rung a distance of at least eighty rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed the street, road or highway;' that in cities there is no statutory obligation for the defendants to sound any steam or other whistle as a warning of the engine's approach to such crossing. Of course, the railroad may, if it so desires, go beyond the terms of the statute and cause both the bell to be rung and the whistle to be sounded."

Immediately following that instruction was a third instruction by which the jury was told: "under the statute which deals with sounding of whistle or bell by a steam locomotive 'it is the sounding or giving of the' warning and not the hearing of it which determines the question of statutory violation. On this phase of the case, the only issue is whether a signal, as required by the statute, was sounded. If you find that a signal was sounded as required by the statute, the fact that it may not have been heard by some person, is not ground for finding that the statute was violated, or that the railroad or its employees were negligent."

As previously stated, appellant contends the court, by the first quoted instruction, erroneously instructed the jury, and such error was prejudicial. Whether the law is as appellant here contends or whether Civil Code section 486 may be complied with by either ringing a bell *or* sounding a whistle we need not determine. Appellant, as appears from the instruction which it requested and which was given, believed the law to require it to ring a bell in cities at all events, but that if it chose it could also sound a whistle warning. Having received instructions in conformity with its view of the law it cannot now contend that such a statement of the law was erroneous and prejudicial to it. It is well established that "A party cannot complain of an instruction given at his own request, or of an error in an instruction given at the instance of his adversary, when he requests a substantially similar one." Yolo Water & Power Company v. Hudson, 182 Cal. 48, 51, 186 P. 772, 774. See also Cedzo v. Bergen, 53 Cal.App.2d 667, 675, 128 P.2d 683; Benton v. Douglas, 82 Cal.App.2d 784, 787, 187 P.2d 469; Blythe v. City and County of San Francisco, 83 Cal.App.2d 125, 132, 188 P.2d 40.

The judgment and orders are affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

Hearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.

MORRIS v. HARBOR BOAT BUILDING CO. et al.

Civ. 19010.

District Court of Appeal, Second District, Division 1, California.

Aug. 28, 1952.

As Modified on Denial of Rehearing Sept. 15, 1952.

Hearing Denied Oct. 23, 1952.

Action to recover damages for fraud in inducing plaintiff to enter into a written contract for purchase of a boat. The Superior Court of Los Angeles County, Henry M. Willis, J., entered judgment on the pleadings in favor of defendants, and plaintiff appealed. The District Court of Appeal, Doran, J., held that complaint stated a cause of action and that on motion for judgment on the pleadings, trial court had no authority to determine whether parole evidence was admissible to prove alleged fraud or whether such fraud could be established.

Judgment reversed.

1. Pleading 🔑343, 350(3)

A motion by defendant for judgment on the pleadings operates as a general demurrer to complaint and for the purposes of such motion the averments of complaint must be taken as true.

2. Appeal and Error 🔑499(1)

Record on appeal from judgment on the pleadings in action for fraud established that motion had been treated throughout as a motion for judgment on the pleadings and not as a motion to exclude parol evidence of alleged fraud or as an objection to any such evidence.

3. Pleading 🔑350(3)

On motion by defendant for judgment on the pleadings, the only question for determination was whether complaint, taking its allegations as true, stated a cause of action.

4. Fraud 🔑41

Complaint stated a cause of action for recovery of damages for fraud in inducing plaintiff to enter into written contract for purchase of a boat by allegedly false representations that boat was capable of a specified speed and had a specified cruising range.

5. Pleading 🔑350(3)

On defendant's motion for judgment on the pleadings in action for fraud, trial court was required to accept as true the facts alleged in complaint and proceed with the trial, if a cause of action was stated, and could not determine on such motion whether parol evidence was admissible to prove alleged fraud or whether such fraud could be established.

6. Evidence 🔑434(8)

Parol evidence is admissible under exception to parol evidence rule to show that by reason of fraudulent representations a party was induced to enter into a written contract which he would not otherwise have done and that by reason of such fraud, written contract is invalid. Code Civ.Proc. § 1856.

7. Evidence 🔑434(8)

The parol evidence rule may not be used as a shield to prevent proof of fraud, even though contract recites that all conditions and representations are embodied therein.

8. Fraud 🔑31

A party induced to enter into a contract by fraud may affirm the contract, retain what he has received, and sue for his damages in an action for deceit.

9. Fraud 🔑59(1)

The measure of damages in an action for deceit is the difference between what defrauded party has actually received and that which, except for the fraud, he would have received and had the right to expect to receive.

10. Fraud 🔑36

Where defrauded party affirms the contract induced by fraud, retains what he has received and sues for his damages in an action for deceit, he does not thereby affirm or waive the fraud.

11. Fraud 🔑36

Failure to return defective parts for rectification, as required by contract warranty, did not preclude maintenance of action to recover damages for fraud in inducing plaintiff to enter into a contract for purchase of a boat by allegedly false representations that boat was capable of specified speed and had a specified cruising range.

12. Pleading ⚿350(3)

Trial court has no authority to determine matters of admissibility of evidence on the hearing of a motion for judgment on the pleadings.

Gustave L. Goldstein, Los Angeles, for appellant.

R. D. Sweeney and John L. Mace, Los Angeles, for respondents.

DORAN, Justice.

The plaintiff has appealed from a judgment on the pleadings rendered in an action to recover damages for fraud. On May 16, 1949, appellant Morris entered into a written contract with respondents Harbor Boat Building Co., and Dair N. Long and Associates, for the purchase of a "Harco 40 Cruiser" with certain special equipment, the total purchase price being $30,215, which was paid by Morris to the respondents.

The complaint alleges that "at the time the aforementioned contract was entered into * * * and prior thereto, the defendants, their agents, servants and employees, for the purpose of inducing plaintiff to enter into said contract and obligate himself thereby * * * among other things, represented to plaintiff that the aforementioned boat Harco 40 Cruiser 'Karimore II' * * * was capable of, and would attain and maintain, a speed of 36 miles per hour and at that speed had a cruising range of 250 miles". It is also alleged that "plaintiff made known to defendants that he was interested in the purchase of said boat as an express cruiser and would buy same only if said boat could and would attain and maintain" such speed and cruising range; "that otherwise he was not interested in buying, nor would he buy, said boat"; that "defendants and each of them were power boat experts of long experience in that field", and that defendants' statements "were not mere expressions of hope or layman opinions but were representations of fact upon which plaintiff was entitled to and did believe, rely and act".

Other allegations are that after taking delivery, appellant found "that said boat never was capable of, nor did it ever attain, at speed of 36 miles per hour or a cruising range of 250 miles", but that the maximum speed ever attained was 28.32 miles per hour with a maximum average speed of only 20 miles per hour, and an average cruising range of 175 miles. The other customary allegations of fraud appear in the complaint. The prayer is for "the difference between the actual value of the property with which plaintiff parted and the actual value of that which he received", namely $15,237.53, and exemplary and punitive damages of $15,000.

The answer denied the alleged fraud and the making of "any representations to the plaintiff other than those which are set forth in said agreement, Exhibit 'A' attached hereto, and particularly the warranty contained therein". By way of affirmative defense, the answer avers that the complaint does not state a cause of action, and that "it is the intention of these defendants at the time of trial herein to move the Court to exclude any evidence offered on behalf of the plaintiff without further notice". A second affirmative defense calls attention to a contract clause providing that "When accepted by the purchaser, the seller, and the Harbor Boat Building Co., this order shall constitute the entire agreement * * * and no other agreements, written or oral, shall apply to this contract except the standard *Harco 40 warranty printed on the reverse side*". (Respondents' italics.)

As a third affirmative defense respondents state that "the current and only literature that defendants, or any of them had published or used * * * consisted of a four page pamphlet" containing a paragraph entitled "Performance", setting out a schedule of engine horsepowers, maximum speeds, and cruising ranges, which gives the "Maximum Speed" of "2—225 H. P." (the engine in question) as 36 M.P.H. and its "Cruising Range" 250 miles. Following this schedule is the following parenthetical statement, "(Speeds and cruising ranges given, although not guaranteed are based on actual trial data and the performance of individual boats may be expected to vary somewhat". It is then alleged that "plaintiff purchased special equipment" weighing "approximately one ton, which added weight will and does affect the speed and cruising range", which facts were known to the plaintiff.

A fourth affirmative defense alleges that the respondent Dair N. Long and Associates, were not agents, servants, or employees of the Harbor Boat Building Co. and had no authority to make any representations. A further affirmative defense alleges that "plaintiff has carelessly and negligently maintained said Harco 40 Cruiser", which rendered the boat incapable "of developing the maximum speed to which said Harco 40 Cruiser would have developed", otherwise.

The case was noticed as a jury trial, and in the absence of the jury and before any evidence had been offered, respondents' attorney moved "for a judgment on the pleadings, provided that, in order to make the record certain here, Mr. Turnbull will stipulate * * * that the entire contents of the written contract, Exhibit A annexed to the answer, is before the court for the purpose of this motion". The appellant's counsel did so stipulate. In connection therewith, Mr. Turnbull, appellant's counsel, stated, "There was only one contract between the parties, but I wouldn't want to limit myself to the fact that these representations of fact were not in writing". Respondents' attorney then stated, "I don't want to bar him by this stipulation from relying on literature in the trial, if the trial ensues * * *". Mr. Turnbull then stated, "That's right. The reservation I made was that part of the inducement made to sign that contract were representations in writing", to which respondents' attorney replied, "I understand that you so claim, and I do not by this stipulation bar you from that claim". The motion was then argued, and the Court said, "I will have to grant this motion for judgment on the pleadings".

The judgment entered thereon, after reciting the above stipulation, states that "after considering the arguments of counsel, the pleadings and the facts herein set forth, and it appearing to the court and the court finds that no evidence is admissable to prove the false representations alleged * * * it is hereby ordered, adjudged and decreed that plaintiff take nothing * * * and that the defendants have judgment against plaintiff". The present appeal is from this judgment.

[1] Appellant's first point is that a motion for judgment upon the pleadings is, in effect, a general demurrer to the complaint, and that since the complaint herein states a cause of action, the trial court should have denied such motion. As appellant avers, "There is ample authority for this statement", as evidenced by the case of Davis v. City of Santa Ana, 108 Cal.App.2d 669, 685, 239 P.2d 656, 665, where the court says: "A motion by defendant for judgment on the pleadings operates as a general demurrer to the complaint, and the averments of the complaint, for the purpose of the motion, must be treated as true". And in Gill v. Curtis Publishing Co., 38 Cal.2d 273, 275, 239 P.2d 630, 631, it is said that where a judgment on the pleadings has been granted, the case should be reviewed "the same as would be a judgment of dismissal entered following the sustaining of a general demurrer, and the allegations in plaintiffs' complaint must be taken as true, and so taken the question is whether a cause of action has been stated".

[2] Seeking to avoid the force of the above rule, respondents' brief suggests that while the motion "was verbally designated a motion for judgment on the pleadings (Rep.Tr. p. 2, line 23), consideration of the entire record discloses that this is an inaccurate appellation". Admitting that "A motion for judgment on the pleadings is not based upon evidence, but solely upon the pleadings", respondents argue that in this case "The motion was either to exclude any parol evidence of the alleged fraud or an objection to any evidence of the alleged fraud and was not, strictly

speaking, a motion for judgment on the pleadings". A survey of the record, however, indicates that from first to last the motion in question was never treated as anything but a motion for judgment on the pleadings. The Minute Order of October 19, 1951 records that "Motion for judgment on the pleadings by attorney for defendants is by the Court granted". No question of evidence was before the trial court at that or any other time.

[3–5] Such being the case, it was only incumbent on the trial court, to determine whether the complaint, taking its allegations as true, stated a cause of action. That fraud is sufficiently alleged in the complaint can hardly be doubted; there is a definite allegation that the boat purchased was falsely represented to be capable of a certain speed and to have a certain cruising range. And as stated in respondents' brief, "The amended complaint then proceeds to allege the usual allegations required in a fraud action in regard to falsity, intent, reliance, etc." In other words it was a typical and customary complaint alleging the required elements of fraud and seeking damages therefor. Whether the plaintiff could or could not establish the alleged fraud was no more a matter than before the trial court than are the merits of a case a proper question upon the hearing of a demurrer. The trial court was obliged to accept as true the facts alleged in the complaint, and to proceed with the trial if a cause of action was stated.

The reason given in the judgment for sustaining the motion, namely that the court believed "that no evidence is admissable to prove the false representations alleged", was no reason at all, since no evidence had been offered. No question of evidence was before the trial court, and the only matter pending was a determination as to whether the complaint stated a cause of action. The appellant was therefore improperly precluded from presenting any evidence as to the alleged fraud. Respondents' present claim that the motion was something other than for judgment on the pleadings finds no support in the record.

[6] Respondents rely on the proposition that "Where the parties have reduced the subject matter of their agreement to writing, parol evidence is inadmissible to add additional warranties, or to prove a representation directly at variance with the terms of the writing". This is the basic rule as expressed in Section 1856 of the Code of Civil Procedure, but the same section then enumerates two definite exceptions where parol evidence is admissible, namely "Where a mistake or imperfection of the writing is put in issue", and "where the validity of the agreement is the fact in dispute", the latter exception being the situation presented in the instant case. To further clarify the matter, Section 1856 then expressly provides that the rule does not exclude extrinsic evidence offered "to establish illegality or fraud".

An examination of the pleadings herein discloses that plaintiff is claiming no additional warranty and is not attempting to vary the terms of a written instrument. The claim is simply that by reason of certain fraudulent representations the purchaser of a boat was induced to execute a contract which otherwise would not have been entered into. This is no uncommon situation and is obviously the one contemplated by the foregoing exception to the parol evidence rule. Indeed, without such an exception a victim of the most aggravated fraud would be entirely helpless.

The nature of fraud, as noted in appellant's brief, is such that one hardly expects to find it set out in black and white in a contractual instrument. Rather, the matter is elusive and insidious in nature, and one which, in most cases, can only be established by parol or extrinsic evidence. As said in Wigmore on Evidence, 3d Ed., Section 2439, "The explanation seems to be that the vital element in fraud is the party's state of mind, which neither can be nor is intended to be embodied in the written document, and that hence the rule does not forbid considering it whenever it is the vital element of the claim". Innumerable cases recognize the exception here under discussion, such as Schied v. Bodinson Mfg. Co., 79 Cal.App.2d 134, 179 P.2d 380, cited by both parties hereto, where the reviewing court reiterates that the parol evidence rule "does not preclude oral evidence of material misrepresentations constituting fraud which render the contract void from its inception".

Respondents' brief lays much stress on such cases as Bank of America v. Pendergrass, 4 Cal.2d 258, 48 P.2d 659, holding that where a promissory note contains an unconditional promise to pay, the parol evidence rule will prevent the maker from showing that the payee orally promised that payment need not be made until the money came in from a certain source. No such situation exists in the instant controversy, and this line of cases is of no assistance. The same may be said in respect to Oxnard Theatres, Inc. v. Paramount Pictures, D.C., 24 F.Supp. 44, which involved an unsuccessful attempt to prove certain oral promises made without an intention to perform, where the written agreement specifically covered the matter at issue. The present case does not involve any oral promise to do anything. Moreover the alleged misrepresentations involve a matter about which the written instrument is silent. The contract says nothing whatsoever about speed or cruising range of the boat sold. Moreover, the printed prospectus hereinbefore referred to, does mention the very speed and cruising range which appellant claims was the inducing representation resulting in execution of the contract.

[7] As stated in appellant's brief and in various cases, "it was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud". And this is true, "even though the contract recites that all conditions and representations are embodied therein", Ferguson v. Koch, 204 Cal. 342, 347, 268 P. 342, 345, 58 A.L.R. 1176, as it did in the instant case. To adopt the respondents' interpretation of the law would quite effectively tie the hands of a fraud victim if not practically do away with the defense itself. This is the pitfall which the statutory expression of the parol evidence rule, and the stated exception thereto, sought to avoid.

[8–10] In the present case, appellant adopted one of several remedies open to a fraud victim, as set forth in Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380, 381, and elsewhere, namely that the plaintiff "may affirm the contract, retain what he has received, and sue for his damages in an action for deceit". The measure of damages in such a case is the difference between what the buyer has actually received and that which, except for the fraud, he would have received and had the right to expect to receive. Obviously, it would amount to a direct and complete contradiction to affirm in one breath that a defrauded buyer has the legal right to bring such an action, and then in the next breath to cancel such remedy by quoting the parol evidence rule and excluding the only type of evidence by which fraud could be established. Incidentally, it may be noted that when pursuing this remedy, the plaintiff by no means "affirms" or waives the fraud, as respondents appear to assert, but merely elects to retain what he has received, seeking reimbursement for the difference in value by way of a money judgment against the seller.

[11] Respondents further insist that under the contract warranty, it was appellant's duty to "return the defective parts for rectification", which appellant did not do. The answer to this is that the complaint makes no allegation in respect to "defective parts", but seeks to recover the damages resulting from such fraud. This is merely another example of the fundamental error of respondents' position, the issue raised by the complaint is not concerned with warranties or express contract provisions. The issue before the trial court was simply whether the complaint stated a cause of action for fraud which would vitiate the written contract.

[12] It is not meant by this decision to express or imply any opinion as to whether plaintiff could or could not es-

tablish the allegations of fraud. Again, it may well be that some or all of the evidence offered by the plaintiff at a trial might prove to be inadmissible for one reason or another, a matter which cannot be determined in advance of a trial and an actual offer of evidence. It is clear, however, that a trial court has no authority to determine matters of admissibility of evidence on the hearing of a motion for judgment on the pleadings as was done in the instant case.

The judgment is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

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113 Cal.App.2d 26

CHEESMAN et ux. v. ODERMOTT et al.

Civ. 8060.

Sac. 6201.

District Court of Appeal, Third District, California.

Sept. 4, 1952.

Hearing Denied Oct. 30, 1952.

Action by Loren W. Cheesman and wife, against Adolph Odermott, and others, to enjoin defendants from discharging irrigation waters into a natural water course which traversed the lands of the plaintiffs. The Superior Court, Sacramento County, John Quincy Brown, J., entered judgment in favor of defendants, and plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held that in view of fact that plaintiffs had almost completely obliterated a natural water course in process of leveling and checking their land for irrigation purposes, they were not entitled to enjoin the upstream defendants from discharging waste irrigation waters into the natural water course in a manner which would have been non-injurious but for the obliteration of the water course by the plaintiffs.

Judgment affirmed.

See also, 106 Cal.App.2d 827, 236 P.2d 211.

1. Appeal and Error 🔑907(2)

Where appeal was upon judgment roll alone, the evidence would be presumed to support the court's material findings of fact.

2. Waters and Water Courses 🔑144

A landowner may discharge waste water into natural water courses so long as such use of the water course does not injure others. Const. art. 14, § 3.

3. Waters and Water Courses 🔑152(3)

Where the flooding of plaintiffs' land was the result of their obliteration of a natural water course in the process of leveling and checking their land for irrigation purposes, plaintiffs were not entitled to enjoin upstream landowners from discharging waste irrigation waters into the water course in a manner which would have been non-injurious but for the plaintiffs' obliteration of the water course.

4. Waters and Water Courses 🔑152(11)

In view of the findings and conclusions of law and the whole judgment, a part of judgment which gave defendants right to discharge into a natural water course the irrigation waters reasonably flowing from their lands through drainage, seepage, percolation and other means, and to have such waters flow across the lands of the plaintiffs, was not so broad as to allow use of such right to the injury of the plaintiffs.

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Busick & Busick, Sacramento, for appellants.

Desmond, Miller & Artz, Sacramento, for respondents.

VAN DYKE, Justice.

This appeal is on the judgment roll from a judgment in favor of defendants in an action brought by plaintiffs who sought to enjoin defendants from discharging irrigation waters into a natural water course which traverses the lands of plaintiffs to their alleged damage.

The trial court found as follows: The area in question lies to the northeast of the City of Galt in Sacramento County and the lands of respondents lie to the east of and are higher in elevation than those of the appellants. The lands of all the parties are part of the same watershed. Surface waters, that is, waters naturally falling upon and spreading over the area embraced in the watershed, drain into Hen Creek. This creek meanders in a generally westerly direction from the higher lands of respondents across the lower lands of appellants, finally emptying into a slough known as Moyer Slough and thence into the Cosumnes River. Generally speaking, the lands of respondents and appellants are devoted to the production of alfala, ladino clover and other irrigated forage crops, and the irrigation is by means of water pumped from wells upon the various tracts. The irrigation season in this area extends from May to October of each year. The respondents discharge surplus irrigation waters by the process of natural leakage, percolation and other means of wastage, into the stream. Following the natural channel, the water comes to, and flows across, the lands of appellants. Appellants have leveled and checked their lands bordering Hen Creek and have prepared the same for irrigation and have irrigated crops thereon by a system of checks. By this work of leveling their land, preparing the same for irrigation and planting crops thereon, the appellants have destroyed the channel of Hen Creek, practically obliterating it as it passed through their lands. By reason of the obliteration of said channel appellants have caused both surface and irrigation waters flowing upon their land through the creek to form expanses of water upon their property. Had they "maintained the well defined channel of Hen Creek as it should have been maintained" across their property no such results would have occurred.

[1] Since the appeal is upon the judgment roll alone, the evidence will be presumed to support the court's material findings of fact. Mogle v. Moore, 16 Cal.2d 1, 104 P.2d 785; Bryant v. Lewis, 22 Cal. App.2d 213, 70 P.2d 701. Appellants accept this hazard and maintain in support of their appeal that giving the rule full application, yet the judgment must be reversed because it is against law. No complaint is made that the findings were not responsive to, or did not cover, the issues tendered by the pleadings.

Appellants take the position that the waters which respondents are causing to flow across the lands of appellants are waters which are artificially obtained and that therefore respondents should be enjoined from discharging the same into the stream in such quantities as to result in this water flowing across the lands of appellants. They quote from 27 Ruling Case Law 1151, section 79, a statement that under both civil and common law while water which naturally flows across land may continue to do so without subjecting the upper owner to any liability, yet the servitude which the owner of higher adjoining land has upon lower land for the discharge of *surface water* naturally flowing on the lower land from the dominant estate, extends only to surface water arising from natural causes such as rain and snow and cannot be augmented or made more burdensome by the acts or industry of man.

[2] Whatever the rule may be in other jurisdictions, we think that in California it has been modified to fit the necessities of a people who must depend greatly on irrigation. It has been declared that "The maxim, 'Sic utere tuo ut alienum non laedas,' which is incorporated in the statute law of this state * * *, implies that one may make any use which he pleases of his own so long as he does not injure others." Reclamation Dist. No. 833 v. American Farms Co., 209 Cal. 74, 80, 285 P. 688, 690. And "The right to use a natural channel as a temporary conduit or as a drain for artificial flow has been frequently upheld. See cases digested in note, 89 A.L.R. 210." Stevens v. Oakdale Irr. Dist., 13 Cal.2d 343, 352, 90 P.2d 58, 63. "The California Constitution, Article XIV, Section 3, declares that the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent possible. * * * The mandates of this section 'apply to the use of all water, under whatever right the use may be enjoyed.' * *

Since foreign waters may be produced for beneficial use * * *, and a natural channel may be used as a conduit or drain for the flow of such waters * * *, and since the use of such foreign waters, as long as it does not interfere with the rights of another, is of no concern to such other * * *, it follows that a noninjurious and reasonable use by defendants of the waters imported upon their lands and allowed to drain into Little Chico Creek is within the protection of the Constitution and may not be enjoined." Fell v. M. & T. Incorporated, 73 Cal.App.2d 692, 694–695, 166 P.2d 642, 643. We think it is now too late in this State to say that waste waters cannot be discharged into natural water courses.

But appellants contend further that the cases decided by the courts of this State, from some of which we have hereinbefore quoted, if properly construed, do not permit the use of natural water courses for the carrying of artificially originated waters, except within the limits that such use of the natural waterways be confined to noninjurious use. We think the appellants have correctly construed the decisions to which reference has been made. For instance, it is to be noted that such limitation was clearly set forth in the foregoing quotation from Fell v. M. & T. Incorporated, supra, where the statement that the "natural channel may be used as a conduit or drain" for the flow of artificially produced water is qualified by saying "since the use of such foreign waters, *as long as it does not interfere with the rights of another,* is of no concern to such other * *, it follows that a noninjurious and reasonable use by defendants of the waters imported upon their lands" may not be enjoined. Again the opinion respecting the claim that the privilege of turning imported waters into the channel of the stream might ripen into an easement, disposed of the contention by saying, "under general principles this [that is, ripening of an easement] could happen only if there should be an interference with the rights of another."

[3] But the foregoing does not aid appellants here. We have no finding here that the use of the channel of Hen Creek which has been made by respondents and which use the appellants sought by this action to enjoin did as a matter of fact injure appellants. On the contrary, in so far as the findings specifically refer to the matter they must be considered as finding that such injury did not occur by such use for the court found that the injury complained of, that is, the flooding of the appellants' lands and the forming of water expanses thereon, would not have occurred save for the appellants' destruction of the natural channel as it passed over their lands. As the upper owners, defendants have the right to make the indicated reasonable and noninjurious use of the natural water course as a drain for their irrigation waters. It follows that the appellants could not by obliterating the water course and causing the very injury of which they complain then obtain injunctive process of the court against their neighbors because of that situation. Their trouble is of their own making. They cannot pare down the rights of the upper owners to make such use of the waterway as the court has found is here being made.

[4] By the judgment entered by the trial court it was declared that the respondents "have the right to discharge into Hen Creek the irrigation waters reasonably flowing from their lands through drainage, seepage, percolation and other means, and have the right to have such waters flow therein to and over and across the lands of plaintiffs and have the right to have such waters be discharged through said Hen Creek where the same does make its exit from the lands of plaintiffs." Taken alone, the language of this declaration would be too broad, since it is not qualified by the condition that injury must not be caused by the exercise of the right declared. But we think that from the findings and conclusions of law and the whole of the judgment no such broad right as at first glance the quoted language might seem to declare was in fact adjudicated, and that on the contrary the judgment does not go so far as to declare that in the exercise of the right stated the respondents individually or collectively or in common with other

upper landowners whose lands drain into Hen Creek may so use the right as to injure the appellants.

The judgment is affirmed.

SCHOTTKY, Justice pro tem., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.

112 Cal.App.2d 846

PONTI v. BURASTERO et al.

Civ. 8124.

Sac. 6237.

District Court of Appeal, Third District, California.

Aug. 25, 1952

Hearing Denied Oct. 23, 1952.

Action by Guido Ponti against Martin Burastero, and others, individually and as copartners doing business under the name of Vallejo Garbage Service, and others, for declaratory relief to test the validity of an ordinance which awarded an exclusive garbage disposal contract, to determine the rights of the individual parties under a contract providing for garbage disposal on dividing territory between them, and against the individual defendants for damages. The Superior Court, Solano County, Joseph M. Raines, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Schottky, J. pro tem., held that an ordinance granting exclusive right to collect garbage was not a public contract nor franchise within the meaning of the city charter.

Affirmed.

1. Municipal Corporations 🔑607

Ordinance granting exclusive garbage removal privilege to one company for term of years was validly enacted in the exercise of the police power of the city. Const. art. 11, § 11.

2. Municipal Corporations 🔑607

In collecting garbage, trash, and similar refuse, and in disposing of the same, a municipality exercises a governmental function. Const. art. 11, § 11.

3. Municipal Corporations 🔑607

Ordinance granting exclusive right to one company to collect garbage for term of years within city limits was not a franchise within city charter regulating the granting of franchises, regardless of the terminology used in the ordinance.

4. Municipal Corporations 🔑607

An ordinance granting exclusive right to collect garbage was not a public contract within city charter and ordinance relating to the manner in which public contracts for public work and for the purchase of materials and supplies should be let.

5. Declaratory Judgment 🔑346

In action by one of three garbage companies for declaratory relief to test validity of city ordinance which awarded an exclusive garbage disposal contract to one of the defendants, evidence sustained implied finding of trial court that it was understood at time of agreement between the three companies establishing their business areas that the company which later secured the exclusive contract would have the exclusive right to service any areas which might be annexed to the city.

6. Constitutional Law 🔑128

Ordinance which awarded exclusive garbage disposal contract to one of three garbage companies and which forbade assignment of the privileges awarded did not impair obligation of contract which had divided the areas within and outside the city limits among the three companies in anticipation of the receipt of the exclusive contract by one of them.

7. Municipal Corporations 🔑120, 250

A municipal ordinance, regulation, or contract designed for the corporation at large operates throughout its boundaries whatever their change, and grants by such ordinance, though accepted and amounting to contracts, are to be construed as made and accepted in contemplation of, and subject to, such changes unless the contrary is clearly expressed.

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Robert E. Burns, San Francisco, Leo C. Dunnell, William H. Herbert and Adey May Dunnell, Fairfield, for appellant.

Rolland L. Pope, City Atty., Vallejo, O'Hara, Randall, Castagnetto & Kilpatrick, Vallejo, for respondents.

SCHOTTKY, Justice pro tem.

This is an action for declaratory relief to test the validity of an ordinance of the City of Vallejo which awarded an exclusive garbage disposal contract to defendant Vallejo Garbage Service, and to determine the rights of the individual parties under a contract providing for garbage disposal on dividing territory between them. Plaintiff also sought an alternative judgment against the individual defendants for damages in the sum of $72,200.

Defendants denied the material allegations of the complaint, and defendant City of Vallejo in its answer joined the plaintiff in seeking a declaration of the rights of all of the parties under the ordinance and under the contract of the individual parties.

There is little, if any, dispute as to facts. The defendant and respondent Vallejo Garbage Service and its predecessors had been operating under an exclusive contract to collect garbage in the City of Vallejo from 1926 until October 11, 1942, the date of the contract in question. The plaintiff and appellant, Guido Ponti, and his father before him, had collected garbage in an area adjacent to the City of Vallejo from a date prior to 1935 until October 11, 1942. Prior to 1936 two areas that were served by Ponti were Vista de Vallejo Tract and the Fleming Tract, both tracts then located outside the city. Vallejo Garbage Service also had customers in these tracts. In 1936 the Fleming and Vista de Vallejo tracts were annexed to the City of Vallejo. However, both Ponti and Vallejo Garbage Service continued to serve customers in these two tracts until the execution of the contract of October 11, 1942. There was evidence at the trial that the two parties operating in the same areas caused much friction, which was one reason for the execution of the said contract. Another reason for the execution of the said contract was that the overlapping routes caused both companies to use excess tires and gas at a time when both commodities were subject to war rationing.

On October 11, 1942, plaintiff and all of the individual defendants, namely, Raoul Ponti and Guido Ponti (plaintiff herein), owners of Ponti Garbage Service, a garbage disposal business, parties of the first part, defendants Nick Zunino and Lawrence Zunino, doing business under the fictitious name of N and L Garbage Service, second parties, a partnership doing business under the fictitious name of Vallejo Garbage Service, the third parties, entered into a written agreement and supplement thereto which provided in substance that said first party should not engage in the garbage disposal business in Vallejo Township or Benicia Township, east of United States Highway No. 40; that the second and third parties would not engage in the garbage disposal business within the Township of Vallejo, west of said United States Highway No. 40, excluding, however, certain designated areas, covered by their then existing contracts with federal agencies; that the term of said agreement was for twenty years; and the supplemental agreement thereto, of the same date, provided that said term should be extended for any additional period of time, over twenty years, that might be provided for, in any exclusive contract or franchise, entered into between second and third parties, with the City of Vallejo. After the contract was executed plaintiff withdrew his proposal for an exclusive contract with the city.

On October 14, 1942 the Council of the City of Vallejo adopted Ordinance No. 898 N.S. authorizing the execution of an agreement between the city and defendant Vallejo Garbage Service, dated October 17, 1942, under which said defendant was given the exclusive privilege to collect and dispose of all garbage and rubbish in the City of Vallejo, for the term from November 9, 1942, to November 9, 1967. The ordinance, which includes a complete copy of the contract, provides that the contract shall be deemed to be an exclusive privilege, so long as the parties of the second part, some of defendants herein, shall fully and faithfully carry out all of its conditions and covenants; also, that a previous garbage contract with said parties should remain in full force and effect, until the 9th day of November, 1942, and that said parties of the second part should pay to the city two per cent of gross collections from customers, and that the "agreement shall not, nor any interest therein, be sold, assigned or transferred without the consent" of the city.

After the execution of the contract the plaintiff transferred his customers inside the City of Vallejo to defendant Vallejo Garbage Service, and transferred his customers east of Highway 40 to defendant N and L Garbage Service. He received in exchange defendants' customers west of Highway 40, and outside of the city as its boundaries were in 1942. All of the parties carried on the garbage disposal business in the different areas as agreed to until the city in 1949 annexed several areas which were being served by plaintiff under the October 11th agreement. In June, 1949, the City of Vallejo annexed the Lakeview Subdivision and in December, 1949 it annexed the Hanns Tract and Highland Subdivision. These newly annexed subdivisions are located west of Highway 40. Plaintiff and defendant Vallejo Garbage Service both claimed the exclusive right to serve the newly annexed territory and the instant action was filed by plaintiff as aforesaid.

Following a trial before the court sitting without a jury, the court found in substance as follows:

(1) That Ordinance No. 898 N.S. granting an exclusive garbage privilege to Vallejo Garbage Service was validly enacted in all respects under the police power and that the provisions of the Vallejo city charter relative to franchises were not here applicable.

(2) That said exclusive privilege extended to all parts of the City of Vallejo including later annexed territory.

(3) That the Vallejo Garbage Service did not restrict themselves by the October 11, 1942 contract merely to the City of Vallejo as it then existed but that, regardless of the interpretation accorded to said contract, Vallejo Garbage Service had no power to assign any part of the exclusive contract before or after it was awarded in view of Clause No. 13 precluding assignment; and further, that in view of the fact the said contract was awarded properly under the police power, no contract between private parties could interfere with this function.

(4) That therefore the plaintiff and appellant, Ponti, had suffered no damage.

Judgment was rendered in favor of defendants in accordance with said findings, and plaintiff has appealed from said judgment. Since the entry of judgment the city has required that plaintiff discontinue service in the annexed areas.

Appellant first contends that Ordinance No. 898 N.S., pursuant to which the contract granted respondent Vallejo Garbage Service the exclusive right to collect garbage within the city, is invalid because it was not adopted by the city council in the mode required by Article XII of the Charter of the City of Vallejo. Appellant quotes from said Article XII as follows:

> "An applicant for a franchise, permit or privilege shall file with the council an application therefor, and thereupon the council shall, if it proposes to grant the same, advertise the fact of said application, together with a statement that it is proposed to grant the same, in one or more newspapers of the city. The publication of such advertisement must run for ten successive days, Sundays and legal holidays excepted, and must be completed not less than fifteen and not more than thirty days before any further action can be taken on such application."

Appellant points out that the said ordinance was adopted by the city nine days after the first publication and that the publication was for five days. Appellant also states that the payments to the city under the contract for the 25-year period will not equal the minimum percentage payments required by the charter.

Respondents do not contend that in enacting Ordinance No. 898 N.S. the city council attempted to comply with Article XII of the Charter relating to franchises, but respondents contend that garbage contracts are governed by the policy power provisions of the State Constitution, and are therefore not controlled by the charter provisions relating to franchises. Respondents cite Article XI, Section 11 of the California Constitution as follows:

> "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

Respondents also cite Article IX, section 49, of the city charter as to the "Powers of the City and of the Council" which reads as follows:

> "Except as herein otherwise expressly provided, the council shall exercise all the general powers of the city herein set forth and all powers now held by or that may hereafter be given to the city under the constitution or the laws of the state; but only in the manner and under the conditions of this charter, and subject to all the provisions thereof. In addition to all such powers, the council, subject to the provisions and restrictions of this charter, shall have power:

* * * * * *

> "(30) To provide for the collection and disposal of garbage, ashes, animal and vegetable refuse, dead animals, animal offal, rubbish and waste matter."

Appellant cites numerous authorities which state the well-settled rules that the power to grant franchises is strictly construed in favor of the public and against the agency to which the power is delegated and that the charter is the constitution of a city and ordinances which do not comply with the charter are invalid. He argues that the City Council of the City of Vallejo had no power to grant the exclusive contract here involved except in accordance with the procedures established by Article XII of the charter.

Respondents in reply point out that under the city charter garbage regulation is treated separately from franchises generally, and that the sections referring to franchises were meant only to cover public utility functions, and argue that the power to control garbage disposal is not derived from the franchise article but is contained in those sections outside of the franchise article. They refer to the fact that the Vallejo City Council has never deemed the franchise article applicable to contracts for garbage disposal and quote the following from 23 California Jurisprudence, page 775:

> "'Contemporaneous exposition is in general the best.' The contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect, while not controlling, is always given great respect. And a contemporaneous interpretation, long acquiesced in by all persons who could possibly have an interest in the matter, has been held sufficient to justify a court in resolving any doubt it might have as to the meaning of ambiguous language employed by the legislature, in favor of sustaining such long unquestioned interpretation. The courts will, if possible, uphold such construction where rights of property have been acquired thereunder for many years."

They point out also that the precise question here concerned was the subject of court action in the Superior Court in Solano County in 1921 and that the Superior Court held in that case that the franchise article did not apply.

[1, 2] We are satisfied, as was the trial court, that the passage of Ordinance No. 898 N.S. and the making of the contract thereunder was in the exercise of the police power of the city. As was said in Glass v. City of Fresno, 17 Cal.App.2d 555, at page 558, 62 P.2d 765, at page 767:

> " * * * It is well settled in this state that in collecting garbage, trash, and similar refuse and disposing of the same a municipality exercises a governmental function. Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768. 'In the collection and disposal of garbage a municipal corporation exercises governmental functions.' Miller v. City of Palo Alto, 208 Cal. 74, 280 p. 108, 109. To the same effect is In re Santos, 88 Cal.App. 691, 264 P. 281.

> It has further been held that the authority of a city to perform such work is derived from section 11 of article 11 of the State Constitution. In re Zhizhuzza, 147 Cal. 328, 81 P. 955; In re Pedrosian, 124 Cal.App. 692, 13 P.2d 389."

[3] We are convinced also that an exclusive contract to handle garbage is not a franchise within the meaning of the charter of the City of Vallejo and that under the great weight of authority the making of such a contract by a municipality is not considered to be the granting of a franchise. The general rule is well expressd in Wallis v. Fidelity & Deposit Co. of Maryland, 155 Wash. 618, 285 P. 656, as follows:

> "That a city in this state has the right under the police power to handle garbage itself, or to provide for its being handled by private parties, is well settled. Smith v. Spokane, 55 Wash. 219, 104 P. 249, 19 Ann.Cas. 1220; Cornelius v. Seattle, 123 Wash. 550, 213 P. 17. It is true that the ordinance in the instant case denominates the right to handle the garbage as a franchise. The bond filed denominates the right granted by the ordinance in question as being a franchise. And if the right granted by this ordinance is a franchise, then the record clearly shows that it was invalid by reason of the fact that it was not passed in accordance with the provisions of the statute above quoted. But the fact that it is denominated a franchise in the ordinance and in the bond does not make it a franchise unless it is one in fact. That the exclusive right to collect garbage in a city is not a 'franchise,' as that term is used in the statute, is settled in this state by the cases above cited, as well as by State v. Lovelace, 118 Wash. 50, 203 P. 28."

In 7 McQuillin on Municipal Corporations, 3rd edition, Sec. 24.251, page 90, it is stated:

> "Generally a municipal corporation can contract with one or more persons or corporations for the collection and removal of waste matters, garbage, filth, trash, refuse, carcasses and offal. It may grant an exclusive privilege to a contractor or licensee to make such collection and removal for a specified period. Removal of substances of this character must proceed quickly and without abatement, with as little inconvenience as possible to inhabitants; and experience in such removal, which contributes to its orderliness and efficiency, may under some circumstances best be obtained through a contract. In any event, it is within municipal legislative competency to decide to have the service performed under a contract. Accordingly, an exclusive contract for the removal of these substances constitutes a proper exercise of the police power. The common-law doctrine that monopolies are odious and therefore illegal refers to franchises and agreements in restraint of trade, and has no application to police regulations designed to promote the health or morality of the public, and, hence, it has no application to an exclusive contract for the removal of waste products such as garbage, refuse, decaying carcasses and similar waste matters, at least where they are a nuisance, offensive or likely to be dangerous to the public health. An ordinance may forbid the collection of garbage by unlicensed persons, revoke existing licenses and give the right to the city garbage contractor. The contract may be made to run for many years, subject, of course, to constitutional, statutory and charter limitations. A charter amendment forbidding monopoly for hauling garbage becomes effective only after expiration of an existing exclusive contract."

And in an exhaustive annotation in 15 A.L.R. at page 300 it is stated:

> "An ordinance, enacted under the authority of a statute, granting an exclusive right to remove garbage, is not prohibited by a statute forbidding the granting of contracts or franchises for the use of the streets, except under certain conditions. O'Neal v. Harrison, 1915, 96 Kan. 339, 150 P. 551, L.R.A.1915F, 1069, wherein the court

> said: 'We regard that statute, however, as referring only to the public utilities specifically named, or to those of a similar nature.'"

Appellant in his reply brief makes the further contention that if Article XII of the city charter is not applicable the ordinance is nevertheless invalid under Article VIII, section 44(12) of the charter which provides:

> "No bill for the grant of any franchise shall be put upon its final passage within thirty days after its introduction, and no franchise shall be renewed before one year prior to its expiration."

The ordinance authorizing the exclusive garbage contract was introduced October 14, 1942 and adopted at a regular meeting of the council on October 17, 1942. However, if our conclusion that the authorizing of an exclusive contract for the disposal of garbage is not the granting of a franchise within the meaning of the charter of the City of Vallejo, we must also conclude that section 44(12) of Article VIII is not applicable.

[4] Appellant in his reply brief argues also that if said Ordinance No. 898 N.S. is not a franchise contract it is a public contract, and is invalid because it does not comply with Article XI, section 65(2) of the city charter and Ordinance No. 31 N.S. Article XI, section 65(2) (1911 Stats., p. 2003) provides:

> "The council shall, by ordinance, provide a regular and orderly procedure for the letting, making and satisfactory performance of all public contracts, to the end that the interests of the city may be properly safeguarded. Such procedure shall, among other things, provide for the making of proposals for doing public work and for furnished material or supplies to the city on printed forms prepared and supplied by the city; for forms and requirements of affidavits of genuineness and good faith in making bids, with penalties for the disregard thereof; for proper security, in money or otherwise, to accompany bids, and the forfeiture thereof on failure to fulfill any contract; for the time and manner of receiving, opening, examining, declaring, rejecting, and awarding bids; for the signing and filing of an adequate number of copies of all contracts; and for the proper execution in favor of the city of sufficient bonds to insure the faithful and satisfactory performance of every contract."

Ordinance No. 31 N.S. was adopted in 1911 pursuant to this mandate of the charter. It requires, as does section 65(2), an affidavit by the bidder of good faith, that the bid is not sham or collusive, and that:

> "Any bid made without such affidavit or in violation thereof shall be absolutely void and also any contract thereunder."

It appears that no affidavit of good faith was filed by respondent Vallejo Garbage Service when it submitted its proposal to the city.

In ruling against this contention of appellant the learned trial judge stated:

> "In action No. 7376, Superior Court of Solano County, Vallejo Disposal Company, a corporation, plaintiff, v. Arata, et als., Defendants, where it was urged as here, that the provisions of the Vallejo City Charter, including Articles XI and XII thereof, and of Ordinance No. 31 N.S. had not been followed, in providing for garbage disposal, the Superior Court held that said provisions did not apply to that situation; judgment was entered, accordingly, on February 1, 1942, and there was no appeal therefrom; though it would appear, that the parties to this action are not bound by said judgment, it is, nevertheless, an interpretation of the Charter provisions in question here, by the Superior Court of Solano County.
>
> "From a reading of the Ordinance No. 31 N.S. it seems clear that it applies only to the awarding of contracts for public work, for the purchase of materials of supplies; it did not, therefore, apply to the enactment of said ordinance nor to the making of the contract, thereby provided for;

> Section VI of Ordinance No. 31 N.S., provides that the contract 'shall state distinctly and specifically, the work contemplated and the material or supplies to be furnished;' further 'that all contracts shall specify the time within which the work shall be commenced and materials or supplies furnished and when to be completed.'" We agree with this analysis.

[5] Appellant next contends that by the contract of October 11, 1942, the parties established their business areas which were to continue for the term of the contract and that the contract should be specifically enforced. Appellant states:

> "The contract specifically provides in Paragraph First that appellant will not engage in the garbage disposal business within the City of Vallejo as that city is delineated and defined by the map of Vallejo as of that date. In Paragraph Second appellant agreed that he would not engage in the garbage disposal business in Vallejo Township or Benicia Township east of Highway 40 as that highway was 'presently located'. In Paragraph Third the individual respondents agreed not to engage in the garbage disposal business within the Township of Vallejo west of Highway 40, excluding the City of Vallejo. These paragraphs are to be construed together and it is clear that the parties established thereby three specific areas in each of which one party was to engage in business, the other parties, in return for a similar promise, agreeing not to engage in business in that area."

Appellant argues that the contract of 1942 should be construed as establishing three distinct areas in each of which one of the parties was to engage in business; and that the contract properly construed defines those areas as the City of Vallejo existed in 1942. Appellant relies upon the language of the contract whereby he agrees not to conduct business in the City of Vallejo as "delineated or defined by the existing map or present boundaries", and argues that such provision impliedly reserves to appellant the right to engage in business in areas added to the city after that date.

Respondents in reply argue that a proper construction of the contract permits respondent Vallejo Garbage Service to operate in this annexed territory and state that the plain meaning and result of the language of the contract is that appellant did not bind himself to stay out of said annexed territory as this annexed territory would then be part of the City of Vallejo.

Upon the theory that the written language was ambiguous, the court admitted evidence to aid in the interpretation of the contract. Witness Greenwood, attorney for defendants, testified that at the time of the making of the contract paragraph third was discussed at a meeting of the parties; that he advised his clients that they could not delimit themselves to the boundary of the city as it existed on October 11, 1942, and retain the franchise with the city; that the matter of future annexation was discussed; that "My memory is that Paragraph Third was changed some from what the original draft was, and that was due to the fact that we knew under our franchise and under the law we had to service the City of Vallejo, no matter what its confines or limits may be, and it took in the City of Vallejo, whatever the confines may be during the life of that franchise" and that "we told him [appellant] if there was any annexation, we told him that under our franchise we would have to service it and service it exclusively, because they always have an exclusive franchise, that is the only kind Vallejo grants."

In view of this testimony the record supports the implied finding of the court that it was understood at the time the agreement was finally signed that respondent Vallejo Garbage Service would have the exclusive right to service any areas which might be annexed to the City of Vallejo, and, therefore, appellant's argument as to the construction and effect of the contract cannot be sustained.

[6] Appellant finally argues that the application of Ordinance No. 898 N.S. to the annexed territory will impair the obligation of appellant's contract. But, as

we have just pointed out, the construction which was placed upon the contract by the trial court, and which is supported by the record, is that respondent Vallejo Garbage Service would have the exclusive right to service any areas which might be annexed to the city, and it is clear that appellant's entire argument upon the point is based upon an erroneous construction of the contract.

Furthermore, so far as respondent, City of Vallejo, is concerned, no agreement of the other parties not agreed to by the city could operate to change the provisions of Ordinance No. 898 N.S. providing that respondent Vallejo Garbage Service should have the exclusive privilege to collect garbage and that the "Agreement shall not, nor any interest therein be sold, assigned or transferred without the consent" of the city.

As stated by the trial judge in his opinion:

> " * * * In this case, of [in the] exercise of police power by the City of Vallejo, a contract was made solely by private individuals, without knowledge or consent of the City, to divide territory into service areas, with reference in some degree, to a future city contract, to be made by some of said contracting parties, and the City contract to include term, rates and other requirements as to service; the City was a stranger to, and is not bound by, said contract, which gave said individuals no rights, that could control city action.
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> "It would also appear, that the issue of impairment or abridgement of contractual rights, is answered by the provision, in the city contract, not heretofore referred to, by any of the parties, that said contract, nor any interest therein, should be sold, assigned or transferred, without consent of the city; in this respect, the following appear to cover the situation fully:
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> "McQuillin on Contracts, Volume 3, page 1349:
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> " * * * an agreement between one obtaining a city garbage contract and others, to carry on the contract as a partnership, is invalid, where the contract forbids its assignment.
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> "DeVita v. Loprete, 77 N.J.Eq. 533, 77 A. 536
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> "Here a garbage contract included a non-assignment provision, quite similar in language to that in the Vallejo contract. Prior to the making of the city contract, the parties, as in this case, contracted between themselves, in expectancy of the future award to some of them, of a garbage contract. The court held that equity would not enforce such prior contract between the persons, and stated as follows: one of the purposes of this provision is manifestly to prevent a collusion arrangement between the parties who might otherwise be partners in the contract by which the city would be deprived of the contract between them and one of them be enabled to an award of the contract at an exorbitant figure.
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> "Hobbs v. McLean, 117 U.S. 567, 6 S.Ct. 870, 29 L.Ed. 940
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> "This authority under the conditions there disclosed, holds, that no cause of action exists, where a contract is made between parties in anticipation of obtaining a government contract."

[7] While it may not be necessary to a determination of the instant case we deem it proper to add that the law seems to be well-settled as stated in McQuillin on Municipal Corporations, Rev. Vol. 1, 2nd ed., sec. 310, p. 860, as follows:

> "The general rule is that a municipal ordinance, regulation or contract designed for the corporation at large operates throughout its boundaries whatever their change, and it has been held by state courts that grants by such ordinance, though accepted and amounting to contracts, are to be construed as made and accepted in contemplation of, and subject to, such rules unless the contrary is clearly expressed."

And as stated in 24 American Jurisprudence, page 677:

> " * * * Similarly, it has been decided that a general franchise grant-

> ing the right to use the streets of a municipality extends to territory subsequently annexed to the municipality, on the ground that when new territory is brought into a city, general ordinances of the city immediately control the new as well as the old territory, and do not require express legislative action to give them such application."

In view of the foregoing we conclude that the trial court correctly determined that Ordinance No. 898 N.S. was validly enacted, that the exclusive privilege extended to all parts of the City of Vallejo, including later annexed territory, that respondent Vallejo Garbage Service was not restricted by the October 11, 1942 contract merely to the City of Vallejo, and that plaintiff and appellant Ponti was not entitled either to damages or specific performance.

No other points raised require discussion.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

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113 Cal.App.2d 10

MARTENS v. REDI-SPUDS, Inc. et al.

Civ. 19004.

District Court of Appeal, Second District,
Division 1, Califorina.
Sept. 2, 1952.

Action by Barbara Martens against Redi-Spuds, Inc., and another to recover for damages arising out of automobile-truck collision. The Superior Court, Los Angeles County, Raymond McIntosh, J., entered judgment on a verdict for plaintiff, and defendants appealed. The District Court of Appeal, Doran, J., held that omitting essential elements from formula instructions purporting to set out all elements essential to recovery was not prejudicial error in view of instructions as a whole.

Judgment affirmed.

Trial ⚷295(6, 7), 296(3, 4)

In action for damages arising from automobile-truck collision at street intersection, involving a simple issue of fault, omitting elements of proximate cause and contributory negligence from formula instructions purporting to set out conditions necessary to a recovery was not prejudicial error, where omitted elements were set out in other instructions given and instructions as a whole were not misleading.

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Spray, Gould & Bowers, Malcolm Archbald, Los Angeles, for appellants.

Larwill & Wolfe and Herbert C. Meade, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment on a verdict in favor of plaintiff.

The action was for damages resulting from an automobile collision.

The accident occurred on a clear day about 9:30 a. m. As recited in appellants' brief, "Miss Martens was driving in an easterly direction on Wilshire Boulevard. She intended to make a left turn to proceed in a northeasterly direction onto Brighton Way.

> "A witness, Mr. Gerwein, was driving his automobile in a westerly direction on Wilshire Boulevard in the lane next to the center line of the street. Driving about forty to fifty feet behind Mr. Gerwein was a vehicle operated by Mr. Lyncr. Mr. Joyner was operating a ton and a half panel delivery truck and was delivering Redi-Spuds to various restaurants. He had followed Mr. Gerwein at this distance of forty to fifty feet over a course of three or four blocks and at a speed of about twenty-five or thirty miles an hour.
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> "The intersection was controlled by traffic signals which were green or "go" for Wilshire Boulevard as these respective vehicles entered the intersection.
>
> "When he was between twenty-five to thirty feet from Miss Martens' auto-

> mobile Mr. Gerwein saw it start to make its left turn. Mr. Gerwein, who states he had slowed down to about ten miles an hour on entering the intersection, brought his vehicle to a stop. About that time the Buick operated by Miss Martens crossed in front of him; his vehicle was struck on the right rear fender by the panel truck operated by Mr. Joyner, and the truck went on the right side of Mr. Gerwein's vehicle and collided with the Buick."

Respondent points out that the record also reveals that, "The witness, Mr. Gerwein, testified that he did not particularly watch the Buick automobile driven by the respondent, Miss Martens, as it approached the intersection; that he did not see the hand signal from the Buick; that he had seen the Buick some distance back and before he came to the intersection, and that upon arriving at the intersection he slowed down to 10 miles per hour before entering the intersection; that he noticed the Buick was going to make a turn and had given a signal to turn or some indication thereof and therefore he stopped; that he stopped because he knew the Buick was going to turn. Mr. Gerwein further testified that he came to a gradual stop and that the Joyner automobile which was behind him did not slow down upon entering the intersection, or at any time prior to striking the Martens automobile.

> "The respondent Barbara Martens testified that she signaled for a turn onto Brighton Avenue. She testified that she put out her left hand and that she held it straight out."

It is contended on appeal that "The trial court committed prejudicial error in the giving of certain formula instructions which omitted essential elements."; that "The court prejudiced the defense in giving an erroneous instruction as to the duty of the defendant Joyner in following Mr. Gerwein's vehicle"; and that, "The court erred in giving a formula instruction that plaintiff was not negligent if she simply complied with the technical requirements of the left turn statute."

Appellants' argument with regard to the so-called formula instructions, which is in no sense critical, is the usual formula objection to such instructions. Thus, with regard to the two principal instructions complained of, appellant argues, "It will be observed that the first of the above quoted instructions specifically tells the jury the only issues they needed to decide were whether the defendant was negligent and whether his negligence contributed as a proximate cause of any injury to plaintiff; and specifically tells them to return a verdict in her favor if they find affirmatively on those two limited issues.

"The second of the foregoing instructions tells the jury plaintiff could recover if they found that Joyner was negligent.

"The first of their instructions wholly eliminates the issue of contributory negligence and the second wholly eliminates the doctrine of proximate cause from the jury's consideration in reaching a verdict.

"The court gave other instructions which properly stated the law. These are attached hereto in the Appendix to this brief. But where formula instructions purporting to set out all conditions necessary to a verdict are given, and erroneously omit certain essential elements, such error is prejudicial and is not cured by the giving of other instructions which correctly set out the elements. In such a case a hopeless conflict of instructions is created and it is impossible to say whether the jury followed the improper or the proper instruction in reaching its verdict." In support of the argument are cited Beyerle v. Clift, 59 Cal.App. 7, 209 P. 1015; La Rue v. Powell, 5 Cal.App.2d 439, 42 P.2d 1063; Broun v. Blair, 26 Cal.App.2d 613, 80 P.2d 95, and others.

Actually a so-called formula instruction is just another instruction. The function of the court's instructions to the jury is of course well settled. There is no logical or valid reason to assign to one a high sounding name and endow it with special importance and significance. A jury is at least supposed to be guided by the instructions as a whole. If they contain the law applicable to the issues involved and are not misleading and are valid in other respects, they are designed to guide the jury in determining the facts in the light of the law. In the within action the court, "affirmatively advised the jury that it was to consider all of the instructions as a whole".

In Amidon v. Hebert, 93 Cal.App.2d 225, 208 P.2d 733, 734, the court noted that, "It has frequently been held that where the method of giving an instruction clearly indicates that it was not intended, and does not purport, to state all of the elements involved in the case, and where the omitted elements were covered by specific instructions elsewhere given, the giving of such a so-called formula instruction does not constitute prejudicial error", and also that, "The rule relied upon by the defendant, that a formula instruction must contain all of the elements essential to a recovery, has been somewhat relaxed where the conditions and surrounding circumstances indicate that it should not be applied in its original strictness." See also Douglas v. Southern Pacific Company, 203 Cal. 390, 264 P. 237.

There was nothing misleading in the instructions herein considered. And incidentally the issue as to who was at fault was so simple that any jury might very well have determined it without any instruction. In order to indorse appellants' argument quoted above, it would be necessary, in the light of the record, to decide that the jury in the action was too stupid to decide anything.

In Trelut v. Kazarian, 110 Cal.App.2d 506, at page 512, 243 P.2d 104, 107, appears the following: "In determining whether the jury was properly instructed as to the law, the instructions taken as a whole must be considered. Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 652, 158 P. 119. It is also the established rule that all instructions of the court are to be considered and construed as a whole to determine whether they contain reversible error. Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 871, 113 P.2d 244."

And in Cannis v. Di Salvo Trucking Co., 111 Cal.App.2d 893, at page 898, 245 P.2d 365, 368, appears the following: "But it is equally clear that before a judgment will be reversed for an erroneous instruction it must appear that the jury was or could have been misled. Act VI, § 4½ of the California Constitution; Hamm v. San Joaquin, etc., Canal Co., 44 Cal.App.2d 47, 111 P.2d 940; Mehollin v. Ysuchiyama, 11 Cal.2d 53, 77 P.2d 855; Cunningham v. Coco-Cola Bottling Co., 87 Cal.App.2d 106, 198 P.2d 333."

The other contentions above mentioned are without merit.

There being no prejudicial errors in the record the judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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113 Cal.App.2d 40

PEOPLE v. HAMBRIGHT.

Cr. 2808.

District Court of Appeal, First District, Division 2, California.

Sept. 5, 1952.

Defendant was convicted in the Superior Court of the County of Alameda, Charles Wade Snook, J., of violating section of the Vehicle Code dealing with the taking and driving of an automobile without the owner's consent, and he appealed. The District Court of Appeal, Nourse, P. J., held that silence of defendant when defendant's companion made admissions with respect to taking of automobile was sufficient corroboration of testimony of defendant's companion.

Affirmed.

1. Automobiles 🔑355(10)

Evidence sustained conviction for violation of section of Vehicle Code relating to the taking and driving of an automobile without the owner's consent. Vehicle Code, § 503.

2. Criminal Law 🔑511(7)

Where defendant and companion were arrested and accused of stealing automobile, and when defendant's companion admitted taking the automobile, defendant did not deny admissions of his companion, silence of defendant under such circumstances was sufficient corroboration of testimony of his companion in prosecution for violation of section of vehicle code dealing with the taking and driving of an automobile without the owner's consent. Vehicle Code, § 503.

◆

Benjamin F. Marlow, Oakland, for appellant.

Edmund G. Brown, Atty. Gen. of the State, David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant was tried to a jury on an information charging a violation of section 503 of the Vehicle Code—taking and driving an automobile without the owner's consent. A second count charged grand theft of the automobile. A third count charged prior conviction of a felony—burglary. He was convicted on the first count, acquitted on the second, and admitted the third. Defendant was 18 years of age at the time of the trial and was committed to the Youth Authority Institution at Lancester. His appeal is from the judgment on the verdict and from the order denying his motion for a new trial.

On Christmas night, 1950, the owner of an automobile parked his car in the street in front of his home in Hayward, Alameda County. Later in the evening he discovered that the car was missing. It was found five days later near Myers on the Placerville-Lake Tahoe highway driven by one Parker in company with the defendant herein. The boys were taken to the Placerville jail where they were interrogated by police officers. Both boys lived in Hayward and had been at their homes on Christmas night. They drove around the streets of Hayward in a car belonging to the step-father of one of them looking for a car to possess and drive to Lake Tahoe where the defendant had some material he wanted to pick up. After they took possession of the parked car they drove to the home of one of them, removed the license plate, and attached the plate of the parent's car. They then drove into the hills back of Hayward where they tossed the old license plate and some material from the trunk. They then drove south to a point some fifty miles north of Bakersfield where they traded the spare tire and tube for gasoline. Their route from that point over the Lake Tahoe highway was not defined until their arrest at a point near Myers.

Both boys were taken to the Placerville jail where they were interrogated jointly by several police officers. Those called as witnesses testified that "they" said thus and so. Or that "they" admitted that "we" did thus and so, referring in each instance to the examination of the two boys collectively. Parker was called by the prosecution and gave full details of the taking and use of the automobile by the defendant and himself. His testimony was not impeached. The defendant did not take the stand.

The first point raised by appellant is that the testimony of the examining officers did not specifically identify him as one of the boys making the admissions. They were only two boys being examined. The statement that "they" said thus and so included both. The statement that they said "We did thus and so" included both. If the admissions were all made by Parker it is significant that at no time—either during the examination or when these statements were testified to at the trial—did the appellant object or question them as applying to him as well as to Parker.

[1] This is the only attack on the sufficiency of the evidence and we must hold that it is unfounded.

[2] Appellant directs some criticism at an instruction relating to the duty of a defendant to explain his possession of stolen property. His argument rests on the theory that Parker was an accomplice whose testimony was not corroborated. But his premise is wrong. When they were questioned by the arresting officers they were jointly accused of having stolen the car. Assuming that Parker made all the answers

the appellant did not deny them either before the police officers or at the time of the trial. Assuming again that Parker alone made a confession of the theft it is conceded that it was done in appellant's presence and that the latter made no denial. His silence under such circumstances is sufficient corroboration of the accomplice's testimony.

The latter point is controlled by People v. Collins, 4 Cal.App.2d 86, 87, 40 P.2d 542, where the court said: "When appellant was confronted with the patient, who had been removed to the general hospital, and was accused of committing the abortion, he declared he had nothing to say. His conduct and his silence in the face of accusatory statements (People v. Bisbines, 132 Cal.App. 239, 22 P.2d 762) sufficiently corroborates the charge of the accomplices. (People v. Watson, 21 Cal.App. 692, 132 P. 836; Pen.Code, § 1111)".

The judgment and order are affirmed.

GOODELL and DOOLING, JJ., concur.

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113 Cal.App.2d 19

SIBERT et al. v. SHAVER.

Civ. 18963.

District Court of Appeal, Second District, Division 2, California.

Sept. 4, 1952.

Rehearing Denied Sept. 23, 1952.

Hearing Denied Oct. 30, 1952.

Proceeding by Rena C. Sibert, as administratrix of the estate of Clarence E. Sibert, deceased, and others, against George W. Shaver, as surviving member of partnership consisting of defendant and deceased, for appointment of receiver to take over and manage partnership business during pendency of surviving partner's appeal from judgment decreeing existence of partnership, rescission of assignment of decedent's interest in a patent, settlement of partnership affairs, and accounting to estate for decedent's interest in partnership. The Superior Court, Los Angeles County, Frank G. Swain, J., entered order appointing receiver, and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence as to declaration and conduct of defendant was sufficient to sustain order appointing receiver.

Order affirmed.

1. Appeal and Error 🔑955
Receivers 🔑8

Appointment of a receiver is confided to the discretion of the trial court, whose order will not be reversed in the absence of a clear showing of abuse of discretion.

2. Partnership 🔑325(2)

In proceeding by administratrix of estate of deceased partner against surviving partner for appointment of receiver for partnership business pending surviving partner's appeal from judgment decreeing existence of partnership, and accounting to decedent's estate for decedent's interest therein, appointment of receiver was not erroneous merely because administratrix possessed other remedies which would have afforded ample protection.

3. Appeal and Error 🔑955

Where it appears that there is danger of misappropriation of partnership property, and evidence is conflicting as to likelihood of loss, reviewing court is in no position to say that court below has abused its discretion in the appointment of a receiver.

4. Partnership 🔑325(2)

Where action by administratrix of estate of deceased partner against surviving partner resulted in judgment decreeing the existence of the partnership, rescission of assignment of decedent's interest in a patent, a settlement of partnership affairs, and accounting to estate of decedent for decedent's interest in partnership, appointment of receiver was proper to carry the judgment into effect, or to preserve the property during pendency of appeal therefrom. Code Civ.Proc. § 564.

5. Partnership 🔑325(3)

In proceeding by administratrix of estate of deceased partner against surviving partner for appointment of receiver for partnership, evidence that surviving partner had declared that he would spend the entire proceeds from partnership business and would go bankrupt before he would account for decedent's interest therein, and that he would permit no one to see the books of the partnership, was sufficient to sustain order appointing a receiver.

6. Judgment ⚿585(5)

Where, in action against surviving partner, request of administratrix of estate of deceased partner for appointment of receiver for partnership business was denied by court's failure to mention it in judgment ordering surviving partner to account for decedent's interest in partnership, such denial did not preclude appointment of receiver in subsequent proceeding upon showing that surviving partner refused to account and concealed partnership funds, since such facts were not adjudicated in original judgment.

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Demetriou & Viney, Wood, Crump, Rogers, Arndt & Evans, Los Angeles, for appellant.

Richard L. North, Los Angeles, for respondents.

MOORE, Presiding Justice.

This appeal is from the order appointing a receiver. The original action was (a) to enforce (1) the rescission of an assignment by respondents of their interest in a patent and (2) an accounting to Mrs. Sibert as administratrix of the affairs of a partnership between appellant and decedent and (b) for a receiver. The facts are fully set forth in the decision of this court. 111 Cal.App.2d 833, 245 P.2d 514. By the judgment thereby affirmed, the court decreed (1) the existence of a partnership, (2) the rescission of the assignment of decedent's interest in the patent on a potato slicer, (3) a settlement of the partnership affairs and (4) accounting to the estate of decedent under the supervision of the probate court for the interest of decedent in the partnership and in all profits collected by appellant from the business he conducted for and on behalf of the S & S Specialty Co. Not having received any accounting in probate and none appearing likely, respondents by due proceedings caused the court below to make and enter its order appointing a receiver to "take immediate possession of and safely keep until the further order of this court, all of the business, books, records, property and assets of the partnership S & S Specialty Co. * * * and to collect and receive * * * moneys due to or on account of the said partnership business and to take possession of all the stock in trade, effects, records and property of every nature and kind belonging to the said business, with power to manage and operate the said business and to do whatever may be necessary and proper to maintain and preserve the same pending the appeal herein."

Appellant bases his demand for reversal of the order on the theory that a custodian for the books would have protected respondents and that a receivership was not necessary for that purpose. He argues that the allegations of the affidavit for a receiver, with one exception, are conclusions and that the latter cannot form the basis for the appointment, citing McCaslin v. Kenney, 100 Cal.App.2d 87, 223 P.2d 94. However, the affidavit that appellant has made statements that he would "personally spend the entire proceeds from said partnership business before he would pay either of plaintiffs a nickel; that he would go bankrupt before he would account to them for anything and that he would never turn any of the books of said partnership over to anyone," was found to be true.

Believing that affidavit to be true is in itself sufficient warrant for the order. Moreover, the court had before it the findings of the court in the main action to the effect that appellant deceived respondents and wrongfully induced them to assign dedecedent's interest and by false statements kept them from knowledge of the true facts.

[1–3] The appointment of a receiver is confided to the discretion of the trial court, Baldwin v. Baldwin, 67 Cal.App.2d 175, 177, 153 P.2d 567; Breedlove v. Breedlove, Excavating Co., 56 Cal.App.2d 141, 143, 132 P.2d 239; Sunset Farms v. Superior Court, 9 Cal.App.2d 389, 405, 50 P.2d 106, and the order will not be reversed in the absence of a clear showing of an abuse of discretion. Armbrust v. Armbrust, 75 Cal.App.

2d 272, 275, 171 P.2d 75; Moore v. Oberg, 61 Cal.App.2d 216, 221, 142 P.2d 443. It was not error to appoint a receiver merely because the plaintiff possessed other remedies which would have afforded ample protection. Sunset Farms Inc. v. Superior Court, supra, 9 Cal.App.2d at page 405, 50 P.2d 106. Where it appears that there is danger of a misappropriation of the property of the partnership and the evidence is conflicting as to the likelihood of loss, the reviewing court is in no position to say that the court below has abused its discretion. Armbrust v. Armbrust, supra, 75 Cal.App.2d at page 275, 171 P.2d 75; Moore v. Oberg, supra, 61 Cal.App.2d at page 221, 142 P.2d 443.

[4, 5] Besides the fact of probable loss to respondents by leaving the assets of the partnership with appellant, there are other grounds for appointing a receiver herein. Such appointment is proper to carry the judgment into effect; to preserve the property during the pendency of the appeal. Code Civ.Proc. sec. 564. Moreover, appellant not only appealed from the judgment entered against him, but before the trial, at the trial, and even now maintains that decedent had no interest in the patent, or in the partnership despite the findings against him and according to the findings on the instant application he will spend the entire proceeds from said partnership business and will go bankrupt before he would account to his sister-in-law and niece and will permit no one to see the books of the partnership. Such a declaration as that found to have been made by appellant "is sufficient to deter a reviewing court from interfering with the order appointing a receiver." Baldwin v. Baldwin, supra, 67 Cal.App.2d at page 178, 153 P.2d at page 569. While respondents have the right to have the estate of the partnership conserved for their benefit, the attitude of appellant offers no encouragement for them to expect it to be present when the judgment is finally affirmed. If he should "continue to operate the business" of the partnership "in the same manner after the rendition of said judgment as before," as declared by him, then respondents can expect nothing out of which to receive an accounting or payment to them for their share of the assets of the partnership. According to the implied findings, he has appropriated large amounts of money and property of the partnership to his own use; has ceased putting serial numbers on the machines sold; has sold products of a gross value in excess of $1,000,000 and "pocketed the money without any record or account thereof; is investing the proceeds of the business for his own purpose."

[6] While it is true that respondents by their complaint asked for the appointment of a receiver and that such request was denied by the court's failure to mention it in the main judgment, yet such denial is not forever conclusive against respondents in view of the later factual developments. Appellant not only failed to file an accounting to the administratrix but denied all requests for same, concealed the partnership funds and by ceasing to place serial numbers on the slicers put it beyond her reach to detect her losses. By reason of such conduct, it is not true that the facts constituting the basis of the instant demand for the appointment of a receiver were adjudicated in the original judgment. Judge Willis, the trial judge in the main action was warranted in assuming at the close of the trial that appellant would abide by the law and submit to such final judgment as might be entered against him. Judge Swain who made the order from which this appeal is taken could not do so. The judge was confronted not only with the findings of fraud committed by appellant, but also with the facts of the latter's zeal to defeat his adversaries at any cost and of his possession of the means with which to accomplish his purpose.

Order affirmed.

McCOMB and FOX, JJ., concur.

113 Cal.App.2d 23

TOMASELLO v. TOMASELLO et al.

Civ. 19086.

District Court of Appeal, Second District,
Division 2, California.

Sept. 4, 1952.

Action for a judgment declaring that specified defendant was the natural father of minor plaintiff and that his mother's former husband had no right to his custody or control and permanently enjoining him from asserting such right. The Superior Court of Los Angeles County, Ellsworth Meyer, J., entered an order granting motion for change of venue and plaintiff appealed. The District Court of Appeal, Fox, J., held that since no actual controversy existed between plaintiff and mother, she was not a necessary party to action, and that, where she was the only defendant claiming residence in county of suit, former husband was entitled to change of place of trial to county of his residence.

Order affirmed.

1. Venue ⚷22(3)

Where action is brought against two defendants, one of whom resides in the county where action is commenced, and the other resides in another county, the defendant residing in another county is entitled to have the place of trial changed to county of his residence unless resident defendant is a necessary party.

2. Venue ⚷22(3)

Whether resident defendant is a necessary party so as to maintain venue in county in which action is brought as against motion of codefendant for change of place of trial to county of his residence, depends upon allegations of complaint and the relief sought.

3. Declaratory Judgment ⚷300

Where action for a judgment declaring that named defendant was the natural father of minor plaintiff and that his mother's former husband had no right to his custody or control sought no relief against mother and she did not deny any material allegations of complaint but asserted in affidavit that facts alleged in complaint were true, no "actual controversy" existed between plaintiff and mother and hence no basis existed for declaratory relief against her. Code Civ.Proc. § 1060.

See publication Words and Phrases, for other judicial constructions and definitions of "Actual Controversy".

4. Venue ⚷22(3)

Where action for a judgment declaring that named defendant was the natural father of minor plaintiff and that his mother's former husband had no right to his custody or control involved no actual controversy between plaintiff and mother so that no basis existed for declaratory relief against her, mother was not a necessary party to action and, where she was the only defendant claiming residence in county of suit, her former husband was entitled to have place of trial changed to county of his residence. Code Civ.Proc. § 1060.

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Allan L. Leonard, Los Angeles, for appellant.

Stanford G. Smith and Raymond H. Goodrich, Santa Cruz, for respondent.

FOX, Justice.

Plaintiff appeals from an order of the Superior Court of Los Angeles County granting the motion of defendant, Harry J. Suttey, for a change of venue to Santa Cruz County.

Defendants Harry J. Suttey and Rose G. Suttey were formerly husband and wife, residing in Santa Cruz County. In February, 1950, Harry filed suit for divorce from Rose. In his verified complaint he alleged plaintiff, who was then approximately 11 years of age, was issue of said marriage. In her verified answer and cross-complaint Rose made the same statement. In April, 1951, Harry was granted an interlocutory decree. The court found plaintiff was issue of such marriage. Custody was awarded to the parties jointly with the provision that physical custody of the child was given to the mother during school periods and to the father at other times. In September, 1951, this order was modified by providing for the placement of the child at a military academy in Los

Angeles County for the current school year.

Rose and her adult daughter by a former marriage claim to have established residence in Los Angeles County about November 1, 1951. In December the infant, through his half sister acting as his guardian ad litem, brought this action in declaratory relief seeking a decree that defendand Tomasello is his natural father and a declaration that defendant Harry J. Suttey has no right to his custody or control and seeking to permanently enjoin Suttey from asserting any such right. Plaintiff's mother, Rose, was named a defendant. Defendant Tomasello is a resident of San Benito County.

Defendant Harry J. Suttey made a motion for a change of venue to Santa Cruz County where he still resides. Both the guardian ad litem and Rose opposed this motion. It was, however, granted. The correctness of this ruling depends upon whether Rose is a necessary party to this action.

[1] Where an action is brought against two defendants, one of whom resides in the county where the action is commenced, and the other resides in another county, the latter is entitled to have the place of trial changed to the county of his residence unless the resident defendant is a necessary party. Hays v. Cowles, 60 Cal. App.2d 514, 519, 141 P.2d 26; Smith v. Smith, 30 Cal.App.2d 70, 72, 85 P.2d 473; Sourbis v. Rhoads, 50 Cal.App. 98, 101, 194 P. 521; Hannon v. Nuevo Land Co., 14 Cal.App. 700, 704, 112 P. 1103.

[2–4] This necessitates an examination of the allegations of the complaint and the relief sought. Hellman v. Logan, 148 Cal. 58, 60, 82 P. 848. Such examination reveals that no cause of action is stated against Rose and there is no prayer for any relief against her. Furthermore, she filed an answer which failed to deny any material allegation in the complaint, and an affidavit in opposition to the motion for change of venue in which she says the facts alleged in the complaint "are absolutely true." It is thus plain that no "actual controversy", see sec. 1060, C.C.P., exists between plaintiff and Rose. Hence there is no basis for declaratory relief against her. Mulligan v. Wilson, 94 Cal. App.2d 286, 292, 210 P.2d 526. She is not, therefore, a necessary party to this action. Consequently, the order is affirmed.

MOORE, P. J., and McCOMB, J., concur.

39 Cal.2d 512

LIBERTY MUT. INS. CO. v. INDUSTRIAL ACC. COMMISSION et al.

S. F. 18590.

Supreme Court of California, in Bank.

Aug. 28, 1952.

Application by the Liberty Mutual Insurance Company for writ of review of workmen's compensation award by the Industrial Accident Commission of the State of California to Glenn W. Dahler, a minor, represented by his guardian ad litem, Stanley P. Mamalakis. The Supreme Court, Spence, J., held that Dahler, a college student, who was employed by restaurant concessionaire at summer resort doing dish washing and the like and who, during time of day when no duties were required of him, went with knowledge and without objection of his employer to resort swimming pool which was beyond property controlled by the concessionaire, was, while at the pool, engaged in a personal recreational activity and injury which he suffered at the pool was not sustained in the course of or incidental to his employment, nor was it proximately caused by the employment.

Award annulled.

Carter, J., dissented.

Prior opinion, 239 P.2d 485.

1. Workmen's Compensation 🔑610

If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment and are compensable, and factors to be considered are nature of accident, nature of employment, custom and usage of particular employment, and terms of contract for employment, and any reasonable doubt as to whether the act is contemplated by employment should be in favor of the employee. Labor Code, § 3600(b, c).

2. Workmen's Compensation 🔑609

There must be some connection between the injury suffered by an employee and his employment other than the mere fact that the employment brought the employee to the place of injury.

3. Workmen's Compensation 🔑770

College student, who was employed by restaurant concessionaire at summer resort doing dish washing and the like and who, at time of day when no duties were required of him, went with knowledge and without objection of his employer to resort swimming pool which was beyond property controlled by the concessionaire, was, while at the pool, engaged in a personal recreational activity and injury which he suffered at the pool was not sustained in the course of or incidental to his employment, nor was it proximately caused by the employment. Labor Code, § 3600(b, c).

◆

Leonard, Hanna & Brophy and Edmund D. Leonard, San Francisco, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger, Robert Ball, Leonard Levy and Stanley P. Mamalakis, San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks to annul an award of the Industrial Accident Commission in favor of the injured employee Glenn W. Dahler. It maintains that the injuries did not arise out of, nor were they incurred in the course of, the employment, and that therefore they are not compensable under the Workmen's Compensation Act. Labor Code, § 3600(b, c).

There is no dispute as to the facts. The North Fork Association, a sportsmen's club, owned a large recreational area in the Sierras. In a portion of this area, it maintained a summer resort, "The Cedars," for the exclusive use of its members, their families and guests. Located in the resort area were some 25 cabins owned by the members, as well as a store and restaurant operated as a concession by Swafford and Company, the employer here involved.

Dahler, a college student, was hired by Mr. Swafford to work at the concession during the summer as a dishwasher and helper. As his duties were discussed at that time, he would be required to serve breakfast and dinner and to open and operate the store a couple of hours in the morning. He was to receive $35 per week, plus room and board. He began his work at the resort on June 27, 1950. He had no definite hours of employment but followed a daily routine established by Swafford when the latter was on the premises for a few days to arrange for the concession's opening for business on July 1. Upon this basis Dahler started work at 7:30 a. m. cleaning the trays for breakfast, which was served at 8:00 a. m.; then he washed dishes until about 10:00 a. m.; and from 10:00 or 10:30 a. m. until noon he worked in the store filling orders. He usually ate lunch between 12:00 and 1:00 p. m., and then he would return to the work of washing dishes and cleaning the dining room, finishing these chores between 2:00 and 3:00 p. m. Normally he would have no further work to perform until 5:00 p. m., when he would begin drying trays and serving salads for the evening meal, wash the dinner dishes and then clean the dining room, completing this work about 10:30 p. m. Once each week in the afternoon when a truck would come with groceries, he would unload the supplies and stock them in the store after he finished his dining-room work in the afternoon. Occasionally in the afternoons he would deliver goods from the store to the cabins of club members. He also had the duty of delivering telephone messages to the members at their cabins. There were only 3 employees regularly stationed at the resort in connection with the operation of the concession: Dahler, the cook Robinson, and the cook's wife. Robinson was in charge and supervised Dahler's work, but the latter's routine followed the pattern fixed by Swafford.

On the association's property but not on the portion occupied by the concession was a stream with a dam built across it. The pool, which was created by the dam and was used for swimming, was some 10 blocks distant from the restaurant and some 7 or 8 blocks beyond the cabins. Dahler had not been told that he could or could not go swimming in the stream but it was just "more or less taken for granted" that he could. He had swum there on several occasions, the first time being on July 3, when he told Swafford that he was going swimming in the afternoon during his free hours and Swafford did not object. When he had free time, Dahler could also have gone fishing or hiking, which were other recreational activities available in the area. Dahler had been furnished a cottage immediately adjacent to the store, which cottage was fitted with all the necessary sanitary facilities so that his swimming in the stream was not necessary for cleansing purposes.

The injuries in question occurred on July 19. On that day Dahler finished his early afternoon work about 3:00 o'clock. He then went to the dam to swim, as a matter of personal pleasure during his free time. He swam, sun-bathed, and undertook to show a girl how to swim. He then proceeded to dive into the stream from some rocks some 3 feet above the water level, when he struck a mudbank beneath the surface and suffered a severe injury.

On this evidence the commission found that Dahler "sustained injury *arising out of and in the course of the employment * * * while diving into a pool on the employer's premises*," and made its award accordingly. (Emphasis added.) Respondents concede that the place of injury, the swimming-pool, was not on the employer's premises and therefore that portion of the finding is erroneous. However, there still remains the question of whether Dahler's injury is compensable as arising out of and in the course of the employment.

[1] Our Workmen's Compensation Act has been broadly construed to embrace various activities which can, in a reasonable sense, be included within its coverage as incident to the employment. So it was said in Employers' Liability Assurance Corp. v. Industrial Accident Comm., 37 Cal.App.2d 567, at pages 573–574, 99 P.2d 1089, at page 1092: "If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment, and are compensable. In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered. Any reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee." Also, Pacific Indemnity Co. v. Industrial Acci-

dent Comm., 26 Cal.2d 509, 514, 159 P.2d 625; Bethlehem Steel Co. v. Industrial Accident Comm., 70 Cal.App.2d 382, 387–388, 161 P.2d 59. But in adhering to the policy of liberal construction of the act, it nevertheless does not appear possible to stretch its broad purpose to cover a case such as this.

The record indisputably establishes that Dahler was injured while diving and swimming solely for his own pleasure in a stream off his employer's premises and on his free time during a work interlude in mid-afternoon. It is true that the employment may be said to have contemplated that Dahler would engage in some recreational activity during his free time if he so chose—whether it be swimming, sun-bathing, fishing, hiking or any other recreational pursuit available in the general area. But that consideration alone would not constitute every recreational activity chosen by Dahler a part of his compensation under his contract of employment nor make the injury compensable as arising out of and in the course of the employment. There is no evidence that at the time of hiring Dahler, anything was said about his participation in any available recreational activities nor even mention made of the stream; or that Dahler after starting his employment, ever discussed with either Swafford or Robinson, the cook, whether he could or could not swim in the stream. It does appear that when Dahler told Swafford and Robinson on different occasions of free time that he was going to swim in the pool, neither offered any objection. But neither was in a position to object, for the pool was located several blocks beyond the cabin and concession area of the resort where Dahler worked and on property over which Swafford had no control.

[2] "There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury." California Casualty Indemnity Exch. v. Industrial Accident Comm., 190 Cal. 433, 436, 213 P. 257, 258. The mere fact that Dahler as Swafford's employee had permissive use of the recreational area beyond the employer's premises does not give rise to blanket protection under the compensation law. Rather, Dahler's swimming activities, unrelated to the employment, remote from his place of work and its risk, pursued as an off-duty personal diversion in the employee's free time, in an area beyond the dominion and control of his employer, and yielding neither advantage nor benefit to the employer, must be held to have been wholly without the compass of the compensation law. Arabian American Oil Company v. Industrial Accident Comm., 94 Cal.App.2d 388, 392–393, 210 P.2d 732.

Clearly distinguishable are the cases cited by respondents to the effect that employees sustaining injury while engaged in the performance of personal acts reasonably and necessarily contemplated by the employment come within the protection of the compensation law. For example of these cases, see Pacific Indemnity Co. v. Industrial Accident Comm., 26 Cal.2d 509, 159 P.2d 625, where 2 employees were drowned in a reservoir on the employer's premises incident to its use as a washing facility furnished by the employer for cleansing purposes after the day's farm labor; and Employers' Liability Assurance Corp. v. Industrial Accident Comm., supra, 37 Cal.App.2d 567, 99 P.2d 1089, where the employee, a household servant, was required to live on the employer's premises, received her board and room as part of her compensation, and was on call by her employer at the time of her injury, which resulted from a fall from a stool on which she was standing in her own room to see better in the mirror the hem of her dress which she was attempting to check.

It is true, of course, that there are other instances where the employee's recreational activity has been held to be so related to the employment that a resulting injury was deemed to be one arising out of and in the course of the employment. Such are the cases cited by respondents: E. g. Piusinski v. Transit Valley Country Club, 283 N.Y. 674, 28 N.E.2d 401, where the claimant was injured on the employer's property, a golf course on which he worked as a caddy, and it appeared that the game in which he was hurt was a recreational activity supervised by the caddy master as a representative of the employer and encouraged as practice play for the caddies because it "tended to make them more efficient caddies"; and Dowen v. Saratoga Springs Comm., 267 App.Div. 928, 46 N.Y.S.2d 822, where the claimant, a locker boy, who was given permission to use a swimming pool maintained by his employer in connection with its business and upon the premises where he worked, was hurt during his recreational hour as the result of a fall from a ladder leading to a diving board from which he intended to dive into the pool, and the injury was held compensable upon citation of the Piusinski case. In such circumstances where the employee was injured on the employer's premises, where he was making permissive use, as contemplated by the contract of employment, of the premises and equipment of the employer used in the conduct of its business, and where the recreational activity was conceivably of some benefit to the employer, the compensation award was sustained as incidental to the employment.

[3] In the present case, the only inference which can reasonably be drawn from the evidence is that Dahler's injury occurred while he was engaged in a personal recreational activity on his own free time in an area without the orbit of his employment and beyond the control or dominion of his employer. Under such circumstances, it cannot be said that the injury was sustained in the course of or incidental to his employment, or that it was proximately caused by the employment. Arabian American Oil Co. v. Industrial Accident Comm., supra, 94 Cal.App.2d 388, 393, 210 P.2d 732. Respondents' theory of compensation rests on the imposition of liability arising solely from the mere existence of the employment relationship and permits of no logical limitation, for carried to its conclusion, it would include any injury as a compensable claim if it occurred in pursuance of any recreational activity available in the general area regardless of connection with the employment. That view of the law would do violence to the express provisions of the Workmen's Compensation Act, which require that all compensable injuries arise out of and in the course of the employment. Torrey v. Industrial Accident Comm., 132 Cal.App. 303, 306, 22 P.2d 525; Pacific Indem. Co. v. Industrial Accident Comm., 27 Cal.App.2d 499, 502–503, 81 P.2d 572; Arabian American Oil Co. v. Industrial Accident Comm., supra, 94 Cal.App.2d 388, 392–394, 210 P.2d 732.

The award is annulled.

GIBSON, C. J., and EDMONDS, TRAYNOR and SCHAUER, JJ., concur.

CARTER, Justice.

I dissent.

The opinion prepared by Mr. Justice Bray of the District Court of Appeal and concurred in by Mr. Presiding Justice Peters and Mr. Justice Fred B. Wood of that court, ably sets forth the facts and applicable law. I adopt it as my dissent:

> "Petition to review an award of the Industrial Accident Commission. The sole issue is whether the injury arose out of and was incurred in the course of employment.
>
> "Facts
>
> "There is practically no conflict in the evidence. The North Fork Association, comprised of persons enjoying the great out-of-doors, owns a large area in the Sierra. Approximately 25 cabins are owned by the members and are located in a portion of the area having a radius equal to about five city blocks. This area is called 'The Cedars.' In it is located a store and restaurant operated as a concession by Swafford and Company. Glenn W. Dahler, a student at the University of California, was 19 years of age. About June 19, 1950, he was employed by Mr. Swafford for Swafford and Company in San Francisco as a dishwasher and helper. About all that was said about his duties at that time was that he was to serve breakfast and dinner and open and operate the store a couple of hours in the morning. He was to receive $35 per week plus room and board. His employment started on the 26th when he went in Swafford's truck with the Swafford and Company cook and her

husband to The Cedars. They arrived late that night. On the morning of the 27th, he helped clean the grill (the restaurant) and apparently worked around it until July 1st when it opened for business. It was patronized exclusively by the members of the North Fork Association, their guests and the employees of the members. Mr. Swafford was present the first two or three days the grill opened. Glenn's duties started about 8 a.m. when he helped serve breakfast, except on days when the trays were dirty, when he started at 7:30 and cleaned the trays. After breakfast he washed dishes. About 10 or 10:30 he opened the store and filled orders until 12. If patrons wanted meat he would thaw it out and deliver it in the afternoon. He usually ate lunch bewteen 12 and 1 with the employees of the association. He would then go back to the dishes, clean the dining room and sweep the floor, finishing between 2 and 3. About once a week the truck would come with groceries and he would unload and pack them away after he finished the dining room. If meat had been ordered, he would deliver it at this time also. He would then be free until around 5 when he would get the trays dried and ready for dinner, serve salads, bus dishes and wash them. This would take until about 10:30. Swafford had given him no definite hours to work. Swafford, however, observed the work that Glenn did. The cook's husband, Robinson, was in charge and supervised some of Glenn's duties but Swafford established Glenn's routine. When telephone calls came for members, Glenn would go to their cabins and notify them to go to the telephone in the amusement hall adjoining the grill.

"On the association property, but not on the portion occupied by the employer's concession, a distance of about ten blocks from the grill, was a dam where the members, their guests and their employees and employees of the association swam. Glenn had swum there before, the first time being July 3d. No one had told him he could go swimming there, or that he could not; it was just more or less taken for granted that he could. On one occasion when Swafford decided not to take inventory Glenn told him he would go swimming instead. Swafford did not object. During his work at The Cedars, Glenn left camp only three times at the most. One night he went with Swafford to Reno to see the sights, and twice he left camp to get groceries. When he did not have time to go swimming he stayed around the camp. When he had free time he could have gone fishing or hiking. On July 19th, Glenn got through with washing the lunch dishes and getting the dining room in order for dinner around 3 o'clock. He then went to the dam to swim, and for no other purpose. He swam, sunbathed, and attempted to show a girl who was a daughter of a member how to swim. He then dove off around two and a half to three feet from the steep rocks into the water, which at that spot was about four feet deep. A girl was standing about where he dove as he had asked her to do so as to show the depth. He struck a mudbank or something. He could not move his body and he was pulled out by the girl. He received severe damage to his spinal cord.

"On this evidence the referee made a finding that Dahler 'sustained injury arising out of and *in the course of the employment * * * while diving into a pool on the employer's premises.'* (Italics added.)

"Was Swimming at the Dam Contemplated in the Employment?

"Respondents concede that the place of injury, the pool, was not on the employer's premises and hence that portion of the finding is erroneous. This, however, does not end the case. The question left to be determined is whether swimming at the dam was reasonably contemplated in the employment of Glenn, and therefore the injury arose out of and in the course of that employment. It is apparent from the record that at the time Glenn was hired by Swafford very little was said about his duties, and that what he was to do was determined in large part by what he was told to do by Swafford and Robinson at the camp, and what all took for granted he did without his being expressly directed. He was confined rather closely to camp and his leisure time was quite restricted. A reasonable inference from all the facts and circumstances is that it was contemplated as a part of his employment that he was to receive, besides his pay, room and board, the right to swim at the dam. This was the recreation he was expected to take as the time element did not permit him any form which would take him away from camp. While 'camp' was generally considered to be the area occupied by the homes of the members, a reasonable inference from the evidence is that it also included the dam where everyone at The Cedars went to swim.

"The inferences above mentioned are not compelled by the circumstances nor are they the only ones that could be drawn therefrom. However, they are reasonable ones and under the well known rule, where different inferences may reasonably be drawn from the facts, we are bound by the determination thereof by the commission.

"Authorities

"The parties have not cited, nor have we found, any case where the facts were identical with those in the case at bar. The nearest case factually is Dowen v. Saratoga Springs Com., 1944, 267 App.Div. 928, 46 N.Y.S.2d 822. There, locker boys, during their lunch hour and after working hours, when accommodations were not crowded, were given permission to use the swimming pool maintained by the employer in connection with its business and upon the premises where the boys were employed. One of the boys, during his recreation hour, was climbing a ladder leading to a diving board from which he intended to dive into the pool. He slipped and was injured. The State Industrial Board ruled that he was entitled to compensation under the Workmen's Compensation Law. The court affirmed the award. There, of course, the injury occurred on the employer's premises. In our case it was off his premises. This distinction, however, is not important. If the recreation facilities are provided *as a part of the employment,* it could make no difference whether they were on or off the employer's premises or were or were not owned by the employer.

"A case illustrating the principle applied by the commission, although the facts are stronger than in our case, is Piusinski v. Transit Valley Country Club, 283 N.Y. 674, 28 N.E.2d 401. There the claimant was employed by the club as a golf caddy. He and the other caddies were encouraged to play golf on the club's course each Monday under the supervision of a caddy master, not only for their own amusement, but because the practice tended to make them more efficient caddies. Claimant was injured while engaged in such a practice game with the other caddies. The court supported the finding of the commission that the injury arose out of and in the course of the employment.

"While the facts are somewhat different, it is difficult to distinguish the ruling in Employers', etc., Corp. v. Industrial Accident Comm., 37 Cal.App. 2d 567, 99 P.2d 1089, from that of the commission here. There the employee, hired as a cook, was required to live at her employer's residence, and, as a part of her compensation, received her room and board. On what was normally her 'day off,' the maid had left, so she worked until 11 or 11:30 a. m. She then told her employer that she would return early that evening to wash the dishes. A little before 8 p. m. she returned. She put an apron over her street dress and washed the dishes. She then retired to her room. She was then on call to answer the telephone or the doorbell, and was expecting her employer to call her to take care of the child. While waiting, she noticed that her dress was a little long. The mirror was not adjustable. To observe more clearly the hem of the dress she stood on a stool. While shortening the dress, she slipped and fell, sustaining injuries which the commission found occurred in the course of and arose out of her employment. After pointing out that where an employee is required to live on the employer's premises, any injury received while the employee is making a reasonable use of said premises is in the course of the employment, even though received during the employee's leisure time, the court states that the only debatable question is whether the injury could be said to have arisen out of the employment. It then stated, 37 Cal.App.2d at page 570, 99 P.2d at page 1090: 'The mere fact that the employee was engaged in performing a personal act when injured does not, *per se*, determine that the injury did not arise out of the employment.' It refers to a number of cases in which the employee was engaged in performing a personal act when injured, and such act was held to arise out of the employment, such as Western Pac. R. R. Co. v. Industrial Accident Comm., 193 Cal. 413, 224 P. 754, where a messenger was struck by an automobile while returning to his place of employment from his home where he had gone to get his overcoat; Whiting-Mead Commercial Co. v. Industrial Accident Comm., 178 Cal. 505, 173 P. 1105, 5 A. L.R. 1518, where an employee had injured his hand while working for his employer and later, while lighting a cigarette, set fire to the bandage which had been soaked in turpentine; Martin v. Lovibond & Sons, 7 B.W.C.C. 243, where a drayman was required to work from 8 a. m. to 9 p. m.; during that time he took no meals at home; he left his team at the side of the street and crossed over to refresh himself at a pub with a glass of beer; he was there about two minutes and on returning across the street was killed by an automobile; Thomas v. Proctor & Gamble Mfg. Co., 104 Kan. 432, 179 P. 372, 6 A.L.R. 1145, where an employee was injured while at play during the noon hour. The court refers to Campbell's Workmen's Compensation, vol. 1, pp. 199–202, for a long list of situations where the employee was allowed compensation while performing purely personal acts. It refers to the cases from other states collected by Campbell which show a contrary rule but points out that they are in states which have a doctrine of strict construction of compensation acts, and that such doctrine has never been adopted in this state. It then holds that the theory of the cases which it approved, as well as the one upon which it decided the case, is that the employee, when injured, was engaged in doing something he might reasonably have been expected to do while in the performance of his duty, or something which was reasonably contemplated by his employment. 'If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment and are compensable. In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered. Any reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee.' 37 Cal.App.2d at pages 573, 574, 99 P.2d at page 1092.

"In Pacific Indem. Co. v. Industrial Accident Comm., 26 Cal.2d 509, 159 P. 2d 625, two boys, Thomas and Adolfo, with other members of their family, were employed as grape pickers on a piecework basis. After working all morning one Saturday they quit at noon, as did all the other pickers. Accompanied by their sister and two friends, fellow workers, they went by automobile to their home, some few miles distant from the camp supplied by the employer to most of his employees, to pick up their work cards, which showed their earnings for the week. They had been told that they would get their pay at the office after 1 p. m. About 12:40 they stopped at an irrigation reservoir located on the employer's property to wash their hands, faces and feet, as they were 'dirty.' They then intended to go to the office for their pay. Adolfo and one of the other boys had finished their ablutions and were standing by the automobile, when Thomas, then in the reservoir and unable to swim, called for help. Adolfo and the other boy plunged into the reservoir to rescue Thomas. They were unsuccessful. The other boy, with the aid of a woman, managed to pull himself out, but both Thomas and Adolfo were drowned. The reservoir was used regularly for washing after work by all the grape pickers, and many of them went swimming there. The commission found that the deaths arose out of and occurred in the course of their employment. The court upheld the finding of the commission. The following excerpts from the opinion in that case apply to our case: 'In considering the problem of the compensable nature of the deaths in question, it must be remembered that the reviewing court is not to determine the weight to be given the evidence [citations] or which of two opposing inferences should be drawn therefrom. [Citations.] A review of the record in the light of these principles of law sustains the commission's findings and awards.' 26 Cal.2d at pages 512, 513, 159 P.2d at page 627. 'Whether a given accident is so related or incident to the work in which the employee is engaged depends upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. [Citations.] The question is, of course, primarily one for the commission to determine.' 26 Cal.2d at page 516, 159 P.2d at page 629. The contention was made that there was no causal connection between the employment and the death of Adolfo. He had finished his ablutions and was standing by the automobile when he heard his brother and coemployee Thomas cry for help. Adolfo was drowned in the attempted rescue. The court held that the death was of an industrial nature and compensable. A somewhat similar situation occurred in O'Leavy v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483, although in the latter case the death occurred off the employer's premises. The employer was a government contractor operating on the island of Guam. It maintained for its employees a recreation center near the shoreline, along which ran a channel so dangerous for swimmers that its use was forbidden, and signs to that effect erected. John Valak, the employee, spent the afternoon at the center and was waiting for his employer's bus to take him from the area, when he heard two men, standing on the reefs beyond the channel, signaling for help. Followed by nearly twenty others, he plunged in to effect a rescue. In attempting to swim the channel to reach the two men he was drowned. On a claim filed by his dependent mother under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., 33 U.S.C.A. § 901 et seq., the commissioner found as a 'fact' that the death arose out of and in the course of the employment. The Court of Appeals for the Ninth Circuit reversed this finding, on the ground that the lethal currents were not a part of the facilities supplied by the employer and that the attempted rescue was neither for recreation nor was it in the course of the employment. The Supreme Court, with a dissent by three justices, reversed the decision of that court, and held that, while the facts did not compel, they supported an inference that the death was fairly attributable to the risks of the employment. It pointed out that an application of the act which 'precluded an award for injuries incurred in an attempt to rescue persons not known to be in the employer's service, undertaken in forbidden waters outside the employer's premises. * * is too restricted an interpretation of the Act. Workmen's compensation is not confined by common-law conceptions of scope of employment.' 71 S.Ct. at page 471. 'The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. Thom v. Sinclair, (Eng.) [1917] A.C. 127, 142 [Ann.Cas.1917D 188]. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose.' 71 S.Ct. at pages 471, 472. Applying to the facts of our case the test as set forth in Employers', etc., Corp. v. Industrial Accident Comm., supra, 37 Cal. App.2d 567, 99 P.2d 1089, and in the cases above mentioned, raises an inference that the employment of this young college student contemplated that in addition to his pay, board and room, he was to use as an incident of that employment the swimming facilities provided by the association for its employees, and which Swafford's employees had the right to use. Actually, Glenn's right to use the pool was by reason of his *distinct status* as an employee and as an incident of his employment. See Pacific Indemnity Co. v. Industrial Accident Comm., supra, 26 Cal.2d 509, 515, 159 P.2d 625.

"Petitioner contends that the fact that the place of injury was off the employer's premises is controlling, quoting from Makins v. Industrial Accident Comm., 198 Cal. 698, 247 P. 202, 49 A.L.R. 411, and that for the same reason the so-called 'bunkhouse rule' does not apply. However, the place of injury is not the criterion. See Associated Indem. Corp. v. Industrial Accident Comm., 18 Cal.2d 40, 112 P.2d 615. It is, whether the act of the employee when injured is reasonably contemplated by the employment.

"There are a number of jurisdictions where the rule of strict interpretation of Workmen's Compensation Acts prevails, the cases from which support petitioner's contentions. But as that rule does not prevail in California, it is unnecessary to discuss them. Graf v. Montecito County Water Dist., 1 Cal. 2d 222, 34 P.2d 138, is easily distinguishable on the facts from our case. There, the injured employees 'were neither going to nor returning from their work, they lived at the campsite, and had been to their abodes, changed their clothes, and boarded the train [belonging to the employer] for an excursion of pleasure wholly aside from their duties as employees' [1 Cal.2d at page 225, 34 P.2d at page 139]. Moreover, the court stated that the record failed to show the exact terms of the employment, and there was no evidence that transportation was promised the employees as a part of their contract, and hence nothing in the record to support the petitioner's contention that riding on the train was incidental to the employment. Moreover, the case was decided in 1934. The dissenting opinion of Shenk, J., to the effect that the train ride was incidental to the employment more nearly represents the Supreme Court's attitude today. Nor is Torrey v. Industrial Accident Comm., 132 Cal.App. 303, 22 P.2d 525, in point. There, the employee went to a picnic ground to discuss business with a co-employee. The latter invited him to go for a motorboat ride. The boat turned over and both men were drowned. The commission held that the death did not occur in the course of employment. The court upheld this determination, holding that the business of the employer was either concluded, or postponed at the time of the boat ride and that the evidence failed to show that the employee went on the boat ride for any purpose other than his personal pleasure. The court refers to the fact that adverse as well as favorable inferences may be drawn from the petitioner's evidence. It may well have been that had the commission drawn an inference to the effect that business was to be discussed during the five-minute boat ride, the court would have upheld such action of the commission. In that case, differing from ours, there was no finding that the interlude of pleasure was an incident of the employment. This same factor is the distinction between our case and Langendorf United Bakeries, Inc., v. Industrial Accident Comm., 6 Cal.App.2d 46, 43 P.2d 1106; Pacific Indemnity Co. v. Industrial Accident Comm., 27 Cal.App.2d 499, 81 P.2d 572; Red Arrow, etc., Corp. v. Industrial Accident Comm., 39 Cal.App.2d 559, 103 P.2d 1004, and others cited by petitioner.

"In Roberts v. Means, 146 Pa.Super. 188, 22 A.2d 98, a boy employed at a hotel to carry bags and rent boats on the shore of a lake, was drowned while diving from a boat which after his day's work and after his supper he had rowed out on the lake. The court held that under the evidence he was using the boat solely for his own pleasure. While the boy had been given permission by the employer to swim from the wharf, if his employer was present, he had been forbidden to go out in a boat under penalty of losing his job. Obviously there is no similarity with the facts in our case. The court also held that the boy's injury occurred off the employer's premises but pointed out that this fact would not be conclusive had the appellant met the burden of showing that the injury occurred in the course of the employment.

"In State Young Men's C. Ass'n v. Industrial Comm., 235 Wis. 161, 292 N.W. 324, Kregel, a medical student, was employed as a counselor to assist the first aid medical director of a Y. M. C. A. summer camp. He was subject to call on his free time, and hence he was usually within the camp area. He was paid a salary and room and board. When not actually occupied he was privileged to use the camp recreational facilities including the tennis courts. While engaged in a game of tennis with other counselors he was struck in the eye by a tennis ball, causing the injury for which he sought compensation. In reversing the lower court, which had confirmed an award of the Wisconsin Industrial Commission, the Supreme Court acted on the theory that his play was purely voluntary on his part and was in nowise for the benefit of his employer. The theory of the case is that 'there is no evidence that at the time the injury was received the claimant was engaged in any work for his employer.' 292 N.W. at page 326. In California the right to compensation by an employee is not limited to injuries received while actually engaging in the employer's work.

"The facts in Aetna Casualty & Surety Co. v. Fulmer, 81 Ga.App. 97, 57 S.E.2d 865, cited by petitioner, are so dissimilar to those in our case as not to require comment. It, Brynwood Land Co. v. Industrial Comm., 243 Wis. 380, 10 N.W.2d 137, and Mishawaka Rubber & Woolen Mfg. Co. v. Walker, 119 Ind.App. 309, 84 N.E.2d 897, applied the well known rule that an injury sustained by an employee while engaging in recreational activity for his own amusement is not compensable. None of them considers the situation where, as in our case, the place and type of recreation is provided by the employer as an incident of the employment.

"Petitioner cites Pacific Indemnity Co. v. Industrial Accident Comm., supra, 27 Cal.App.2d 499, 81 P.2d 572, for the proposition that 'the mere fact of employment and permission to use the premises of the employer does not give rise to a right to compensation under the (Workmen's) Compensation Act * * * for an injury resulting to an employee.' 27 Cal.App.2d at page 503, 81 P.2d at page 574. There, the claimant was injured while attending a union meeting in a room on the employer's premises, which the employer had expressly agreed with the union committee might be used for that purpose. In denying compensation, the court points out that not only was the employee not engaging in any business for her employer, but for aught that appears, the meeting may have been held for purposes antagonistic to her employer. There can be no quarrel with the principle above mentioned. Our case, as herein shown, does not depend upon that principle.

"The award is affirmed."

For the reasons above stated, I would affirm the award.

39 Cal.2d 529

FIREMAN'S FUND INDEMNITY CO. v. INDUSTRIAL ACC. COMMISSION et al.

S. F. 18591.

Supreme Court of California, in Bank.
Aug. 28, 1952.

Application by the Fireman's Fund Indemnity Company, for writ of review of a workmen's compensation award made by the Industrial Accident Commission of the State of California to Ethel Elliott. The Supreme Court, Spence, J., held that Ethel Elliott, a cook-housekeeper, who regularly took short walks for her health during a free time in her eight-hour working day, but who missed walk one day in order to care for her employer who was sick, and who left for walk at end of working day, following admonition by employer that she should not go far, was not, when she fell and broke leg as she took her walk along highway just fifty feet from employer's driveway, engaged in activity having any causal connection with her employment, and injury was not compensable.

Award annulled.

Carter, J., dissented.

1. Workmen's Compensation 🔑609

Although Workmen's Compensation Act has been liberally applied to encompass injuries which may reasonably be regarded as having some causal relation with the employment, each case must be decided on its own particular facts. Labor Code, § 3600(b, c).

2. Workmen's Compensation 🔑711

Where the contract of employment contemplates rendition of services on the employer's premises, injuries suffered by the employee in off-the-premises activities are not incidental to the employment and are ordinarily noncompensable unless some special connection can be shown. Labor Code, § 3600(b, c).

3. Workmen's Compensation 🔑765

For purposes of workmen's compensation when an employee is off duty, the relation of employer and employee is suspended and does not reattach until the employee resumes the master's work, except under special circumstances where, by contract, express or implied, the relationship attaches at an earlier time. Labor Code, § 3600 (b, c).

4. Workmen's Compensation 🔑652

Acts which are necessary to the life, comfort, and convenience of a servant while at work, such as eating lunch, getting drink of water, smoking tobacco where not forbidden, attending to wants of nature, changing to or from working clothes, and the like, although strictly personal to the employee, are incidental to the service rendered by him, and injuries sustained in their performance arises out of and in the course of the employment for purposes of workmen's compensation. Labor Code, § 3600 (b, c).

5. Workmen's Compensation 🔑770

Cook-housekeeper, who regularly took short walks for her health during a free time in her eight-hour working day, but who missed walk one day in order to care for her employer who was sick, and who left for walk at end of working day, following admonition by employer that she should not go far, was not, when she fell and broke leg as she took her walk along highway just fifty feet from employer's driveway, engaged in activity having any causal connection with her employment, and injury was not compensable. Labor Code, § 3600(b, c).

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Leonard, Hanna & Brophy and Edmund D. Leonard, San Francisco, for petitioner.

Edmund J. Thomas, Jr., Robert Ball and Leonard Levy, San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks the annulment of an award of the respondent commission in favor of Ethel Elliott, who was injured while taking a walk after she had completed her household duties for her employer. This case presents a problem similar to that involved in Liberty Mutual Insurance Company v. Industrial Accident Commission, Cal.Sup., 247 P.2d 697, the extent to which injuries sustained in the pursuit of recreational activities may be regarded as arising out of and occuring in the course of the employment. Labor Code, sec. 3600(b, c). A review of the instant record, in the light of the legal principles discussed in the companion case, compels the conclusion that the injury here must likewise be held noncompensable.

The facts are undisputed. Mrs. Elliott was employed as a cook and housekeeper in the Orinda home of Mrs. Georgie S. Hubbard. She worked 8 hours per day, but after completing her daily duties, she remained on the premises, eating and sleeping there, except on her days off. It was her custom to take short walks once or twice a day during her free time, for recreation. She had been advised to do so by the doctor attending her employer, Mrs. Hubbard.

Mrs. Elliott sustained the injuries in question on the evening of July 10, 1950. Mrs. Hubbard was ill during the day and Mrs. Elliott was required to remain in attendance upon her, so that she missed her customary midday walk. In the evening a friend of Mrs. Elliott came to the house before Mrs. Elliott had finished her work and waited for her so that they might take a walk together. Mrs. Elliott testified that her last task for the day was the depositing of some garbage in the refuse can near the driveway. She had told Mrs. Hubbard that she intended to take a short walk, and the latter replied, "Don't go far. You can go, but don't go far." Mrs. Elliott then joined her friend, and they started down the public road fronting her employer's property. The traveled portion of the road was paved and along each side was a graveled area, but there was no curbing or sidewalks. When they had proceeded along the road some 50 feet from the Hubbard driveway, they were confronted by the headights of an approaching automobile. Mrs. Elliott stepped off the paved portion of the road onto the graveled shoulder, slipped and fell, breaking her leg.

[1] Upon these facts the commission found that Mrs. Elliott "sustained injury arising out of and occurring in the course of her employment" and made its award accordingly. Petitioner contends that the record does not bring the injury within the coverage of the compensation act in that it occurred off the employer's premises while the employee was engaged during her own free time in a recreational activity entirely unassociated with the employment. Liberal though the application of the compensation act has been in this state to encompass injuries which may reasonably be regarded as having some causal relation with the employment, Industrial Ind. Exchange v. Industrial Accident Comm., 26 Cal.2d 130, 137, 156 P.2d 926; Lockheed Aircraft Corp. v. Industrial Accident Comm., 28 Cal.2d 756, 760, 172 P.2d 1; Pacific Indemnity Co. v. Industrial Accident Comm., 86 Cal.App.2d 726, 729, 195 P.2d 919, each case must be decided in the light of its own particular facts, and here petitioner properly argues that it would require "a long stretch of the imagination" to hold Mrs. Elliott's injury "reasonably incident to [her] employment". Torrey v. Industrial Accident Comm., 132 Cal.App. 303, 306, 22 P.2d 525.

[2, 3] "Where the contract of employment contemplates rendition of services on the employer's premises, injuries suffered elsewhere are ordinarily noncompensable. Under such circumstances, off-the-premises activities of an employee are not incidental to the employment, unless some special connection can be shown. In each case, compensability depends upon the establishing of the existence of such a connection." Hanna, Industrial Accident Commission Practice and Procedure, p. 37. Application of this general rule was made in Postal Telegraph Cable Company v. Industrial Ac-

cident Commission, 1 Cal.2d 730, 37 P.2d 441, 96 A.L.R. 460, where an award for compensation was annulled upon evidence showing that the employee, a telegraph messenger on his way to work, was injured in a traffic collision at a time when he "was on no special errand for" his employer and "he had not yet reached his place of employment where his duties were to begin." 1 Cal.2d at page 732, 37 P.2d at page 442. After noting that there must be some "causal connection" between the injury and the employment to sustain a compensation award, the court continued at page 733 of 1 Cal.2d, at page 443 of 37 P.2d: "When an employee is off duty, the relation of employer and employee is suspended and does not reattach until the employee resumes the master's work. It is true that this re-entry into service may occur under special circumstances before the employee reaches the premises of the master, but this can happen only where, by contract, express or implied, the relationship attaches at such earlier time. We need not pause to give examples of this exception."

[4] Respondents argue that liability under the compensation law has been extended to cover personal acts necessary to the comfort, convenience and welfare of the employee, and within that concept the present case constitutes an exception to the general rule. But such contention overlooks the premise on which the exception is established—that the employee at the time of injury was at work and either on the employer's premises, Whiting-Mead Commercial Co. v. Industrial Accident Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518; F. W. Woolworth Co. v. Industrial Accident Comm., 17 Cal.2d 634, 111 P.2d 313; Elliott v. Industrial Accident Comm., 21 Cal.2d 281, 131 P.2d 521, 144 A.L.R. 358; Employers' Liability Assur. Corp. v. Industrial Accident Comm., 37 Cal.App.2d 567, 99 P.2d 1089, or on a business errand off the premises, Western Pac. R. R. Co. v. Industrial Accident Comm., 193 Cal. 413, 224 P. 754. This principle of compensability is generally stated as follows: "Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, are incidental to the service rendered by such a servant, and an injury sustained in their performance arises out of and in the course of the employment. The rule is broad enough to include the majority of an employee's acts upon the employer's premises, such as eating lunch, getting a drink of water, smoking tobacco where not forbidden by the employer, attending to the wants of nature, changing to or from working clothes, and many others. Such acts, although not themselves representing a rendition of service, are reasonably incidental thereto, and are considered to be acts for the mutual benefit and convenience of the employer and employee." Hanna, Industrial Accident Commission Practice and Procedure, p. 36; see Whiting-Mead Commercial Co. v. Industrial Accident Comm., supra, 178 Cal. 505, 507, 173 P. 1105. As acts reasonably to be expected, they are regarded as taking place in the course of the employment. Employers' Liability Assur. Corp. v. Industrial Accident Comm., supra, 37 Cal.App.2d 567, 570–573, 99 P.2d 1089; Western Pipe & Steel Co. v. Industrial Accident Comm., 49 Cal.App.2d 108, 111, 121 P.2d 35.

But here the employee, Mrs. Elliott, was neither at work nor on her employer's premises when injured. Respondents argue that Mrs. Hubbard's caution of Mrs. Elliott not to go far permits an inference that the latter's work for the day was not yet finished and her walk was a mere interruption in the performance of her household duties. However, such an inference cannot arise in view of Mrs. Elliott's express testimony to the contrary—that "after [she] finished [her] work," had "emptied the garbage," she took her "evening walk" with her friend and sustained the injury in question. Mrs. Hubbard's cautionary remark suggests no more than the natural response of a sick and elderly person, experiencing a feeling of loneliness upon being informed that she is to be left without a companion for a short time. No claim is made that the walk was taken other than for Mrs. Elliott's personal purposes.

Nor is there merit to respondents' position that since Mrs. Hubbard sanctioned Mrs. Elliott's departure on the proposed walk, it thereby became an act "authorized" by the contract of employment. A similar argument was advanced and rejected in the case of Arabian American Oil Company v. Industrial Accident Commission, 94 Cal. App.2d 388, 210 P.2d 732, involving a stenographer who worked and lived within her employer's fenced-in area surrounding an oil refinery in Saudi Arabia. She was injured when she and a coemployee were riding in a vehicle owned by the employer, traveling outside the fenced area and en route to a beach for a swim. In annulling the compensation award, the court stated at page 392 of 94 Cal.App.2d, at page 734 of 210 P.2d: "Petitioner contends that the injury did not arise out of or in the course of the employment, and that the injury was not proximately caused by the employment. That contention is sustained. Miss Brown [the employee] had finished her work for the day, had gone home and changed her clothing to beach apparel, had eaten dinner, left petitioner's premises and, at the time of the accident, was on a pleasure trip. While petitioner permitted employees, after working hours, to use its motor vehicles for pleasure, it did not require them to do so. Miss Brown had complete freedom in deciding whether she should go on a pleasure trip, in selecting an escort and driver, and in deciding where to go. The mere fact that she was riding in a vehicle owned by petitioner at the time of the accident is not sufficient to create liability under the Workmen's Compensation Act."

Respondents finally argue that in taking her recreational walk, Mrs. Elliott was following her medical adviser's recommendation as to a suitable exercise, and so was conditioning herself to perform better the duties of her employment. But if such theory should be adopted as sufficient to establish the necessary causal connection with the employment, then any injury sustained by an employee in a recreational activity would be compensable. Precisely the same contention was unavailingly urged in the case of Wilson v. General Motors Corporation, 298 N.Y. 468, 84 N.E.2d 781. There the employee was injured while participating in a softball game as a member of a team entered in a league consisting entirely of employees of the same employer. The games were played on the employees' own time in a public park some distance from the employer's plant. In holding that neither the fact that the employer gave its permission to employees to participate in the games, and even cooperated to some extent in the program, nor the fact that such recreational activity might indirectly redound to the employer's benefit as a health measure for the employees would authorize a compensation award, the court stated at pages 783–784 of 84 N.E.2d 783: "These ball games, the record makes plain, were out-of-hours, off-the-premises, personal diversions of the men, and were not only optional with the employees but were exclusively for their own recreation and indulgence, without business advantage to the employer. The games were neither initiated nor sponsored by the employer, in no way connected with its affairs, and in no manner subject to its control. Even if the company had so desired, it could not have halted the ballplaying or changed the program in any way. In other words, totally lacking is any basis for an inference that it controlled the activity or sought to compel or induce any employee to participate in it. * * * Too tenuous and ephemeral is the possibility that such participation might perhaps indirectly benefit the employer by improving the workers' morale or health or by fostering employee good willl." While recognizing its duty to construe liberally the coverage of the state Workmen's Compensation Act and the liability for injury "arising out of and in the course of" the employment, the court nevertheless concluded that on the record before it "the granting of a compensation award would not only do violence to the letter of the statute but would offend against its spirit, by penalizing employers who, without prospect of profit or benefit, co-operate in enabling their employees to engage in social or athletic recreation on their own time and away from the company premises." 84 N.E.2d at page 784.

[5] As the record here stands, the following facts are determinative of the noncompensability of the claim in question: Mrs. Elliott was injured while walking on a public road as an act of recreational diversion of her own free choice and when off-duty from her work. Such circum-

stances do not reasonably permit an inference of a "causal connection" between the injury and the employment in support of a compensation award. See Liberty Mutual Ins. Co. v. Industrial Accident Comm., Cal. Sup., 247 P.2d 697.

The award is annulled.

GIBSON, C. J., and EDMONDS, TRAYNOR and SCHAUER, JJ., concur.

CARTER, Justice.

I dissent.

The facts here are simple. They are more favorable to the employee, however, than portrayed by the majority opinion.

The injured employee, Mrs. Elliott, was working as housekeeper for Mrs. Hubbard at the latter's home. Although she said her hours were eight a day, no definite working hours were fixed. She lived at the home and had her meals there. Mrs. Hubbard's doctor had advised her to take a walk every day and it had always been her custom to do so. She would take her stroll either after the noonday or evening meal, depending upon when she could get away. Mrs. Hubbard was aware of this practice and may be said to have acquiesced in it. On the day of the accident, Mrs. Hubbard was ill in bed and *told* Mrs. Elliott to have her walk after the evening meal rather than earlier. Mrs. Hubbard also told her not to be gone long, giving rise to the inference that in view of her illness Mrs. Elliott was still working and on call. Contrary to the assertion in the majority opinion, that inference is not refuted by Mrs. Elliott's testimony that after she had finished her work she went for a walk, as that was merely a way of saying that she had the opportunity at that time to take the stroll rather than that she was no longer subject to Mrs. Hubbard's call and had to return soon to attend her. Mrs. Elliott emptied the garbage in a receptacle in the driveway by Mrs. Hubbard's house and walked into the street which had no sidewalks. When about 50 feet from the driveway and in front of adjoining lots which Mrs. Hubbard had "sold" but for which she had not received her money, she stepped aside to avoid a car travelling on the road. She fell, she said, in the "lots."

From the evidence the commission was justified in deducing that the injury occurred on the premises of the employer or that it occurred while Mrs. Elliott was in effect "on the job." In either case there is no question that the injury occurred in the course of the employment. In addition, however, the injury clearly falls within the rule, that injuries arising out of activities for the personal needs, comfort and welfare of the employer are compensable. Mrs. Elliott's walk was a habit and custom concurred in by her employer and in the instant case was expressly authorized. The cases clearly support an award of compensation under that rule.

In Papineau v. Industrial Accident Comm., 45 Cal.App. 181, 187 P. 108, an injury was held compensable where it occurred while the employee, a bootblack, was away from his employer's premises to obtain a bottle of milk to drink with his lunch; it was his custom, with the approval of his employer, to get the milk. The court said, 45 Cal.App. at page 182, 187 P. at page 109: "Upon these facts petitioner insists that the injury did not arise out of and in the course of the employment of Miles. Three reasons are assigned for this contention: First, that the claimant had left the premises of the petitioner on a personal errand and was not engaged in the performance of any service for his employer; second, that the injury was not due to a risk incident to his employment, but caused from a peril common to all persons using the elevator; and, third, that the injury was caused by a joke perpetrated by the operator of the elevator.

"While it is sometimes difficult to distinguish the line between an injury arising out of and in the course of employment and one which does not so arise, nevertheless the facts here presented bring the case within the rule announced in the opinion in Archibald v. Ott, 77 W.Va. 448, 87 S.E. 791 L.R.A.1916D, 1013, wherein it is said: 'Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment.' In leaving the barber shop, with the knowledge, consent, and approval of his employer, for the purpose of procuring a bottle of milk to use with his lunch, as was his custom, the claimant, while ministering unto himself, was nevertheless, in a remote sense, in that one who works must eat, engaged in an act which contributed to his efficiency and furtherance of the work. Thus compensation has been awarded for an accident suffered where the employe had left the performance of his work to procure drinking water. Keenan v. Flemington Coal Co., 5 F. 164, St. of Sess. Other cases sustaining the rule are cited in the opinion in Whiting-Mead Commercial Co. v. Industrial Accident Comm. [178 Cal. 505] 173 P. 1105 [5 A.L.R. 1518],wherein an award for an injury resulting to an employe from a burn sustained from igniting a turpentine-soaked bandage on his hand, while lighting a cigarette for his personal use, was upheld. The fact that the elevator in question was controlled by the owners of the building is unimportant for the reason that the tenant had the right, as an appurtenance of the premises leased by him, to the use of the elevator for himself and employes in going to and from the barber shop, and hence the elevator was a part of the employer's premises. * * *

"That the elevators were for the use of all persons having occasion to use them as a means of access to the building could not affect claimant's right to the award. *A like argument might be made with reference to injuries sustained by persons whose employment requires them to travel upon lines of railway or upon the public streets,* right to recover for which is supported by ample authority." (Emphasis added.) Doubt was cast upon that case by California Casualty Indemnity Exch. v. Industrial Accident Comm., 190 Cal. 433, 213 P. 257, but there the court took an ultra-conservative attitude which has since changed except for an occasional decision such as here. See 22 Cal.L.Rev. 581, 582.

In the case at bar, where the employee went no more than 50 feet on the fronting street from the employer's driveway for a walk which she was directed to take by her employer, we have a stronger case than the Papineau case.

In Western Pipe, etc., Co. v. Industrial Accident Comm., 49 Cal.App.2d 108, 121 P.2d 35, the employees were permitted to leave their work for an undesignated half hour to obtain dinner, while they were working overtime. Their pay covered the half hour. An employee left his work and drove to a place some distance from his employer's premises to get his dinner and was killed while crossing the street. In holding the death compensable the court said, 49 Cal.App.2d at page 110, 121 P.2d at page 37: "The petitioner contends that the law is well-settled that an employer is not responsible for the act of, or injury to, an employee while the latter is off the premises for the purpose of securing his personal meals. There are many cases holding that injuries received by an employee while on his way to or from meals are normally not compensable. [Citations.]

"The basis of some of the cases which deny the employee compensation for injuries received while going to or from meals is that while the employee is on such an errand he is not rendering any service for his employer. Other cases recognize that this is merely one part of the so-called 'going or coming' rule—i. e., that injuries received while going to or coming from work normally do not arise out of, nor occur in the course of, the employment. There are, of course, many exceptions to both rules. *It is not indispensable to recovery that at the time of the injury an employee must be rendering service to his employer. Acts of the employee for his personal comfort and convenience while at work, such as taking a drink of water, lighting a cigarette, warming himself, etc., do not interrupt the continuity of the employment. This exception is not limited to acts performed on the employer's premises.* In Western Pac. R. R. Co. v. Industrial Acc[ident] Comm., 193 Cal. 413, 224 P. 754, a messenger was struck by an automobile while returning on his bicycle to his place of employment from his home where he had gone to get his raincoat when a storm came up while he was outside performing service for his employer. The injury was held compensable. In Leffert v.

Industrial Acc[ident] Comm., 219 Cal. 710, 28 P.2d 911, the deceased employee, a salesman, was required to report each morning at the employer's plant to receive directions for the day. After getting their instructions, salesmen customarily had a cup of coffee together at a nearby coffee shop. On the morning in question the salesmen, on arrival, found the plant on fire and were directed to report at another office to receive instructions. Before going to this office the employees followed their usual custom of having a cup of coffee. The deceased, after finishing his coffee, announced his intention of returning to the burning building to retrieve his overcoat. While crossing the street to the building he was hit by an automobile. It is held that the injury was compensable, and an award denying recovery was annulled. See, also, Whiting-Mead Commercial Co. v. Industrial Acc[ident] Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518. * * * The employer apparently realized that men could not be expected to work at their highest efficiency without food during this overtime period, and for that reason agreed that they should have half an hour off for the purpose of securing their dinner."

In the case at bar Mrs. Elliott was hired by the month; her pay consisted of cash and board and room; she had no fixed hours of work and was authorized to go for a walk. Her compensation apparently covered that period. If an injury which occurred while getting dinner away from the employer's premises with his permission is compensable, then the same must be said for an injury received while taking a walk at the direction of the employer.

In Whiting-Mead Commercial Co. v. Industrial Accident Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518, the court affirmed an award for an injury received while the employee was smoking, and cited with approval various situations such as getting a drink of water, or beer, refreshment and responding to the call of nature.

In Goodrich v. Industrial Accident Comm., 22 Cal.2d 604, 140 P.2d 405, we held an injury to be compensable which occurred when the employee went home to inform his wife that he would be working all night. We stressed the proposition that an injury occurring while an employee is administering to his personal needs and welfare need not, to be compensable, occur on the employer's premises. We summarized the cases on this question as follows, 22 Cal.2d at page 607, 140 P.2d at page 407: "There are many acts of an employee for his personal convenience, comfort or welfare, the doing of which do not necessarily take him out of the course of his employment, *even though done away from the premises of the employer.* (California Cas[ualty] Ind[emnity] Exch. v. Industrial Acc[ident] Comm., 21 Cal.2d 751, 135 P.2d 158.) Various instances of that character have been considered by the appellate courts: Drinking wine because of indisposition (Elliott v. Industrial Acc[ident] Comm., 21 Cal.2d 281, 131 P.2d 521 [144 A.L.R. 358]); smoking (Whiting-Mead Com[mercial] Co. v. Industrial Acc[ident] Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518); going to obtain a slicker to wear in the performance of his duty (Western Pacific R. R. Co. v. Industrial Acc[ident] Comm., 193 Cal. 413, 224 P. 754); going to obtain an overcoat (Leffert v. Industrial Acc[ident] Comm., 219 Cal. 710, 28 P.2d 911); going into a hallway to obtain fresh air (F. W. Woolworth Co. v. Industrial Acc[ident] Comm., 17 Cal.2d 634, 111 P.2d 313); going to obtain water for a fellow employee who had fainted (County of Los Angeles v. Industrial Acc[ident] Comm., 89 Cal.App. 736, 265 P. 362); returning from purchasing a package of cigarettes for employee's own use (Western Pipe, etc., Co. v. Industrial Acc[ident] Comm., 49 Cal.App.2d 108, 121 P.2d 35); domestic servant sewing a hem on her dress (Employers', etc., Corp. v. Industrial Acc[ident] Comm., 37 Cal.App.2d 567, 99 P.2d 1089)."

In Graf v. Montecito County Water Dist., 1 Cal.2d 222, 34 P.2d 138, the employee was injured while riding on the employer's train operated for employee's recreation and boarded after the work day had ceased. The court held injury not compensable, but Mr. Justice Shenk dissented, pointing out that the train was the employer's premises.

The majority relies mainly on the ground that the injury occurred off the employer's premises. As pointed out hereinabove, there is evidence to the contrary, but even if there were not, such is not the rule. The cases heretofore discussed show that an act done for the personal convenience and welfare of the employee *need not be done on the employer's premises* to authorize compensation where the act done is customary and with the employer's permission.

While the courts are required by statute, Labor Code, § 3202, to liberally construe the Workmen's Compensation Act, even a rational, non-liberal construction would sustain the award in this case.

I would, therefore, affirm the award.

113 Cal.App.2d 31

RAMOS et al. v. UNITED SLATE, TILE & COMPOSITION ROOFERS, DAMP & WATERPROOF WORKERS ASS'N, LOCAL NO. 40 et al.

Civ. 14993.

District Court of Appeal, First District,
Division 2, California.
Sept. 5, 1952.

Rehearing Denied Oct. 4, 1952.
Hearing Denied Oct. 30, 1952.

Proceeding by Jack Ramos, and another, individually, and as co-partners doing business as Ramos and Kohler, against United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association Local No. 40, a labor organization, and others, to prevent defendants from picketing plaintiffs because of jurisdictional dispute between defendants and union representing plaintiffs' employees. The Superior Court, County of San Mateo, Murray Draper, J., granted preliminary injunction, and defendants appealed. The District Court of Appeal, Goodell, J., held that filing of amended complaint after order to show cause had been issued and served did not require issuance of new order to show cause or vacation of old one.

Order affirmed.

1. Labor Relations 🔑969

In proceedings to enjoin defendant union from picketing subcontractors because of jurisdictional dispute between defendant union and union representing subcontractors' employees, filing, after order to show cause had been issued, of amended complaint which contained additional allegations that defendant union had refused to be bound by decision of board to which controversy had been submitted, and that subcontractors were bouud by contract to employ members of union representing employees, did not require issuance of new order to show cause or vacation of old one. Code Civ.Proc. § 527.

2. Injunction 🔑139

Statute providing for issuance of injunction upon verified complaint or affidavits is the measure of the trial court's power in the matter of provisional injunctions. Code Civ.Proc. § 527.

P. H. McCarthy, Jr., F. Nason O'Hara, Herbert S. Johnson, San Francisco, for appellants.

Aaronson & Cohn, San Carlos, for respondents.

GOODELL, Justice.

On February 13, 1951 a verified complaint was filed wherein plaintiffs sought an injunction to prevent picketing. An order to show cause was immediately issued and served, setting the hearing for February 16th and on that day the matter was heard and continued to the 19th and then to the 21st. On the 20th an amended complaint was filed but no new order to show cause was obtained. On the 21st an order was made that a preliminary injunction should issue. This appeal followed.

Appellants state their contention as follows: "The only question presented for decision is whether the filing of the first amended complaint substantially differing from the original complaint upon which the order to show cause was based, did not vacate the order to show cause and divest the trial court of its jurisdiction to proceed thereon."

Appellants do not attempt to point out wherein the two complaints substantially differ, nor do respondents attempt to show that they do not so differ. Moreover, appellants cite no authority in support of their position but concede that their "extensive search of the California authorities fails to reveal any case directly in point." And although the appeal is from an order granting an injunction, appellants have not seen fit to bring up as part of the record the injunction itself.

In 1951 a project was under way in San Mateo County for the construction of a group of approximately 500 homes. Sterling Home Builders Company was the general contractor, and plaintiffs, who are licensed roofing contractors, had the subcontract for the roofing work. Plaintiffs employ only union labor and had an agreement with Wood, Composition and Asbestos Shinglers' Union, Local No. 3111, an American Federation of Labor local, that the members of 3111 would be employed on the roofing work. *No dispute existed between plaintiffs and Local 3111.*

Defendant United Slate, Tile & Composition Roofers Damp & Waterproof Workers' Association, Local No. 40 is also an A. F. of L. union, and between the two locals a jurisdictional dispute existed over the roofing work on this project.

On October 1, 1949 these two locals agreed, with A. F. of L. approval, to submit their jurisdictional disputes to The National Joint Board for Settlement of Jurisdictional Disputes. For some time defendants had maintained that plaintiffs' employees should be members of Local 40, the latter claiming sole jurisdiction in this field of construction.

On February 12, 1951 defendants caused a picket or pickets to be placed about said jobs and threatened to maintain the picket line until such time as the members of Local 40 were employed by plaintiffs, and it was this incident that gave rise to this action.

The facts hereinabove summarized are alleged in *both* complaints.

[1] The original complaint alleged "That the presence of pickets implies to the general public, to other employees of the plaintiffs, to the general contractor and its employees, and to materialmen * * * that a dispute exists between plaintiffs and some union * * * which * * * will cause the plaintiffs irreparable harm * * * and that plaintiffs will be unable to complete the work contracted for * * *." The amended complaint contains substantially the same statement. Both pleadings allege that plaintiffs cannot lawfully employ any of the members of Local 40 because of their agreement with Local 3111 to employ its members. Both pleadings allege that defendants are financially irresponsible and insolvent.

The amended complaint described the location of the project with more particularity than did the original complaint and it added "That all of the materials and services required for this job are acquired in intra-state commerce." It added also that plaintiffs' agreement with Local 3111 was *in writing.*

Paragraph VI of the amended complaint, dealing with the agreement of October 1, 1949 for the submission of the jurisdictional disputes of 3111 and 40 to the National Board, calls it a "committee" instead, and names John T. Dunlop as its chairman. The following allegation therein is new: "Such agreement also provides that during the time a dispute is pending before said committee, (1) there shall be no stoppage of work, (2) the union originally assigned to the work prior to the time of submission of the dispute shall continue with the work, and (3) that no pickets will be permitted on the job." This of course is nothing but an amplification respecting the contents of the agreement originally pleaded. It did not plead any new incident or any new ground for an injunction.

Paragraph VII is new. It alleges that on November 28, 1950, defendants disputed the right of Local 3111 to perform the work for plaintiffs and caused a picket to be placed at the job; that defendants and Local 3111 authorized Associated Home Builders (of which Sterling is a member) to submit this jurisdictional dispute to the Board, and that on November 30 Chairman

Dunlop telegraphed defendants: "Informed roofers are on strike and picketing in jurisdictional dispute with carpenters over installation of composition shingles, * * * Sterling Building Company Contractor. You are directed to direct local union to remove picket line and to return to work immediately * * *"; that defendants thereupon removed the pickets and reaffirmed the agreement between 3111 and 40 that pending the settlement and final determination of the dispute they would abide by the agreement of October 1, 1949, which provided for (1) no stoppage of work, (2) that the union originally assigned to the work should continue with the work, and (3) that no pickets would be permitted on the job.

While entirely new, it will be seen at a glance that all paragraph VII does is to allege that defendants had picketed the job two months earlier; that both locals had submitted the controversy, then acute, to the Board which within 48 hours ruled against Local 40; that the latter acceded and withdrew the picket line. It gave a background for defendants' February action, by showing aggravation, but, after all, it left the February 12 picketing as the ground—and the sole ground—for the injunction.

Paragraph VIII is not altogether new. It again alleges the February 12 incident and adds that the picket bore the designation "A. F. of L. Picket". It alleges that Associated Home Builders again contacted Dunlop, who, by telegram dated February 14, directed the removal of the picket line but that defendants had refused to abide by such directive. This, like paragraph VII, is nothing but an allegation of further aggravation.

Paragraph IX is somewhat new. It alleges, inter alia, "That while the plaintiffs are attempting to complete their work, no union employee of the general contractor and no union employee of any of the other sub-contractors of the general contractor will remain on the job, so that delay and irreparable harm and injury will result to the general contractor and each of its subcontractors if the plaintiffs attempt to carry out the terms of their agreement with the general contractor. That the plaintiffs cannot discharge their present employees for the reason that they would be violating their agreement with Local No. 3111 which provides for the employment only of union labor who are members of said Local No. 3111."

While new, it is simply an argumentative expansion of the reasons alleged earlier as to the *consequences* of defendants' actions. It states no new *cause*.

Paragraph X alleges "That the picketing * * * is illegal * * * and maintained solely for the purpose of attempting to coerce plaintiffs into a breach of their contract with Local No. 3111 to avoid financial loss." Substantially the same allegation, but without the coercive language, was in the first complaint.

Paragraph XI alleges "That the picketing complained of is illegal * * * because * * * the sign bearing the notice 'A. F. of L. Picket' is misleading in that it implies that a labor union dispute exists between some employer and some union or member thereof, when in truth and in fact no dispute whatever exists." The original complaint did not allege that the picket was identified as representing the A. F. of L.; otherwise it is substantially unchanged.

It thus appears that there is nothing in the amended complaint which changed in any essential respect the allegations of the original complaint on which the order to show cause was issued. No new incident or cause was introduced into the case by it.

Section 527, Code Civ.Proc. provides for the issuance of "An injunction * * * upon a verified complaint, or upon affidavits". The amended complaint was verified. Every one of its new allegations could have been laid before the court by affidavit instead of by pleading, in which event appellants would have no basis or foundation for the procedural point now urged (which is their only point) that the filing of the amended complaint vacated the order to show cause and divested the court of jurisdiction to proceed.

As a matter of fact plaintiffs (at the time they served and filed their amended complaint) laid before the court the affidavit of the business agent of Local 3111 which contained the substance of the allegations found in paragraphs VI, VII and VIII of the amended complaint (omitting the quotation of Dunlop's telegraphic ruling). Plaintiffs could have safely dispensed with these allegations in the amended complaint as long as that affidavit was before the court.

The amplifying allegations effected no essential changes in the cause of action as originally pleaded but merely rounded out the original allegations. The plaintiffs' case still remained one based on the picketing which commenced on February 12. The original complaint pleaded a dispute between *two local unions belonging to the same parent organization,* as to which union should have its members employed on this large roofing job; it was purely an internal and private dispute. Plaintiffs had a written contract with one of them, binding plaintiffs to employ *its* members; they alleged that defendants' actions sought to force them into a breach of that contract. The added allegations showed that the Board to which both 3111 and 40 had agreed to submit their controversies had repeatedly decided against Local 40 and that the latter after once acceding, had finally refused to be bound by the Board's decisions. Plaintiffs were not parties to any contract save the one which bound them to continue to employ the members of Local 3111, and they had no controversy with anyone.

The Court could have wholly disregarded the amended complaint, and still a case for a preliminary injunction would have been made.

[2] Appellants contend that the provisions of § 527 are the measure of "the power of trial courts in the matter of provisional injunctions", Harlan v. Superior Court, 94 Cal.App.2d 902, 905, 211 P.2d 942, 945, citing United Railroads v. Superior Court, 170 Cal. 755, 759, 151 P. 129. There can be no doubt of that, but in the case at bar an order to show cause was immediately issued and served on the filing of the original complaint, which, when read with the original complaint, gave the defendants all the notice they were entitled to, and nothing contained in the amended complaint filed on February 20 but served the day before, right in the middle of the hearing) called for a new order to show cause, or for vacating the old one.

We see no reason to discuss other collateral arguments made by appellants or to discuss any of their other citations since they admit they cannot supply any authority directly supporting their position.

The order is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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113 Cal.App.2d 43

PEOPLE v. WHITEHEAD.

Cr. 2342.

District Court of Appeal, Third District, California.

Sept. 6, 1952.

Defendant was convicted in the Superior Court, Madera County, Sherrill Halbert, J., of voluntary manslaughter, and he appealed. The District Court of Appeal, Peek, J., held that in view of the whole record, it was prejudicial error to limit defendant's cross examination of a state's witness to the physical acts testified to on direct examination where those physical acts occurred in conjunction with verbal acts.

Judgment reversed.

1. Witnesses 🔑268(3)

When testimony has been introduced relative to an occurrence, all parts of that occurrence, verbal as well as physical, are properly within the scope of the cross examiner's probe. Code Civ.Proc. §§ 1854, 2048.

2. Criminal Law 🔑1186(4)
Witnesses 🔑268(3)

In homicide prosecution, where certain state witnesses who had not been at immediate scene of shooting testified to hearing some one threaten to kill another, and witness who had been at scene was directly examined as to physical acts but not as to conversation, and prosecuting attorney in closing argument referred repeatedly to the threat to kill, refusal to allow defense counsel to cross examine witness who had been at scene of shooting as to the "verbal acts" which occurred in conjunction with the physical acts, was prejudicial error. Code Civ.Proc. §§ 1854, 2048; Const. art. 6, § 4½.

3. Criminal Law ⚷327

It is the responsibility of the prosecution to prove the defendant guilty, and not that of the defendant to prove himself not guilty.

4. Criminal Law ⚷661

Where prosecution was successful in improperly limiting cross examination of a state's witness to the physical acts which were related on direct examination but which had occurred in conjunction with verbal acts, it was not the duty of defendant to correct or mitigate the error by calling such witness as his own and questioning him about such verbal acts. Code Civ. Proc. §§ 1854, 2048; Const. art. 6, § 4½.

◆

David E. Peckinpah, Denver C. Peckinpah and Daniel L. Jensen, Fresno, for appellant.

Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

By an information defendant was charged with the crime of murder. He pleaded not guilty to the crime charged and the cause proceeded to trial before the jury. At the conclusion thereof he was found guilty of voluntary manslaughter. He now appeals from the judgment of conviction and the order denying his motion for a new trial.

The facts, which are undisputed, show that on September 16, 1951, between 7:30 and 7:45 o'clock p. m. John Whitehead, the defendant, Eudee Edwards, Eunice Hartfield and Sylvester Adams, the deceased, were standing on Eleventh Street between A and B Streets in the city of Madera. Two eye witnesses observed the shooting from a point some 100 to 150 feet distant. Both testified they did not know who actually fired the shots but that the group was engaged in an argument and that they heard some member thereof, the identity of whom they likewise were not able to ascertain, state, "I will kill you." Immediately thereafter they heard three shots fired in rapid succession. These witnesses observed the deceased go west on Eleventh Street and the other three go east 20 or 30 feet and turn into an alley. They also testified to seeing one of the group, who was otherwise identified as the defendant, place a gun in his pocket.

In addition to the witnesses above mentioned the state called a police officer who identified the gun; the autopsy surgeon who testified to the cause of death as being from a hemorrhage resulting from a gunshot wound in the leg; and Eudee Edwards.

The principal question presented for decision relates to the correctness of the restrictions placed on the scope of defendant's cross-examination of Edwards, who was the first witness called by the prosecution.

He testified to owning a gun similar to the one he was asked to identify. Counsel then stipulated the gun was the one taken from the Hartfield premises and owned by Edwards. He further testified that he had known Adams, the deceased, for ten years; that he was on Eleventh Street between A and B Streets on the day Adams was shot; that he had the gun first during the morning of that day but that the defendant had it in the afternoon; that his sister Eunice Hartfield was with defendant and himself; that Whitehead fired the gun three times at Adams from a distance of five or six feet; that after the shots were fired, Whitehead, Hartfield and the witness went to the house where Hartfield lived; that he could not recall there being any conversation either during the walk to the house or afterwards when he and Whitehead were in the backyard; that while in the backyard the empty shells were removed and three new shells were put in the chambers; and that Whitehead went into the house and obtained a shotgun.

On cross-examination Edwards testified, without objection, that a short time before the shooting he gave the gun to Whitehead while they were at "Tony's Liquor Store"; that Whitehead previously had possession of the gun but that he was not certain of the time. Thereafter the following occurred:

> "Q. Where did you first see Sylvester Adams on that day?
>
> "Mr. McClenahan: I object to that as going beyond the scope of cross-, of direct-examination, he testified he saw Adams at the time of the shooting, I believe counsel is limited to that.
>
> "The Court: Objection will be sustained.
>
> "Mr. Peckinpah: Q. Had you seen Sylvester Adams prior to the time that the shots were fired? Don't answer that until counsel has a chance to object to it.
>
> "Mr. McClenahan: I object to it.
>
> "The Court: Objection will be sustained.
>
> "Mr. Peckinpah: Q. When you saw Sylvester Adams immediately before the shots were fired, isn't it a fact that he was moving towards this Defendant?
>
> "Mr. McClenahan: I object to that, there is no testimony on direct examination that he was moving at all.
>
> "Mr. Peckinpah: He did say he was moving.
>
> "Mr. McClenahan: That testimony was stricken from the record. * *
>
> "The Court: The objection will be overruled as to that particular question. * * *
>
> "The Witness: Oh, yes, he was moving towards him, yes, he was advancing, coming towards him.
>
> "Q. When you say, 'advancing, coming towards him,' when you say 'him', you mean John Whitehead? A. Yes, sir, I mean John Whitehead.
>
> "Q. Now, at that time, did Sylvester Adams threaten John Whitehead?
>
> "Mr. McClenahan: I object to that question. There is no testimony whatsoever on direct examination of anything said by the Defendant, and it is wholly improper cross-examination.
>
> "The Court: The objection will be sustained.
>
> "Mr. Peckinpah: Q. At the time that Sylvester Adams was moving towards this Defendant, just before the shots were fired, isn't it a fact that this Defendant was backing away from Adams?
>
> "Mr. McClenahan: I object to that. There is no statement of any direction of movement on the part of Whitehead.
>
> "Mr. Peckinpah: I submit there is not only evidence, but he marked the record where this Defendant was.
>
> "The Court: The objection will be overruled as to that question.
>
> "Mr. Peckinpah: I will re-ask the question in the interests of saving time. Isn't it a fact that when Sylvester Adams was advancing towards Whitehead, that Whitehead was backing away from Adams? A. He backed away from him, yes.
>
> "Q. Isn't it also a fact that at that time, as Whitehead backed away from Adams, he said, 'Don't come up on me'?
>
> "Mr. McClenahan: I object to that. There is no testimony of any conversation whatsoever on direct examination.
>
> "The Court: The objection will be sustained.
>
> "Mr. Peckinpah: How long had you known Sylvester Adams? A. Approximately ten years.
>
> "Q. I beg your pardon? A. Ten years or more, yes.
>
> "Q. How old a man was he? A. I don't know exactly, in his thirties.
>
> "Mr. McClenahan: What was your answer?
>
> "The Witness: I said he was thirty-some-odd years.

> "Mr. Peckinpah: About twenty years younger than this Defendant?
>
> "Mr. McClenahan: I object to that question, to that question, there is no testimony of the age of the Defendant, Your Honor.
>
> "The Court: The objection will be sustained.
>
> "Mr. Peckinpah: Q. How big a man was Sylvester Adams? A. Well, I don't know, he weighed about 175, something like that.
>
> "Q. About 175? A. About 175 and 176, something like that."

Subsequent to the sustaining of objections to these questions counsel for defendant asked the court:

> "In order to save time, Your Honor, I take it, from the Court's rulings, I am precluded to ask any questions regarding any conversation that occurred at the time of the shooting."

To which the court replied:

> "That will be the Court's ruling. In other words, I have permitted you to go into the question of movements, because I think that was part of the location of the People, but everything else that occurred at that time was precluded for the reason that those facts have not been covered on direct examination."

Counsel for defendant then stated that "in view of that ruling, we have no further questions on cross-examination."

Defendant now makes two contentions, (1) that the trial court prejudicially erred in unduly restricting the cross-examination of the witness Edwards, and (2) that the trial court likewise erred in failing to give certain instructions proposed by defendant.

Section 2048 of the Code of Civil Procedure provides generally that "The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination." It is further provided in section 1854 of the same code that "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence."

In elaboration of these rules the writer in 27 Cal.Jur. 96 et seq. states:

> "The authorities all agree that wide latitude should be allowed in cross-examination for the purpose of testing accuracy or credibility, especially if the witness is a reluctant one or is hostile, or if he is one of the parties in interest, *or is a witness against a defendant in a criminal prosecution.* The court has, however, discretionary power over cross-examination which will be disturbed on appeal only in case of an abuse thereof. Thus the court may confine an examination within reasonable limits, and *may curtail a cross-examination which is unduly protracted, frivolous, or which relates to matters which are irrelevant, admitted or have already been fully covered."* (Emphasis added).

The fundamental feature of cross examination "* * * is that a witness, on his direct examination, discloses but a part of the necessary facts. That which remains suppressed or undeveloped may be of two sorts, (a) the remaining and qualifying circumstances of the subject of testimony, as known to the witness, and (b) the facts which diminish the personal trustworthiness of the witness.

"(a) The remaining and qualifying circumstances of the subject of testimony will probably remain suppressed or undisclosed, not merely because the witness frequently is a partisan, but also and chiefly because his testimony is commonly given only by way of answers to specific interrogatories * * * and the counsel producing him will usually ask for nothing but the facts favorable to his party. If nothing more were done to unveil all the facts known to this witness, his testimony (for all that we could surmise) might present half-truths only. Someone must probe for the possible (and usual) remainder. The best person to do this is the one most vitally interested, namely, the opponent. Cross-examination, then, i. e. further examination by the opponent, has for its first utility the extraction of the remaining qualifying circumstances, if any, known to the witness, but hitherto undisclosed by him." (Wigmore, Vol. V [3rd Ed.] Sec. 1368, p. 33.)

It is undisputed that where a witness testifies as to part of a conversation on direct examination, on cross-examination the whole of the conversation, at least so far as it is germane to the issues, may be brought out. However, in the present case, as shown by the above summary of the evidence, no testimony whatsoever was introduced on direct examination concerning any conversation between Whitehead, Edwards, Hartfield and Adams at the time of the shooting. Indeed, it is quite apparent from the record that the prosecution did not want such testimony from the witness Edwards. In fact respondent's argument in support of the propriety of the ruling of the court is that since no such conversation was brought out on direct examination the trial court was correct in limiting the cross-examination as it did.

We do not understand that the rule in this state supports such a fine distinction. Rather it would appear that the situation presented in the instant case comes within the statement of the rule heretofore quoted from Wigmore on Evidence. Nor do we find anything to the contrary in any of the cases cited and relied upon by respondent. Each case may be distinguished on its facts from the situation presented in this appeal.

[1] The proper rule would appear to be that physical acts testified to cannot be arbitrarily separated from the verbal acts accompanying them and made at the same time and place. Such "verbal acts" also must be considered to be admissible in order to prevent the false coloring of the event, to rebut, explain, qualify and possibly to impeach the testimony concerning the physical acts also occurring at that time and place. In other words when testimony has been introduced relative to an occurrence all parts of that occurrence, verbal as well as physical, are properly within the scope of the cross-examiner's probe. For the trial court to draw the line on a horizontal plane, thereby determining that testimony may be given as to the occurrence of physical acts but that the conversation attendant with such acts is something wholly distinct therefrom and hence may not be admitted, is artificial and may well lead to a a coloring of the evidence. Therefore since the prosecution examined the witness as to the occurrence during which the deceased was shot, it may not so limit such examination so as to preclude the cross-examiner from eliciting conversation which was a part of the same occurrence. By examining the witness as it did it thereby voluntarily opened a door which it cannot arbitrarily close, and the cross-examiner may bring out all the facts within the knowledge of such witness as had transpired at the occurrence testified to in chief, and which are material to a thorough understanding thereof. C.C.P. §§ 1854, 2048.

Although neither party has referred this court to a case directly in point nor has independent research disclosed any such cases, we do find support for our conclusion from other jurisdictions.

Thus, in Smith v. State, 142 Tex.Cr.R. 349, 152 S.W.2d 751, 755, the trial court refused "to permit the cross-examination of an assistant district attorney who, after testifying as to the circumstances under which a confession was prepared and signed, was asked the question: 'Did you try to get the defendant to confess the crime?'" The court said: "The question was direct and to the point on cross-examination. We do not conceive any necessity for a discussion of the authorities. The court committed error in sustaining the state's objection."

Again, in Clements v. State, 199 Ark. 69, 133 S.W.2d 844, 850, the court in its opinion said:

> "The record reflects that on direct examination witness had stated that deceased had borrowed his pistol a week before the killing and same was returned to him after the killing. The only inference, it seems to us, to be drawn from these circumstances was that deceased had borrowed the pistol to carry out his threat to kill appellant. We think the court properly permitted the state to elicit from the witness the explanation which had been given to him by deceased as to why he desired the pistol, and certainly it was proper cross-examination.
>
> "In Tiner v. State, 109 Ark. 138, 148, 158 S.W. 1087, 1090, the court said: 'It is well settled that cross-examination should be permitted as to all matters developed on direct examination, and it may be extended into all circumstances surrounding or affecting the transaction which the witness has detailed in his direct examination.'"

[2] Respondent, however, in effect says that even though there be error, under the provisions of Article VI, Section 4½, such error cannot be held to be predjudicial. We think a reading of the entire record of this case demonstrates the prejudicial character of the error disclosed therein.

As previously stated, subsequent to the testimony of Edwards the prosecution placed two witnesses on the stand, Eileen Brunolli and Joe Foster. These witnesses together with Edwards, were the only persons to testify to the actual shooting. They both testified to hearing one of the group say "I will kill you" and immediately thereafter three shots were fired in rapid succession, but these witnesses were 100 to 150 feet distant from the occurrence, and could not determine who made the statement "I will kill you" or understand anything else that was being said. Nor were they able to discern who fired the shots although Foster's testimony disclosed he saw the person otherwise identified as the defendant place a gun in his pocket.

At the conclusion of this testimony the prosecution rested and the defense did likewise.

Thereafter, the prosecution, in its argument to the jury, made much of the fact that the statement "I will kill you" was made. The importance placed on this statement by the prosecution is well illustrated by a portion of its argument to the jury wherein the deputy district attorney stated:

> "So, you've got to find that by walking towards him, that entitled Whitehead to shoot him down in cold blood. Look at how many people walk toward you every day. The statement, 'I will kill you,' who made it, we don't know. Was it made by Whitehead, did he say, 'I will kill you,' then he goes ahead and does it? Was it made by Adams, as he was advancing, was it made by Eunice, was it made by Eudee, was it made by anyone else? We have no evidence at all. We are endeavoring to bring everything before you, everything that could be heard, we endeavor to bring that and include it in the People's case. You cannot find Adams made that statement. There is nothing to connect him with it. There is nothing to connect Whitehead or Eunice or Eudee as to who made that statement. Words alone cannot constitute justification for self-defense. I can stand here and say 'I will kill you,' I could walk towards you and say, 'I will kill you,' but that is no real or apparent, imminent peril or possibility. I can do it, particularly when I've got two friends standing on either side of me."

Thus it is apparent that while the prosecution did not want any testimony from Edwards as to who made the statement "I will kill you", it did want the statement in evidence.

[3, 4] It is axiomatic that the prosecution must prove the defendant guilty, not that the defendant must prove himself to be not guilty. Hence the further argument of the prosecution that if the defense wanted the evidence relative to the conversation in the record it should have called Edwards and examined him as its own witness, is no answer to the error here made. The defense had the right to bring such conversation out on cross-examination and cannot

be held to have the duty to correct or mitigate the error made by the prosecution in successfully restricting the cross-examination of its witness.

For the reason that the defense was improperly restricted in its cross-examination of a key witness, and that error was prejudicial to the defendant's rights, it is unnecessary to discuss appellant's remaining contention.

The judgment is reversed.

VAN DYKE, J., and SCHOTTKY, Justice pro tem., concur.

VELKOV v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al.*

Civ. 19130.

District Court of Appeal, Second District, Division 3, California.

Sept. 11, 1952.

As Modified Sept. 15, 1952.

Rehearing Denied Oct. 1, 1952.

Hearing Granted Nov. 10, 1952.

Proceeding in prohibition by Virginia Velkov to restrain the Superior Court of Los Angeles County, Stanley Mosk, J., from proceeding in an action against petitioner. The District Court of Appeal, Wood, J., held that under the evidence presented at hearing on motion to quash service of summons and subpoena in the action against petitioner, whether petitioner had carried the burden of proving her nonresidence was a question for the judge.

Petition for writ of prohibition denied and alternative writ discharged.

1. Process 🔑120

A nonresident who comes into the state to testify as a witness in a judicial proceeding is immune from services of civil process while in actual attendance at the proceeding and during such reasonable time as may be consumed in going to and returning from the place of trial.

2. Prohibition 🔑27

In a proceeding in prohibition, all intendments are in favor of the action of trial court and petitioner has the burden of showing that court sought to be prohibited is acting in excess of its jurisdiction.

3. Process 🔑126

On motion to quash service of summons and subpoena on ground that defendant was a nonresident of state and had come into the state at request of State Bar to testify in a matter pending before it, the evidentiary value of certificate for assignment and transfer of action to a particular department of superior court and affidavit to secure a subpoena made by attorneys for plaintiffs was for the determination of judge.

4. Process 🔑126

On motion to quash service of summons and subpoena on ground that defendant was not a resident of state and had come into state at request of State Bar to testify in a matter pending before it, defendant had the burden of proving that she was not a resident of the state.

5. Process 🔑126

Under the evidence presented at hearing on motion to quash service of summons and subpoena on ground that defendant was not a resident of state and had come into state at request of State Bar to testify in a matter pending before it, whether defendant had carried the burden of proving her nonresidence was a question for judge, and hence District Court of Appeal would not prohibit superior court from proceeding in the action.

6. Prohibition 🔑27

In proceeding to prohibit superior court from proceeding in action, it is not the function of District Court of Appeal to determine the weight of the evidence.

◆

C. E. Spencer, Los Angeles, for petitioner.

Leonard Horwin and Harry M. Fain, Beverly Hills, for real parties in interest.

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* Subsequent opinion 253 P.2d 25.

PARKER WOOD, Justice.

Petition for a writ of prohibition to restrain the Superior Court of Los Angeles County from proceeding in an action entitled Gold et al. v. Velkov et al., number S.M.C. 3153.

It is alleged in the petition that petitioner is a resident of the State of New York; she came into the State of California on May 12, 1952, at the request of the State Bar of California for the purpose of testifying in a proceeding then pending before said State Bar and for no other purpose; the State Bar is an arm of the judiciary of California and has power to subpoena witnesses to attend hearings before it; petitioner, on arrival within California, was served with a subpoena by the State Bar directing her to appear on May 15, 1952, in a matter pending before the State Bar; on May 12, 1952, Gold and Needleman filed in the clerk's office of said superior court their complaint against petitioner and Samuel A. Guiberson, Jr.; Leonard Horwin and Harry M. Fain are the attorneys for said plaintiffs, and a copy of said complaint is attached to and made a part of said petition; Leonard Horwin filed a certificate for assignment and transfer of said action (Gold v. Velkov) to the Santa Monica department of the superior court, and he stated therein that both defendants therein are nonresidents; a copy of said certificate is attached to and made a part of said petition; on May 15, 1952, copies of the complaint, summons, and certificate for assignment were served on petitioner; on May 14, 1952, Harry M. Fain made his affidavit to secure a subpoena duces tecum in connection with a deposition sought to be taken of petitioner, and said affidavit stated in part: "That Virginia Velkov resides out of Los Angeles County, to wit, in the City and State of New York"; a subpoena was issued directing her to appear for the deposition before a notary public in said county on May 22, 1952; the subpoena was served upon petitioner on May 15, 1952; on May 21, 1952, the petitioner, by her attorneys appearing specially for said purpose, made a motion in said court to quash service of the summons and subpoena upon the ground that petitioner was a nonresident of California and not subject to process of California courts while she was in attendance upon the State Bar under its subpoena; the motion was denied; on May 22, 1952, petitioner appeared before said notary and refused to testify upon the ground that she was a nonresident of California in attendance before the State Bar and was not subject to jurisdiction of California courts; at said time the attorneys for said plaintiffs directed the notary to prepare a report of the proceedings, and they threaten to proceed before the superior court for the purpose of requiring petitioner to comply with the subpoena and "for her contempt" for failure to be sworn; the superior court and the judges thereof, unless prohibited by this court, intend to hear, try, and decide motions and proceedings based upon said complaint, and they will order petitioner to give her deposition, and will, if she further refuses to testify, punish her for contempt of court; said court has no jurisdiction over petitioner for the reason she is a nonresident of California and is a resident of New York; petitioner has no plain, speedy and adequate remedy in the ordinary course of law; the remedy by appeal from the order denying said motion, or from any order made directing the taking of the deposition, is not adequate and speedy; unless a writ of prohibition is issued petitioner will be required to appear generally and thereupon she will be subject to the orders of said court, although she is a nonresident of California and is exempt from process of California courts.

In answer to the petition, the real parties in interest, said Gold and Needleman, stated: they do not have sufficient information or belief with regard to the allegation that petitioner is a resident of New York, and for lack of such information or belief they deny said allegation; they deny the allegation that petitioner came into California on May 12, 1952, at the request of the State Bar; they aver upon information and belief that petitioner is the complaining witness in the matter before the State Bar, the person who instituted and engendered the same, and is appearing therein at her own instance and for her own motives of self-interest rather than in response to any request of the State Bar; they deny that petitioner came to California for the purpose of testifying in a proceeding pending before the State Bar and "for no other purpose"; they aver that she is in California for the purpose of conferring with her attorneys, to the end of recovering from said Gold and Needleman and defeating the property interests assigned by her to them as fees for legal services, and for the purpose of employing said hearing before the State Bar as a means of effecting the reconveyance of said property interests to her; if petitioner was in fact served with a subpoena directing her to appear before the State Bar, such service was not required in order to obtain her testimony in said proceeding; said service was requested by her solely for the purpose of attempting to defeat service of the summons and complaint upon her; the allegation of nonresidence in the certificate for assignment, attached to the petition, is with regard to residence in the district of the Santa Monica branch of the superior court "and does not relate to the claimed residence or non-residence of petitioner in the State of New York"; the statements of Harry M. Fain (in his affidavit relative to the subpoena) that Virginia Velkov "resides out of Los Angeles County, to wit, in the City and State of New York" was based upon the statement of the State Bar to the attorneys for said Gold and Needleman; said statement of Harry M. Fain in his said affidavit "was not intended to be and is not an averment of legal residence or domicile, but is merely the averment of a fact of physical status preliminary to obtaining a subpoena duces tecum re deposition, incident to procurement of her deposition at the earliest possible date"; said motion to quash the service of summons and subpoena was made upon written motion and affidavit, and the denial of the motion was after a hearing and the taking of evidence; the attorney for petitioner, in addition to urging the objections to said deposition as stated in the petition herein, urged objections based upon alleged lack of jurisdiction over the subject matter as set out in the transcript of the proceedings on the deposition, and the petitioner thereby submitted herself generally to the jurisdiction of said court; they deny that they threaten to proceed before the court to require her to comply with the subpoena, and they aver that her attorney agreed to appear in court on the following day, May 23rd, to obtain a determination of the objections to said deposition; they deny that the court has no jurisdiction over her for the reason she is a nonresident of California; deny she has no plain, speedy or adequate remedy in the ordinary course of law, and that she is exempt from process of California courts.

As a first affirmative defense, said parties in interest allege that petitioner has failed to meet the burden of proving that she is a resident of New York. They allege seven additional affirmative defenses, but in view of the conclusion hereinafter stated with respect to the first affirmative defense, it is not necessary to state the other allegations.

[1, 2] A nonresident of this state who comes into this state to testify as a witness in a judicial proceeding is afforded an immunity from service of civil process while in actual attendance at the proceeding and during such reasonable time as may be consumed in going to, and returning from, the place of trial. Gerard v. Superior Court, 91 Cal.App.2d 549, 552, 205 P.2d 109. In a proceeding in prohibition, all intendments are in favor of the action of the trial court, and the burden is on petitioner to show that the superior court is acting in excess of its jurisdiction. Franklin v. Superior Court, 98 Cal.App.2d 292, 294, 220 P.2d 8.

The judge of the superior court, in denying the motion herein to quash the service of the summons and subpoena, stated that he denied the motion upon the ground, among others, that he could not find as a fact that the petitioner is a bona fide resident of a state other than California. Petitioner argues that the court was in error in making that finding; there was no conflict in the evidence; it was admitted that petitioner was not a resident of California; and it was an abuse of discretion to deny the motion.

In support of the motion to quash the service, Mr. Prince, one of the attorneys who then represented this petitioner, filed his affidavit wherein he stated that "he knows of his own personal knowledge that said defendant, Virginia Velkov, is a resident of the State of New York and is a married woman and her husband resides in and is a resident of the State of New York." No affidavit was filed by the petitioner and she did not testify. With respect to Mr. Prince's affidavit, the judge stated in effect that the statement therein as to residence was a conclusion. The judge said that he did not know how Mr. Prince, who is a resident of California, could know of his own knowledge that petitioner acquired residence in another state, that Mr. Prince was stating that he knows petitioner's intention as to residence, and there is no declaration by petitioner of her intention as to residence. The judge also said the affidavit was not of very strong probative value.

[3] The certificate for assignment and transfer of the case of Gold v. Velkov to the Santa Monica branch of the court, which certificate was made and verified by Mr. Horwin, one of the attorneys for plaintiffs therein, recited that "Both defendants [Velkov and Guiberson] are nonresidents, but when they live in this county they customarily reside in the district of the above Branch." The affidavit to secure a subpoena in connection with the deposition, which affidavit was made by Mr. Fain, one of the attorneys for plaintiffs in said case, recited that petitioner resides in New York. It does not appear that said certificate or affidavit was introduced in evidence, or brought to the attention of, or observed by, the judge. Even if they had been introduced in evidence, their evidentiary value on the question as to petitioner's residence was for the determination of the judge.

J. George Gold, one of the plaintiffs in the declaratory action, testified that he was one of the attorneys for petitioner in her action for separate maintenance against Samuel A. Guiberson, which action was filed in the Superior Court of Los Angeles County in October, 1950; a judgment therein was obtained in June, 1951; that in her verified complaint therein she alleged that she was a resident of California. He also testified that she owned a home in California, and lived in it, from 1946 until early in 1951; that, in conversations which he had with her prior to June 8, 1951, she said that she did not have any definite plans with respect to travel and residence; that in letters which he received from her, the last one of which was received in September, 1951, she indicated that she had not made up her mind as to whether she would continue her residence in Los Angeles or whether she would take up residence elsewhere; that if she ceased to be a resident of California it was after June 8, 1951; and that he had no personal knowledge of her present residence.

[4–6] The burden was upon petitioner, upon the motion to quash service of summons and subpoena, to prove that she was not a resident of California. Under the evidence presented the judge could have concluded that she failed to carry the burden of such proof. As above stated, there was no affidavit of petitioner, and she did not testify. In her separate maintenance action, which terminated about a year before the present proceeding was commenced, she alleged that she was a resident of California. The evidence was legally sufficient to support a finding that petitioner was a resident of this state. It is not the function of this court to determine the weight of the evidence.

The petition for a writ of prohibition is denied, and the alternative writ is discharged.

SHINN, P. J., concurs.

VALLÉE, J., did not participate.

113 Cal.App.2d 14

WILSON et al. v. RHOADES et al.

Civ. 4229.

District Court of Appeal Fourth District,
California.
Sept. 3, 1952.

Action by Corinne Wilson, and others against Jefferson Davis Rhoades, and others, for allegedly negligent death occurring in truck-automobile collision at highway intersection. The Superior Court, San Diego County, Dean Sherry, J., entered judgment on verdict for plaintiffs, and thereafter granted their motion for new trial on the sole issue of damages, and defendant appealed. The District Court of Appeal, Mussell, J., held that where evidence was sharply conflicting as to whether it was the negligence of the defendant or the negligence of the decedent which caused the accident, and gross inadequacy of the verdict awarded indicated a compromise of the issues of liability and damages, granting of new trial solely on issue of damages was improper, and case would be remanded for retrial on all issues.

Judgment and ordered reversed; new trial ordered.

1. New Trial ⚷9

The granting of a new trial limited to issue of damages rests in discretion of trial court, but an abuse of that discretion is shown when record discloses that issue of liability is close and the damages are inadequate, and other circumstances indicate that verdict is probably result of prejudice, sympathy, or compromise, or that for some other reason liability issue has not actually been determined.

2. Death ⚷98

Damages, in the amount of $3,000 for loss of support and companionship and for funeral and burial expenses, awarded to wife and six children, four of whom were minors, for negligent death of plasterer who earned $5,000 a year and had life expectancy of 21 years were grossly inadequate.

3. New Trial ⚷9

Where evidence as to liability is sharply conflicting and the damages awarded are so grossly inadequate as to indicate a compromise of the issues of liability and damages, the entire case should be re-examined.

4. New Trial ⚷9

In action for negligent death where evidence was sharply conflicting as to whether it was defendant's negligence or decedent's negligence which caused truck-automobile collision at highway intersection, and where damages awarded to plaintiffs were so grossly inadequate as to indicate compromise of issues of damages and liability, trial court improperly granted plaintiffs' motion for new trial on the sole issue of damages and case would be remanded for retrial on all of the issues.

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W. P. Smith, Los Angeles, William H. Daubney, Oceanside, and Luce, Forward, Kunzel & Scripps, San Diego, for appellants.

Thomas Whelan and William F. Reed, San Diego, for respondents.

MUSSELL, Justice.

This action arose out of an automobile collision which occurred April 11, 1949, at about 8:00 o'clock P.M. at the intersection of U. S. Highway 101 and 11th Street in Del Mar, San Diego County. The plaintiffs are the widow and six children of decedent Edward Albert Polloreno, who was killed in the collision.

After trial by jury, a verdict was rendered in favor of plaintiffs for the sum of $3,000 and judgment for that amount was entered. Thereafter, the plaintiffs moved for a new trial on the single issue of the measure of damages and the defendants moved for a new trial on all the issues. The court granted plaintiffs motion "on the single issue of the measure of damages on the grounds of insufficiency of evidence to sustain the amount of the verdict and upon the inadequacy of the verdict." Defendants motion for a new trial was denied and they have appealed from the judgment and from the order granting plaintiffs' motion for a new trial upon the issue of damages.

[1] The principal question for our determination is whether the trial court

abused its discretion in granting a new trial limited to the issue of damages. The rule controlling the disposition of this question is that the granting of a new trial limited to the issue of damages appropriately rests in the discretion of the trial court, but an abuse of that discretion is shown when the record discloses that the issue of liability is close, the damages are inadequate "and other circumstances indicate that the verdict was probably the result of prejudice, sympathy, or compromise or that for some other reason the liability issue has not actually been determined." Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324; Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335. Applying the rule announced in these cases to the facts disclosed by the record before us, we conclude that the order granting a limited new trial in the instant action should be reversed.

Evidence of liability. At the time of the accident, the decedent, Mr. Polloreno, who had been traveling north on U. S. Highway 101, made a left turn to go west on 11th Street, across the highway, and was struck by a southbound automobile operated by the defendant, Jefferson Davis Rhoades. At and near the intersection involved, Highway 101 runs generally north and south, is 70 feet in width and is divided by a center island. 11th Street runs generally east and west and is 40 feet in width. The point of impact was established as approximately 24 feet south of the north curb line of 11th Street and 3 feet west of the white line dividing the southbound traffic lanes on Highway 101, and within the intersection. Following the impact the Polloreno truck came to rest on its right side some 30 feet southwest of the point of impact and the defendants' automobile came to a stop approximately 60 feet south of the point of impact in the west lane of the highway.

The defendant, Jefferson Davis Rhoades, testified that he was driving a 1946 Dodge sedan and was accompanied by his wife and seven year old son; that after he had passed the Del Mar Hotel, traveling south, he accelerated his speed and was traveling some 30 to 40 miles per hour in the westerly southbound lane of Highway 101; that he had no specific recollection of seeing any northbound vehicles as he approached the 11th Street intersection and when he first saw the truck driven by the decedent, it was half way across the dividing part of the highway, was headed in a westerly direction and was about 40 feet distant; that he did not have time to apply his brakes or turn his car before the accident occurred. Defendant stated to the officers after the accident that he saw the car coming toward him from the opposite direction, but "never dreamed of its turning in front of me and that it happened so quickly I didn't have time to apply the brakes before the collision."

Defendant's wife testified that she could not estimate the speed of the automobile driven by her husband during the block or two before the accident, except that he was not driving very fast; that their seven year old son was with them in the back seat; that she saw the Polloreno automobile just before the accident, a second or two before they hit; that it was just to the left of them; that it seemed to her that her husband pulled to the left; that the headlights of their automobile were burning and that her husband had been following several slow moving trucks while approaching Del Mar.

Several witnesses testified in behalf of plaintiffs as to the position of the automobile and truck after the accident and as to what they observed on the ground after the accident occurred. None of these witnesses, however, actually saw the two vehicles collide.

The record shows that there was a brow of a hill some six or seven hundred feet north of the point where the accident occurred; that there were no lights at the intersection and that the accident occurred in a 55 mile per hour zone, which commenced about a block north of the intersection.

Plaintiffs claim that the physical facts indicate that the defendant was traveling at an excessive rate of speed and was negligent in failing to keep a proper lookout. The defendants claim that the physical facts demonstrate that the decedent negligently "cut the corner" and turned squarely into the path of defendants' vehicle. There was, therefore, a sharp conflict in the evidence as to the question of negligence, if any, of the defendant and of the decedent and that the issue of liability of the defendants is close.

[2] *Inadequacy of damages.* The special damages stipulated to in this case were $682.17 for funeral and burial expenses. Since the verdict of the jury was for $3,000, the decedent's family was awarded $2,317.83 for loss of support and companionship of the decedent, who admittedly was earning $5,000 a year as a plasterer and was steadily employed. The decedent was 50 years of age at the time of his death and had a life expectancy of some 21 years. Mrs. Polloreno and four minor children were entirely dependent upon decedent's income for support and there was testimony that it was decedent's habit to give his weekly paycheck to his wife and the entire amount was used for the support of herself and the children, with the exception of a small amount which Mrs. Polloreno gave to decedent for his personal expenses. Under the circumstances shown, it is quite apparent that the award of $2,317.83 for general damages was grossly inadequate.

Appellants contend that the trial court erred in giving the following instruction to the jury:

> "It is the settled law of this state that a driver of an automobile is bound to anticipate that he may meet other *vehicles* at an intersection, and he must, in order to avoid a charge of negligence, keep a proper lookout for other vehicles and keep his machine under such control as will enable him to avoid a collision with another *vehicle* using proper care and caution and if the situation requires, he must slow up and stop." (Italics ours.)

The contention is that the jury was told by the instruction that Mr. Rhoades was guilty of negligence because he was unable to avoid the collision and that it placed an absolute duty upon a driver to anticipate other automobiles and avoid collisions with them regardless of whether the latter were legally or properly driven. Respondents state that this instruction was taken substantially verbatim from Marshall v. Klatt, 19 Cal.App.2d 110 at page 112, 64 P.2d 1105. However, the word "vehicle" is substituted for the word "person" in the language used in the cited case. As given, the instruction removed from the text the qualification that the other party involved whose presence must be anticipated, be himself using proper care and caution. We are not here deciding that the instruction was prejudicially erroneous. However, where, as here, the record indicates that the verdict of the jury may have been partially based upon sympathy for plaintiffs, the effect of the instruction on the jury may be considered as a circumstance resulting in a compromise verdict.

The ruling of the trial court in granting a limited new trial and the record before us indicates that the general damages awarded were not substantial in view of the undisputed evidence of decedent's earning capacity, his life expectancy and the loss of support and companionship to the members of his family.

[3, 4] In an action such as the instant case a request for a new trial limited to the issue of damages should be considered by a trial court with the utmost caution and any doubts should be resolved in favor of granting a complete new trial. Leipert v. Honold, supra, 39 Cal.2d 462, 247 P.2d 324. As was said in Wilke v. Crofton, 34 Cal.2d 304, 310, 209 P.2d 790, 793:

> "The question arises whether the case should be remanded on all issues or on the issue of damages alone. In many instances a retrial of the single issue of damages would meet the requirements of substantial justice, see Collins v. Ramish, 182 Cal. 360, 368–369, 188 P. 550; Gray v. Cotton, 166 Cal. 130, 139, 134 P. 1145; Pearsall v. Henry, 153 Cal. 314, 330, 95 P. 154, 159; Paul v. Williams, 64 Cal.App.2d 696, 703, 149 P.2d 284, but where, as here, the evidence as to liability is sharply conflicting and the damages awarded are

so grossly inadequate as to indicate a compromise of the issues of liability and damages, the entire case should be reexamined. See Keogh v. Maulding, 52 Cal.App.2d 17, 19–22, 125 P.2d 858; Wallace v. Miller, 26 Cal.App.2d 55, 57, 78 P.2d 745; Bencich v. Market St. Ry., 20 Cal.App.2d 518, 529–530, 67 P. 2d 398; Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 10–11, 175 P. 26, 177 P. 845."

The judgment and order granting a new trial on the single issue of measure of damages are reversed and a new trial is ordered on all the issues.

BARNARD, P. J., and GRIFFIN, J., concur.

113 Cal.App.2d Supp. 907

FRYE & SMITH, Limited et al. v. FOOTE et al.

C. A. 169,802.

Appellate Department, Superior Court,
San Diego County, California.
Aug. 21, 1952.

Frye & Smith, Ltd., a corporation, and others, sued William A. Foote, the Yale Foundation, a corporation, and others, for the value of, and on open accounts for, goods and services rendered. From judgments of the Municipal Court, City of San Diego, Lowell Howe, J. pro tempore, for plaintiffs, defendants appealed. The Superior Court, Burch, J., held that the evidence supported the judgments.

Judgments affirmed.

1. Corporations ⚷432(8)

One whose agency for corporation in promoting public subscription campaign to raise money for construction and maintenance of a hospital on corporation's lands rested partly in parol was competent to testify as to fact of such agency.

2. Corporations ⚷432(12)

In action for value of and on open accounts for goods sold and services rendered by plaintiffs under contracts with a corporate defendant, evidence that it intentionally and expressly conferred on co-defendant individual authority to enter into contracts justified judgment for plaintiffs against such corporate defendant. Civ.Code, § 2316.

3. Religious Societies ⚷31(5)

Evidence that unincorporated church association, organized by a corporation's officers and directors to sponsor public subscription campaign for money to construct and maintain hospital on corporation's lands, had no interests adverse to corporation, expressly authorized corporation's agent to incur obligations to parties furnishing goods and rendering services, acknowledged and undertook to liquidate indebtedness to such parties as its own, and was fully advised by such agent of nature and extent of his business activities with such parties, justified judgment against association for value of and on open account for such goods and services.

4. Religious Societies ⚷31(5)

A judgment against church corporation, organized by another corporation's officers and directors to succeed unincorporated association organized by them as sponsor of public subscription campaign to raise money for construction and maintenance of hospital on such other corporation's lands, for value of and on open accounts for goods furnished and services rendered by others under contracts with land owning corporation's authorized agent, could only be supported by evidence that church corporation knowingly accepted benefits of such goods and services.

5. Appeal and Error ⚷996

Where there is evidence of facts supporting inference favorable to judgment appealed from, reviewing court is without power to substitute its deductions from evidence for those of trial court.

6. Appeal and Error ⚷931(1)

A reasonable doubt as to sufficiency of evidence to support judgment appealed from should be resolved in favor of judgment.

7. Corporations ⚷448(2)

A corporation knowingly accepting benefits of contract made by its promoters before it came into existence is liable thereunder as a party thereto.

8. Religious Societies ⚷31(5)

Evidence justified trial court's inference that church corporation, organized by another corporation's officers and directors to succeed unincorporated association organized by them as sponsor of public subscription campaign to raise money to build and maintain hospital on such other corporation's lands, acknowledged its indebtedness to parties furnishing goods and rendering services under contracts with corporation's authorized agent to incur obligations necessary in promoting campaign, with full knowledge of such parties' claims, so as to justify judgment against church corporation in claimants' action for value of and on open accounts for such goods and services.

J. A. Hamman, Thomas Sherrard, San Diego, and F. W. Powell, La Mesa, for appellants.

Miller, Higgs & Fletcher, San Diego, for respondents.

BURCH, Judge.

Plaintiffs, Frye & Smith, Ltd., a corporation, and Roy H. Jasper and Agnes G. Jasper, doing business as Jasper's Mailing Service and Motor Service and Motor Vehicle Publishing House, with others who have since dismissed, filed their verified complaint in several counts for goods and services rendered, the value thereof, and on open accounts therefor, and had judgment thereon. The several defendants against whom the judgments were rendered were the Yale Foundation, a corporation, the Church of the Merciful Saviour, an unincorporated association, and the Church of the Merciful Saviour, a corporation. Frye & Smith had judgment for $1,219.19 and Roy H. Jasper and Agnes Jasper for $1,531.32, each judgment running against all the defendants. The defendants appeal.

No question is raised that the charges are incorrect in amount or that the goods and services were not rendered. Defendants chiefly maintain that their relation to plaintiffs were such as to absolve them from liability.

The Yale Foundation authorized its codefendant, William A. Foote, to incur the obligations which might be necessary in promoting a public subscription campaign to raise $1,500,000 with which to build and maintain a 500 bed hospital on lands owned by it. It was planned that the subscription begin December 1, 1949. On or before September 1, 1949, the Foundation employed Foote, set up offices for him in their building on the grounds where it was proposed to build the hospital, and agreed to furnish the funds to defray initial expenses, looking to the start of the subscription campaign.

Mr. Foote entered upon his duties and incurred indebtedness which the Foundation liquidated. Anticipating sales resistance should the campaign be conducted under the sponsorship of the Yale Foundation, the officers and directors of that corporation organized themselves as an unincorporated association about July 23, 1949, under the name of the Church of the Merciful Saviour, which was publicized as the sponsor, and acted as such until a corporation of the same name could be organized by the same persons. The association, though itself without funds or property, so operated until the defendant, the Church of the Merciful Saviour, a corporation, was organized on December 29, 1949. In the meantime, the association was held out as the sponsor, received some funds from the Yale Foundation, and paid bills incurred by Foote with plaintiffs and others under his contract of employment with the Yale Foundation. Other bills, including those of plaintiffs now in suit, were not paid because the Yale Foundation found itself financially unable to effect its promise as to most of the charges incurred after the first six weeks of the pre-campaign period. The wide contact and extensive publicity effected by defendant Foote in furtherance of his duty to the Foundation created a good will for the subscription campaign which was destroyed by the financial embarrassment of the Foundation which, in turn, caused it to breach its promise to pay the bills incurred by defendant Foote. As a result, the whole enterprise came to naught.

It was estimated variously that the pre-campaign expenses would require advances from $4,500 to $8,000 before funds from subscribers would be available. There was, however, no contract as to this. The important consideration in this connection is that defendant Foote made known to The Yale Foundation that there would be these expenses, that Foote was without means, and the Foundation agreed to pay them. Thomas v. Moody, 57 Cal. 215. During all the times that the bills of plaintiffs were being incurred, the officers and directors of the Foundation and the unincorporated association were made fully acquainted with and acquiesced and approved of Mr. Foote's activities and the persons with whom he was transacting the business.

Section 2316 of the Civil Code provides that:

> "Actual authority is such as a principal intentionally confers upon the agent (i. e. express authority), or intentionally, or by want of ordinary care, allows the agent to believe himself to possess (i. e., implied authority)." (See also Restatement of the Law of Agency, §§ 7, 26.)

[1] The agency rested partly in parol and was fully evidenced by defendant Foote who was competent to testify as to the fact. Boone v. Hall, 100 Cal.App.2d 738, 224 P.2d 881; Syar v. U. S. Fidelity & Guaranty Co., 51 Cal.App.2d 527, 531, 125 P.2d 102; Shields v. Oxnard Harbor District, 46 Cal.App.2d 477, 488, 116 P.2d 121.

[2] The above evidence suggests that the Yale Foundation intentionally and expressly conferred on Foote the authority to enter into the agreements with plaintiffs, and would justify the judgment of the court below in favor of plaintiffs against the Yale Foundation. See section 2316, Civil Code; Sims v. Frew, 24 Cal.App. 725, 142 P. 106; Peterson v. Ryan, 108 Cal.App.2d 41, 238 P.2d 117.

[3] The Church of the Merciful Saviour had no interests adverse to the Yale Foundation and might also (2 Cal.Jur. (2d) 659, section 11) and did, in fact, expressly authorize defendant Foote to incur obligations to plaintiffs and others whom Foote contacted as its representative. Moreover, it acknowledged the indebtedness and undertook to liquidate it as its own. At meetings of its Board of Trustees and in conferences with its officers it was fully advised by defendant Foote of the nature and extent of his business activities with plaintiffs and others. The judgment against it is justified in these circumstances.

[4] The judgment against the Church of the Merciful Saviour, a corporation, can only be supported by evidence that it knowingly accepted the benefits of the goods and services furnished by plaintiffs. Scadden Flat G. M. Co. v. Scadden, 121 Cal. 33, 38, 53 P. 440; White v. Kaiser-Frazier Corp., 100 Cal.App.2d 754, 760, 224 P.2d 833; El Rio Oils, Ltd. v. Pacific Coast Asphalt Co., 95 Cal.App.2d 186, 213 P.2d 1; Rideout v. National Homestead Association, 14 Cal. App. 349, 112 P. 192; Biggart v. Lewis, 183 Cal. 660, 192 P. 437; Peek v. Steinberg, 163 Cal. 127, 124 P. 834; Mitchell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418; Turner v. Fidelity Loan Concern, 2 Cal.App. 122, 83 P. 62; Abbott v. Limited Mutual Compensation Ins. Co., 30 Cal.App.2d 157, 85 P.2d 961; Commercial Lumber Co. v. Ukiah Lumber Mills, 94 Cal.App.2d 215, 210 P.2d 276, 17 A.L.R. 454; Ramsey v. Brooke County Bldg. & Loan Ass'n, 102 W.Va. 119, 135 S.E. 249, 49 A.L.R. 673.

[5, 6] If there be evidence of facts supporting an inference favorable to the judgment, the reviewing court is without power to substitute its deductions for those of the trial court. If, therefore, there be room for reasonable doubt as to the sufficiency of the evidence, the doubt should be resolved in favor of the judgment. Peterson v. Ryan, 108 Cal.App.2d 41, 238 P.2d 117.

[7] The record shows that the corporation at a meeting in January, 1950, acknowledged the propriety of plaintiffs' claims in their entirety and undertook to partially liquidate them. See Mountain States Creamery Co. v. Tagerman, 39 Cal. 2d 355, 246 P.2d 21. No payments were made, though a plan of liquidation was offered and rejected. Plaintiffs' services were beneficial to the conduct of the subscription campaign which was a principal business of the new corporation. It is said:

> "A corporation is liable as a party to a contract entered into by its promoters before it comes into existence, if it knowingly accepts the benefits of the contract. (Scadden Flat G. M. Co. v. Scadden, 121 Cal. 33, 38, 53 P. 440.)" White v. Kaiser-Frazier Corp., 100 Cal.App.2d 754, 760, 224 P.2d 833.

[8] The court was justified in drawing an inference from the above evidence that the corporation, with full knowledge of the plaintiffs' claims, acknowledged them as its own.

Pointing to the fact that the plan of liquidation was unacceptable to the plaintiffs, the defendant, The Church of the Merciful Saviour, a corporation, cites Scott v. Los Angeles Mountain Park Co., 92 Cal.App. 258, 267 P. 914, and contends that because no payments were made, or rather accepted, there was no ratification of the contract. An examination of that case indicates an entirely different issue. It was an action on a contract and the court found that the minds of the parties had not met. The law of adoption or ratification of a promoter's contract involved in this case is a totally different issue. We conclude the judgment against The Church of the Merciful Saviour, a corporation, was supported by the record. Judgments are affirmed.

SHELL and HEWICKER, JJ., concur.

TURRENTINE, P. J., and GLEN, J., deeming themselves disqualified, do not participate in this opinion.

39 Cal.2d 556

PEOPLE v. BURNETT.

Cr. 5324.

Supreme Court of California, in Bank.

Sept. 19, 1952.

Defendant was convicted in Superior Court, San Diego County, Dean Sherry, J., on one count of a two-count information charging the issuing of two checks without sufficient funds, and he appealed from the judgment and from order denying motion for new trial. The Supreme Court, Gibson, C. J., held that under circumstances of case, erroneous instruction, to effect that it was question for jury whether defendant intended to defraud if he had informed payee when issuing checks that there were insufficient funds, was prejudicial, and entitled him to new trial.

Judgment and order reversed.

Prior opinion, 241 P.2d 616.

1. Criminal Law 🔑1134(1)

Where principal question on appeal was whether defendant was prejudiced by an erroneous instruction given by trial court, Supreme Court was required to examine entire record in order to determine whether there had been a miscarriage of justice. Const. art. 6, § 4½.

2. False Pretenses 🔑5

There can be no conviction under statute making it a crime to issue check without sufficient funds if payee was informed by maker at time of delivery that there were insufficient funds to pay the check. Pen. Code, § 476a.

3. Criminal Law 🔑1186(4)

In prosecution which resulted in conviction on one count and deadlocked jury on another count of information charging issuing of checks without sufficient funds, where jury announced it had agreed on one count and, having asked for further instructions, was erroneously instructed that it was question for jury whether maker of check intended to defraud if he informed payee when delivering check there were not sufficient funds, such erroneous instruction was prejudicial. Pen.Code, § 476a; Const. art. 6, § 4½.

Edgar G. Langford, San Diego, and Everett H. Smith, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., James Don Keller, Dist. Atty., and Clifford L. Duke, Jr., Deputy Dist. Atty., San Diego, for respondent.

GIBSON, Chief Justice.

Defendant was charged by information with issuing two checks without sufficient funds in violation of section 476a of the Penal Code.[1] The first count was on a check for $992.68 issued to Ed Lewis, and the second count was on a check for $1,480 issued to Joseph Bacorn. Both checks were drawn on the general account of William P. Osterhout, Inc., and were dated February 9, 1951. These and all other checks of the corporation were signed by Mrs. Winn, the treasurer, and were cosigned by defendant, who was the secretary. Defendant was convicted on the Lewis count, but the jury was unable to agree on a verdict as to the Bacorn count. Defendant appeals from the judgment and from an order denying his motion for new trial.

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[1] Pen.Code, § 476a provides: "Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check * * * knowing at the time of such making, drawing, uttering or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with said bank * * * for the payment of such check * * * in full upon its presentation,

[1] The principal question on this appeal is whether defendant was prejudiced by an erroneous instruction given by the trial court, and we must therefore examine the entire record in order to determine whether there has been a miscarriage of justice. Const. art. VI, § 4½.

The corporation owed Lewis $1,292.68 for some work he had done for it, and two checks were issued to pay the debt. One was for $300 and was dated February 5, and the other, the check upon which the prosecution was based, was for $992.68 and was dated February 9. Both checks were signed by Mrs. Winn as treasurer and were cosigned by defendant as secretary. Mrs. Winn, who was not prosecuted, claimed the defendant ran the corporation. The evidence for defendant, however, was that Mrs. Winn handled its financial affairs and that she told Lewis and another witness that she owned the corporation. The testimony was also conflicting as to the time and circumstances of delivery of the checks to Lewis.

The evidence for the prosecution was that on February 5 Lewis came into the front office of the corporation and asked Mrs. Winn for payment of his bill. She took him to defendant's office where he was told by defendant that there were not enough funds in the bank at that moment to pay the bill in full, but that he would give Lewis a check for $300 and pay the balance later in the week. Lewis agreed to accept the part payment, and a check, dated February 5, for $300 was issued to him and was duly paid. Later in the week, on February 9, he returned and asked Mrs. Winn for payment of the balance. She went to defendant's office and told him that Lewis was requesting further payment on his bill. He directed Mrs. Winn to make out a check for $992.68 for the balance, stating to her that there were sufficient funds in the bank to cover it. She then delivered the check to Lewis.

On the other hand, defendant's evidence was that on February 3 or 4, Lewis came to Mrs. Winn and asked her why he couldn't get paid, and since defendant had been with the corporation longer than Mrs. Winn, they came back to talk with him. He and Mrs. Winn endeavored to explain to Lewis that finances were not running smoothly because collections were slow, but that he would be paid in a few days. Mrs. Winn also told Lewis that she intended to put into the company money that she expected to get from certain notes and escrows. Lewis left, saying that he had to have some money and that he would be back. When Lewis returned on February 5, defendant was in his office transacting business with William Mettler, a salesman. Mrs. Winn entered the office and asked defendant to sign the two checks in favor of Lewis, one for $300 dated February 5 and one for $992.68 dated February 9. Defendant signed them without asking Mrs. Winn any questions, and she left the room with the checks. Mettler testified that he was in the office on that day and saw defendant sign some checks at Mrs. Winn's request and that immediately thereafter he saw Mrs. Winn, in the outer office, hand Lewis two checks. It was also shown that the $300 check to Lewis was numbered 1003, that the second check to Lewis for $992.68 was numbered 1004, and that several other checks bearing dates after February 5, but prior to February 9, bore higher numbers than the two Lewis checks. This evidence tends to show that both checks were made out and delivered to Lewis on February 5 and hence that the check

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although no express representation is made with reference thereto, is punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than fourteen years."

for $992.68 was a postdated check which was to be held until the later date because there were not sufficient funds to pay it.

After deliberating several hours the jurors returned to the courtroom, and the foreman announced that they had agreed as to one count but were deadlocked on the other. The court directed them to deliberate further, but before the jury retired again one of the jurors asked, "Is intent to defraud, if you give a check with not sufficient funds and at the time that you deliver the check you informed the person to whom you issued that check that there is not sufficient funds? If he demands it, you say, 'Well, I give you the check, but there is not sufficient funds in the bank to cover that check', is that to be construed as intention to defraud?" The court replied, "That is a question for the jury to determine after considering all of the facts and circumstances of the case." The jury returned in about a half-hour with a verdict of guilty on the Lewis count but was unable to reach a verdict on the Bacorn count.

[2] The court erred in its instruction. The jury should have been told that there can be no conviction under section 476a if the payee is informed by the maker at the time of delivery that there are insufficient funds to pay the check. In re Griffin, 83 Cal.App. 779, 781, 257 P. 458; People v. Wilkins, 67 Cal.App. 758, 228 P. 367.

[3] The prosecution contends that the error was not prejudicial because it went only to the Bacorn count. It is claimed that the record indicates that the jury had already agreed upon the Lewis count when the instruction was given and, therefore, that the juror's inquiry and the erroneous instruction related only to the charge on the Bacorn check as to which the jurors failed to agree. We cannot say, however, that the effect of the error was so limited, since both the inquiry and the instruction were applicable to the Lewis count and may have been so understood by the jury. Even if we should assume, as claimed, that the jurors had reached an agreement on the Lewis count when the inquiry was made, we have no way of knowing whether their conclusion at that time was guilty or not guilty, and it is possible that the erroneous instruction caused them to reconsider and change their decision. Obviously, we should not indulge in speculation as to what occurred during the jury's deliberations.

The prosecution further contends that defendant was not prejudiced because, it is asserted, there was no evidence that Lewis was given notice at the time of delivery of the February 9 check that there were insufficient funds to pay it. It is clear from defendant's evidence, however, that the jury could have found that the Lewis check, dated February 9, was delivered February 5 and was given with the understanding that it was to be held until February 9, and notice of insufficiency of funds could be inferred from acceptance of the postdated check. As we have seen, not only was there testimony that both the February 5 check and the February 9 check were delivered to Lewis on February 5, but they were numbered consecutively, and other checks dated after February 5 but before February 9, bore higher numbers. It has been held that where a maker claims that a check was postdated and was given with the understanding that the check was to be held until a future time, the mere fact of postdating is evidence of such an understanding. People v. Weaver, 96 Cal.App. 1, 13, 274 P. 361. Here, in addition, there are the added facts that the postdated check was given in conjunction with a currently dated check, and that both checks were given at the same time in payment of a single debt. It may be inferred from such circumstances that Lewis knew that he was accepting a postdated check, and that the two checks together were a representation of the maker that there were not sufficient funds currently available to pay it. The inference is strengthened by the fact that Lewis deposited one check immediately and held the other until February 9. Since there was ample evidence from which the jury could have found that the February 9 check was accepted by Lewis on February 5 with notice that there were insufficient funds and hence that there was no intent to defraud, and since the court, when specifically asked about the effect of such notice, erroneously instructed the jury, we cannot say that a miscarriage of justice has not resulted.

The judgment and order denying a new trial are reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

113 Cal.App.2d 95

LEWIS et al. v. FAHN et al.

Civ. 8123.

Sac. 6242.

District Court of Appeal,
Third District, California.

Sept. 12, 1952.

Hearing Denied Nov. 10, 1952.

Charles E. Lewis and Genevieve Lewis brought action against Isadore Fahn and Sara Fahn to recover moneys allegedly paid under duress and to recover moneys allegedly due plaintiffs from defendants for remodeling done by plaintiffs under lease. The Superior Court of Sacramento County, John Quincy Brown, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held that complaint sufficiently alleged causes of action.

Judgment reversed with instructions.

1. Contracts 🔑95(1)

Payment 🔑87(2)

Generally, "duress" may be said to exist whenever one, by the unlawful act of another, is induced to make a contract or to perform some other act under circumstances which deprive him of the exercise of free will.

See publication Words and Phrases, for other judicial constructions and definitions of "Duress".

2. Payment 🔑87(2)

There is no standard courage or firmness with which victim of duress must comply at risk of being without remedy, and question is merely whether pressure applied did in fact so far affect the individual concerned as to deprive him of contractual volition, and, if it did, there is "duress", and, if it did not, there is none.

3. Landlord and Tenant 🔑213(5)

In action by lessees against lessors to recover moneys allegedly paid under duress, complaint alleging that lease provided for reduced rentals during time lessees were remodeling on the two leased parcels, but while lessees were remodeling, they paid full rentals because of written and verbal threats by lessors that unless lessees did so, lessors would cancel lease and institute legal proceedings to evict lessees, sufficiently alleged a cause of action to recover moneys paid under "duress".

4. Pleading 🔑1

The purpose of pleadings of plaintiffs is to inform defendants of the nature of the cause which the plaintiffs state against the defendants, with sufficient particularity to advise defendants of issues they will be required to meet at trial of action.

5. Landlord and Tenant 🔑157(12)

In action by lessees against lessors, count of complaint alleging that by terms of lease it had been agreed that if cost of remodeling by lessees on the two leased parcels exceeded $20,000, then lessors would pay lessees sixty per cent. of such excess up to total cost of $24,000, that remodeling cost $21,482.18, and that lessors therefore became indebted to lessees in sum of $889.30, which was sixty per cent. of $1,482.18, and that such sum had not been paid, stated a cause of action.

6. Action 🔑47

In action by lessees against lessors, it was proper for lessees to join cause of action based on counts seeking to recover excess rents exacted by alleged duress and cause of action based on count alleging that by terms of lease lessors agreed to pay certain per cent. of excess remodeling cost but that lessors did not pay excess, over objection of lessors that pleading improperly united cause of action on written contract with causes of action for tort, since suit to recover money paid under duress is ex contractu.

7. Payment ⚷87(1)

Money which has been paid through duress or where undue and unconscionable advantage has been taken of a situation or of pressing necessity of a person, by means whereof payment has been coerced, and which payee ought not to retain, may be recovered back.

8. Payment ⚷89(1)

However tortious may have been methods whereby payments were extorted, the law implies a duty to repay, when in equity and good conscience that ought to be done, and suit is ex contractu on that implied promise.

9. Limitation of Actions ⚷180(3)

Cause of action to recover sums allegedly paid under duress would not be deemed barred by limitations on demurrer to complaint, where alleged extortionate demands counted on were alleged to have continued up to the very filing of the action, since plea of limitations could be no more than a partial defense and would therefore have to be interposed by answer and not by demurrer.

10. Declaratory Judgment ⚷390

Where primary object of declaratory judgment was to establish respective rights and obligations of lessors and lessees with respect to lease requirements of remodeling by lessees and of financial adjustments dependent thereon, it was not reasonable to hold that judgment in effect merely informed parties that no enforceable contract was in existence as to those matters and that it was necessary for them to agree later if anything was to be accomplished with respect to remodeling. Code Civ.Proc. § 1060.

11. Judgment ⚷564(1)

Declaratory judgments have same essentials of finality as between the parties as do other judgments. Code Civ.Proc. § 1060.

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Albert L. Wagner and E. R. Vaughn, Sacramento, for appellant.

Lewis & Lewis, Sacramento, for respondent.

VAN DYKE, Justice.

A demurrer was sustained to plaintiffs' second amended complaint. No request was made for leave to further amend and no further amendment having been proffered judgment followed in favor of defendants, from which judgment this appeal is taken.

The complaint contains three counts. The first is for the recovery of moneys paid under duress; the second is supplementary to the first; and the third is an action to recover moneys alleged to be due by contract. By the first count plaintiffs alleged the following: On May 19, 1944 they entered into a written lease with defendants whereby they leased certain real property in Sacramento City, consisting of two contiguous parcels of land in the heart of the city. The lease provided the rental for one parcel should be $725 per month, except that until the lessee should have completed certain remodeling which the lease provided should be done by them, the rental for the parcel would be $575 per month. Remodeling was not completed until August 9, 1950. Plaintiffs for said period paid the full sum of $725 per month, but only under protest and solely because the defendants made written and verbal threats that unless they did so they (the defendants) would cancel plaintiffs' lease and institute legal proceedings to evict plaintiffs from the leased premises. The payments so made, in excess of the amount properly demandable under the lease, amounted to the total sum of $8,100. The lease provided that as rental for the second parcel plaintiffs should pay the sum of $610 per month, but that during the period of remodeling, and for not exceeding two and a half months, a reduction in the rental for that parcel of $250 per month would be made. The remodeling was completed in two and a half months, but plaintiffs were allowed no reduction and paid the full rental, an excess of $500 over the amount due. This payment likewise was made under protest and solely by reason of the same verbal and written threats under the compulsion of which they paid the $8,100. Under the remodeling provisions lessors had agreed to reimburse the plaintiffs in respect of certain of the expenditures therefor by way of a credit upon accruing rents and these accrued credits amounted to $2,450 which should have been credited upon rents falling due. Notwithstanding the foregoing, plaintiffs paid the full sum accruing, thus paying $2,450 in excess of what was justly due. These payments likewise were made under protest and by reason of the same threats as hereinbefore referred to.

By the third count plaintiffs alleged the following: By the terms of the lease and in respect of the remodeling it had been agreed between the parties, inter alia, that if the cost of the remodeling exceeded $20,000 then the defendants would pay to the plaintiffs 60% of such excess up to a total cost of $24,000. The remodeling cost $21,482.18, wherefore defendants became indebted to plaintiffs in the sum of $889.30, being 60% of $1,482.18, which sum had not been paid.

In respect of the remodeling requirements of the lease plaintiffs were guilty of great prolixity in their pleading. The ultimate facts to be pleaded in that respect were the actual completion of the remodeling as required by the contract, the date thereof and the cost, thus fixing the period for the reduced rental of the first parcel, credit upon rentals of the second parcel and the amount whereby the remodeling cost exceeded $20,000, bringing into play the obligation of the defendants to pay 60% of such excess. But in attempting this comparatively simple task plaintiffs pleaded matter having to do with a great amount of strife which arose between the parties over the proper construction of the agreement between them, including a recital of the history and ultimate result of a suit which they brought against the defendants for declaratory relief in respect of such meaning. There was also pleaded detailed history of the strife over who had the right to dictate the sort of remodeling called for and the extent and cost thereof, coming finally to allegations that each party secured an architect of their own choice to prepare plans and specifications in detail for such remodeling. Both sets of plans and specifications were annexed to the pleading as exhibits thereto. Out of the welter of confusion thus introduced into the pleading by the plaintiffs the simple purpose and scope of the pleading seems to have been largely lost. We think it may fairly be said that the pleading stands as an excellent example of how not to plead. However, we also think that by a careful and studious scrutiny the pleading can be reduced to the matter we have stated.

[1] Just what must be made to appear in order to justify recapture of money paid under duress has been subject to constant change as courts have liberalized the strict common law rules governing such action.

> "Generally speaking, duress may be said to exist whenever one, by the unlawful act of another, is induced to make a contract or to perform some other act under circumstances which deprive him of the exercise of free will." 17 Am.Jur. p. 873.

It is also said in 17 American Jurisprudence "Duress and Undue Influence", pages 882–885:

> "Anciently, duress in law by putting in fear could exist only where there was such a threat of danger to the object of it as was deemed sufficient to deprive a constant or courageous man of his free will, and the circumstances requisite to that condition were distinctly fixed by law. That is to say, the resisting power which every person was bound to exercise for his own protection was measured, not by the standard of the individual affected, but by the standard of a man of courage; and those things which could overcome a person, assuming that he was a prudent and constant man, were not left to be determined as facts in the particular case, but were a part of the law itself.
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> "* * * [D]uress is still often defined as that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness. By many if not most of the modern authorities, however, the true doctrine of duress is held to be that a contract, deed, or any obligation obtained by so oppressing a person by threats regarding the safety or liberty of himself, or of his prop-

> erty, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetence to act be produced by what was formerly deemed duress, and relievable at law as such, or wrongful compulsion remediable only by an appeal to a court of equity.
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> "There is no legal standard of resistance with which the person acted upon must comply at the peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is, Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? *Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim. The means used to produce that condition, the age, sex, state of health, and mental characteristics of the alleged injured party, are all evidentiary, merely, of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously what will accomplish this result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, and not any arbitrary standard, is to be considered in determining whether there was duress.*" (Italics added.)

[2] In 17 C.J.S., Contracts, § 175, headnote, page 533, it is stated:

> "Under the modern doctrine there is no standard of courage or firmness with which the victim of duress must comply at the risk of being without remedy; the question is merely whether the pressure applied did in fact so far affect the individual concerned as to deprive him of contractual volition; if it did there is duress, if it did not there is none."

A reading of the California cases of later vintage leads us to believe that the relaxed and modern rule of the subjective test of duress as stated in the foregoing quotations from American Jurisprudence and Corpus Juris Secundum is the controlling rule in California and particularly is this so we think in respect of that form of duress with which we are here concerned and which has sometimes been termed "illegal business compulsion". This type of duress is the subject of an annotation appended to the report of the case of Ramp Buildings Corp. v. Northwest Building Co., 164 Wash. 603, 4 P.2d 507, 79 A.L.R. 651, and in our own state has been the subject of discussion in Young v. Hoagland, 212 Cal. 426, 298 P. 996, 75 A.L.R. 654; Millsap v. National Funding Corp., 57 Cal.App.2d 772, 135 P.2d 407; LaTelle v. American Trust Co., 64 Cal. App.2d 830, 149 P.2d 385; McNichols v. Nelson Valley Building Co., 97 Cal.App.2d 721, 218 P.2d 789; Steffen v. Refrigeration Discount Corp., 91 Cal.App.2d 494, 205 P.2d 727. In the last case cited it was said 91 Cal.App.2d at page 498, 205 P.2d at page 729:

> "* * * The test of duress is, at its harshest, what would have influenced the conduct of a reasonable man * * * and many courts have relaxed the rule to make the test the state of mind induced in the particular person. * * * Taking the harsher test of the effect on the mind of the average reasonable man we cannot say that the evidence does not support the court's finding that the overpayments herein recovered were made under duress. Whether the individual acted as a reasonably prudent person is ordinarily a question for the trier of the facts."

[3, 4] Tested by the foregoing rules, we think it cannot be said that plaintiffs, appellants here, have failed to state a cause of action for the recovery of moneys paid under duress. The question is a close one, but we think the pleading is sufficient to

inform appellants' adversaries of the nature of the cause which they state against them with sufficient particularity to advise them of the issues they will be required to meet at the trial of the action. That is the purpose of pleadings and we do not think that defendants to this action, respondents here, will suffer any prejudice through lack of information which the rules of pleading require the complaint to give them. Here the pleader has stated wherein the demands were unlawful. Following that is the plea of compulsion. While the plea of compulsion is meager, it is, we think, sufficient to meet the challenge of a general demurrer. It is alleged, in effect, that these payments were made because demanded under a threat that unless they were made the lessors would declare the lease cancelled and bring action in eviction. That the payments so made were not voluntary is, we think, sufficiently made out. Indeed, given an unlawful demand, a threat of groundless litigation unless the unlawful demand be met presents a situation where courts should not too readily listen to a claim by the party extorting the payment that his victim ought to have been a braver man and should have resisted his attack. We are not concerned with whether or not these ultimate facts can be es-established in proof. Of course it is difficult to see how this compulsion could have persisted to the degree necessary to make out payment under duress over the long period of time involved, and many other difficulties of proof can easily be foreseen. But it cannot be said that proof is impossible when we remember the sensitiveness of credit arrangements to attacks upon business, and the disastrous results that even an unjustified attack upon the very basis and foundation of a business not strongly organized may have. These matters are all matters of fact for the trier of fact to determine.

[5] As to the count in debt, the third count, in the complaint, it did, as we have stated, contain allegations as to the obligation of the respondents to repay certain sums expended by appellants in remodeling and the failure of respondents to pay. Without further discussion it appears from that count that the obligation did arise and the breach occurred. We think the count states a cause of action.

The demurrer was both general and special as to each count and respondents invoke the rule that if the pleading be subject to either general or special objections and, the defects being pointed out, the pleader declines to amend, the ensuing judgment must be affirmed if any of the specifications of defects in the pleading are good. Turning to these special grounds of demurrer, we find the first to be that two or more separate and distinct causes of action have been united and not separately stated in that the recovery of sums alleged to have been paid under duress is asked, without a separate pleading, along with a plea for the recovery of money specifically provided to be paid under the terms of the lease. We think this specification not sound. In the first count the pleader seeks recovery of three groups of payments: 1. That group consisting of the monthly overpayments as to the rental of parcel 1 from the date of the lease to the date of completion of remodeling, and totaling $8,100; 2. The group of overpayments totaling $500 made because respondents refused to allow as credit upon rentals accruing the sum of $250 per month during two months of the time required to remodel; 3. The group of payments totaling $2,450 which ought to have been credited against rentals. We think there is no true distinction between these groups of overpayments and that they are properly asked for in a single count. In addition, plaintiffs recited in the first count that $889.30 was due and owing under the terms of the lease providing that defendants would pay 60% of the excess if the cost of remodeling exceeded $20,000. As noted above, this cause of action was separately stated in the third count. We therefore think that such recitals in the first count should be treated as surplusage.

[6, 7] It is next objected that the pleading improperly unites a cause of action upon a written contract with causes of action for tort, that is to say, actions to recover moneys paid under duress. We think respondents misconceive the nature

of the action to recover money paid under duress.

> "* * * [M]oney which has been paid through duress * * *, or where undue and unconscionable advantage has been taken of a situation or of the pressing necessity of a person, by means whereof payment has been coerced, and which the payee ought not to retain, may be recovered back". 70 C.J.S., Payment, § 146, page 350.

[8] And however tortious may have been the methods whereby the payments were extorted the law implies a duty to repay when in equity and good conscience that ought to be done and the suit is ex contractu upon that implied promise. As was said in Philpott v. Superior Court, 1 Cal.2d 512, headnote 4, 36 P.2d 635, 95 A.L.R. 990.

> "In said action, where plaintiff sought to recover money paid under the contract and alleged a rescission because of fraudulent misrepresentations, and did not elect to ask for the damages which he may have suffered from the tort inflicted upon him by defendants or for the application of equitable remedies, he waived the tort and the action was in assumpsit upon a promise implied by law in order to prevent the unjust enrichment of defendants from the property of plaintiff."

The joinder complained of was proper.

[9] Respondents interposed pleas of the statute of limitations, claiming that the action to recover the sums allegedly paid under duress was barred by various provisions thereof. But the extortionate demands counted upon are alleged to have continued up to the very filing of the action and it is obvious that the plea of the statute of limitations could be no more than a partial defense and would therefore have to be interposed by answer and not by demurrer. 16 Cal.Jur. "Limitation of Actions", sec. 205, p. 610.

The demurrer contains various charges of uncertainty in the pleading. We think it unnecessary to state these assignments in detail since it will suffice to say that they are directed at allegations needlessly contained in the complaint and having to do with anticipation of defenses resting in estoppel and waiver.

Since the case must be returned to the trial court for further proceedings we think it proper to discuss certain matters concerning the construction of the contract between the parties in respect of remodeling as affected by a pleaded final judgment of the Sacramento County Superior Court obtained in a previous action between the parties for declaratory relief. The complaint alleges as follows: In the early part of 1946 a dispute arose between the parties as to the meaning of paragraph 15 of the lease and appellants herein instituted in said Superior Court an action for declaratory relief. A judgment was rendered in said action on January 4, 1949 which became final in due course, no appeal having been taken (a copy of the decree is appended to the complaint as an exhibit). Paragraph 15 of the lease provided:

> "That *is* is agreed by and between the parties hereto that Lessees shall do certain permanent remodeling of the herein demised premises, as soon as architectural plans can be formulated and building materials obtained, at their own expense (except as hereinafter provided). The general plan being to ultimately connect both parcels of said demised premises into one store, of the 'L' shape design, at the option of Lessees. All of said remodeling shall be done by adhering to the plans and specifications of architect, but upon the advise of, and otherwise in discretion of, Lessees. Lessors agree to supervise all work of remodeling, in behalf of Lessees, without compensation, as time will permit."

Paragraph 18 of the lease contains certain provisions concerning a method for sharing by the parties of the cost of remodeling. The declaratory decree concerning the rights and obligations of the parties under said paragraph 15 declared as follows:

> "That the Lessees should, upon the execution of said lease do and cause to

be done certain permanent remodeling and improvements of the demised premises; that to that end, said Lessees are required to procure architectural plans, and specifications prepared by a professional and reputable architect covering in detail the said remodeling and improvement of said premises; that the plans and specifications of said Architect should be prepared and formulated so as to ultimately transform the premises from th*ere* then condition into a single store of the 'L' shape design; that said Lessees should cause said plans and specifications to be prepared in a reasonable time and should thereafter proceed within a reasonable time upon the work of causing the same to be carried out and performed by competent supervisors, craftsmen and laborers being excused for any delay in performance only upon Lessees' inability to obtain building materials; that as to minor details regarding such matters as interior decorations, and minor arrangements, the Lessees have the right and discretion to select, and Lessors have the right to supervise all work of remodeling, without compensation. But neither the rights of Lessors nor the right of Lesses, as in this paragraph defined, permit of the Parties or either of them, deviating from the general plan in these Findings outlined and established."

Concerning paragraph 18 of the lease the declaratory judgment stated the following:

"It is further decreed that while paragraph Fifteenth provides that the alterations and improvements should be made at the expense of Less*ors* (Plaintiffs), said lease in paragraph Eighteenth provides a mode of partial reimbursement by said Lessors of all sums expended by Lessees in said remodeling and alterations made by said Lessees as in paragraph Eighteenth provided, as follows, to-wit:

"(a) For all such sums so expended by Lessees in full, $10,000.00, Lessors shall reimburse said Lessees in full, said reimbursement being made however, (and limited to) by allowance of credit upon rentals accruing thereafter under the terms of this lease, at the rate of $175.00 per month beginning upon the date remodeling actually begins.

"(b) For costs of such alterations and improvements of $10,000.00 and up to $20,000.00 Lessees shall *not* be entitled to reimbursement whatsoever, but shall bear and pay the same at their own cost and expense.

"(c) All costs of the same exceeding $20,000.00 up to $24,000.00, shall be borne *60%* by Lessors and *40%* by Lessees, the reimbursement of such *60%* by such Lessors to Lessees shall be made in case as provided in paragraph (f) hereof.

"(d) All costs of the same in excess of $24,000.00 and not exceeding $27,000.00 shall be reimbursed by Lessors to Lessees by cash in full as provided in paragraph (f) hereof.

"(e) No reimbursement shall be made by Lessors to Lessees for any expenditures so made over and above $27,000.00.

"(f) Lessors shall pay and reimburse to Lessees all sums other than the sum mentioned in paragraph (a) hereof (which by the terms of these Findings they are required to pay) as and when the same are due and payable from Lessees to Laborers, Contractor, Materialmen and others performing services or furnishing materials and supplies in the making of such alterations and improvements."

It is contended by respondents that while the provisions of the lease concerning remodeling required the appellants as lessees to procure architectural plans and specifications, these plans were subject to the approval of the lessors and must receive their assent. In effect their contention is that the parties merely agreed to agree in the future as to what remodeling should be done and how it should be accomplished, with the consequential result that these provisions concerning remodeling were unenforceable; further that the decree left the matter just where the parties put it by their written agreement.

[10, 11] We do not think the decree of the court is subject to such a construction. When it is considered that the primary object of the declaratory judgment was to establish the respective rights and obligations of the parties in respect of the requirements of remodeling and of the financial adjustments dependent thereon, we do not think it reasonable to hold that the decree in effect merely informed the parties that no enforceable contract was in existence as to those matters, and that it was necessary for them later to agree if anything was to be accomplished in respect of the proposed remodeling. We must assume, since we have here a final judgment of a competent court, that the same was prefaced by a pleading containing the essentials of a plea for declaratory relief as set out in Section 1060 of the Code of Civil Procedure, including allegations that the parties to the suit were interested under provisions of a written contract, construction of which was desired. We think we must further assume that the question of whether or not there were in fact valid provisions in the contract which were the object of construction must have been either admitted for want of denial or raised and litigated; and that the decree of the court established that there were such valid provisions. Declaratory judgments have the same essentials of finality as between the parties as do other judgments; and this by specific provisions of the code section referred to. We think, therefore, that the necessary meaning of the declaratory decree is as follows: That the lessees were obligated to remodel the premises; that to accomplish this remodeling they were required to procure plans and specifications therefor from a reputable architect; and that the plans and specifications should be prepared and formulated so as to ultimately transform the premises into a single store of "L" shape design; that if these things were done and the remodeling accomplished pursuant to such plans and specifications by competent supervisors, craftsmen and laborers, the results must be accepted by the lessors as performance of the lessees' obligations to remodel, whether the lessors consented to the plans and specifications or not. Whether or not the remodeling which was accomplished was according to such plans so procured and executed and whether the work did or did not achieve the ultimate result of changing the store into the required design, would be factual matters in so far as it might become necessary to determine the same in further proceedings. Appellants in their complaint did allege that they did these things and generally that they performed their obligations under the remodeling requirements of the lease, as construed by the declaratory decree.

The judgment is reversed with instructions to the trial court to permit the defendants to answer over.

ADAMS, P. J., and PEEK, J., concur.

113 Cal.App.2d 53

PAILHE v. PAILHE (two cases).

Civ. 15056.

District Court of Appeal, First District, Division 1, California.

Sept. 12, 1952.

Rehearing Denied Oct. 11, 1952.

Hearing Denied Nov. 10, 1952.

Alfred Pailhe, individually, brought an action against Rene Pierre Pailhe, and the same plaintiff as administrator of the estate of Elisabeth Pailhe, deceased, brought an action against the same defendant for a decree holding that defendant held realty and an insurance policy in trust for plaintiff as administrator. The cases were consolidated for trial. The Superior Court of the State of California, in and for the City and County of San Francisco, I. L. Harris, J., rendered a judgment for defendant in the first mentioned action and rendered a judgment for plaintiff in the second mentioned action and defendant appealed. The District Court of Appeal, Bray, J., held that evidence justified finding that decedent was suffering from severe illnesses, that defendant had falsely represented that defendant would care for decedent for remainder of decedent's days, and would relieve decedent of cares and worries in consideration of conveyance of realty, that representations were false and not performed, that decedent placed highest trust in defendant, and that defendant exercised undue influence upon decedent.

Judgment affirmed in part and reversed in part.

1. Pleading ⚷8(15)

In action brought by one child of a decedent against remaining child of decedent for decree that defendant held realty conveyed to defendant by decedent in trust for plaintiff as administrator of decedent's estate, allegations of first count of complaint relative to representations defendant allegedly made to induce conveyance, to effect that defendant would care for decedent, which defendant allegedly did not intend to carry out, coupled with allegations that decedent placed highest confidence in defendant, and allegations of second count relative to control of decedent's mind by defendant, coupled with allegations of confidence, were allegations of facts and not of conclusions.

2. Trusts ⚷371(4)

In action brought by one child of a decedent against remaining child of decedent for decree that defendant held realty conveyed to defendant by decedent in trust for plaintiff as administrator of decedent's estate, allegations that conveyance was deed of gift and that conveyance was given on defendant's promise to care for decedent, and that defendant did not keep such promise and that decedent's volition was overcome by defendant, sufficiently informed defendant that plaintiff was claiming that defendant gave no consideration for deed and hence there was nothing for plaintiff to offer to restore, and complaint was not defective because not alleging offer to restore. Civ.Code, § 1691, subd. 2.

3. Trusts ⚷372(3)

In action brought by one child of a decedent against remaining child of decedent for decree that defendant held realty conveyed to defendant by decedent in trust for plaintiff as administrator of decedent's estate, evidence justified findings that decedent was suffering from severe illnesses, that defendant had falsely represented that defendant would care for decedent for remainder of decedent's life, and would relieve decedent of cares and worries in consideration of conveyance, that representations were false, and not performed, that decedent placed highest trust in defendant, and that defendant exercised undue influence upon decedent.

4. Trusts ⚷372(3)

In action brought by one child of a decedent against remaining child of decedent for decree that defendant held realty conveyed to defendant by decedent in trust for plaintiff as administrator of decedent's estate, plaintiff had burden to prove undue influence allegedly exercised upon decedent by defendant by clear, satisfactory and convincing evidence.

5. Deeds ⚷211(4)

In action to set aside a deed on ground of undue influence exercised upon grantor by grantee, plaintiff meets his burden to prove undue influence by clear, satisfactory and convincing evidence when advantage gained by grantee through reliance by grantor upon confidential relationship is shown, and grantee fails to go forward with evidence to dispel presumption of undue influence arising therefrom.

6. Evidence ⚷269(3)

In action brought by one child of a decedent against remaining child of decedent for decree that defendant held realty conveyed to defendant by decedent in trust for plaintiff as administrator of decedent's estate, declarations made by decedent after execution of deed and out of presence of defendant that decedent had made deed with understanding defendant would care for decedent for balance of decedent's life were admissible in evidence on question of intent.

7. Evidence ⚷269(1)

When intention or state of mind of alleged donor is involved, evidence of declarations made by him before or after transaction is admissible though declarations were not made in presence of adverse party.

8. Judgment ⚷204

Court of equity will, in one action, grant all the relief to which parties are entitled, although at law such a result might strictly require several actions.

9. Action ⚷44

It is policy of law to allow a party to obtain in one action all relief to which he may be entitled on account of a single transaction, although such relief may be of a character that would require several suits under strict rule relating to forms of common law actions prior to adoption of codes.

10. Equity ⚷39(1)

Where equity has acquired jurisdiction for one purpose it will retain that jurisdiction to final adjustment of all differences between parties arising from causes of action presented.

11. Deeds ⚷17(3)

Love and affection can constitute a sufficient consideration for a conveyance of realty.

12. Executors and Administrators ⚷130(2)

After time to file or present claims had expired, and in absence of proof that possession of realty comprising part of estate of a decedent was necessary for payment of debt, legacies or expenses of administration, administrator of estate who was co-owner of realty comprising part of decedent's estate could not recover possession of such realty from co-owner. Probate Code, § 581.

◆

Gus K. Burgren, San Francisco, for appellant.

Matthew Koppel, James G. Flaherty, San Francisco, for respondent.

BRAY, Justice.

An action by Alfred Pailhe, individually, and one by him as administrator, against his brother Rene, were consolidated for trial. In the first mentioned action the court gave judgment for defendant. Plaintiff did not appeal. In the second action the court decreed that defendant held certain real property and an insurance policy in trust for plaintiff as administrator. Defendant appeals.

Questions Presented.

1. Sufficiency of the complaint.

2. Sufficiency of the evidence to show fraud and undue influence.

3. Were grantor's declarations subsequent to execution of deed admissible?

4. Where the only allegations concerning fraudulent transfer of the insurance policy were contained in the action which the court adjudged in defendant's favor, was the judgment that defendant held it in trust valid?

5. Erroneous findings and judgment.

1. Sufficiency of the Complaint.

Inasmuch as the court found against plaintiff on his complaint as an individual we are concerned with the sufficiency of the administrator's complaint alone. At the beginning of the trial defendant moved to exclude all evidence on the ground that the complaint did not state causes of action. The court took the motion under advisement and apparently never ruled on it. The court's action amounts to a denial of the motion.

While the complaint is hardly a model of pleading, it is sufficient. The first count, after alleging the death of Elisabeth on September 28, 1948, the appointment of plaintiff as administrator, and the fact that plaintiff and defendant are her sons and sole heirs at law, alleges that she was the owner of certain real property in San Francisco; that prior to December 17, 1946, she was an elderly person suffering from severe illnesses and consequent pain and incapacitation; that defendant then represented to her that if she would convey the real property to him to the exclusion of plaintiff, defendant would care for her for the remainder of her days, would provide her with necessaries and reasonable luxuries, and would lift from her all worries, tribulations and labor of any description; that these representations were false and fraudulent, made without intent to perform them, and with the design that decedent would rely on them and deed the property to defendant; that decedent did rely on them and, further, placed the highest degree of trust and confidence in defendant; that a relationship of trust and confidence existed between decedent and defendant; that she was thereby induced to and did sign and deliver to defendant a deed of said property; that defendant carried his fraudulent plan into effect by in nowise caring for decedent or in lifting her burdens and obligations, but did, in fact, make them heavier.

The second count incorporates all the allegations of the first count, and then alleges that in doing the things therein set forth defendant exercised undue influence and restraint over decedent's mind and thereby induced her to sign the deed in the following circumstances, among others: that at such time decedent was not of sound and disposing mind but was in so extreme a condition of mental and physical weakness as to be unable to exercise a free will as to her affairs; that her volition was overcome by that of defendant, who thereby induced her to depart from her free desire to bequeath the property equally to plaintiff and defendant and induced her to grant it exclusively to defendant.

[1] Defendant contends that the complaint merely sets forth conclusions and not facts, as was the situation in Bacon v. Soule, 19 Cal.App. 428, 126 P. 384. In that case there was no allegation of confidential relationship. The action was between a brother and his sisters and the court pointed out that the brother-sister relationship alone did not raise a presumption of confidence and trust. But in our case not only was there a parent and child situation which the Bacon case holds raises a presumption of confidential relationship, 19 Cal.App. at page 434, 126 P. at page 385, but in addition there was an allegation that such confidential relationship actually existed. The allegations in the first count of representations which defendant had no intention of carrying out, coupled with the allegation that decedent placed the highest degree of confidence in defendant, were somewhat similar to those which the court in Alaniz v. Casenave, 91 Cal. 41, 27 P. 521, held to be sufficient. As to the second count the allegations of control by defendant of decedent's mind, coupled with the allegations of confidence, were somewhat similar to those upheld in Re Estate of Bixler, 194 Cal. 585, 229 P. 704. The allegations which defendant contends are mere conclusions were there held to be ultimate facts.

[2] Defendant contends that the complaint is defective because there is no allegation of an offer to restore. He points out that there is also no allegation that defendant gave no consideration for the deed. However, it is alleged that the conveyance was a deed of *gift*, and, in the first count, that it was given on defendant's promise to provide for her, etc., and that defendant did not keep that promise but actually made her burdens heavier. In the second count, it is alleged that decedent's volition was overcome by that of defendant. While the complaint could have been better drawn, it sufficiently informed defendant that plaintiff was claiming that defendant gave no consideration for the deed and hence there was nothing for plaintiff to offer to restore. Section 1691, subdivision 2, Civil Code, requiring an offer to restore in proper cases, does not apply. A number of the criticisms of the complaint cannot be raised on general demurrer. See Campbell v. Genshlea, 180 Cal. 213, 217, 180 P. 336. There was no special demurrer. Defendant was not harmed by the court's not requiring that particularity and technicality in pleading which the courts once required.

2. Sufficiency of the Evidence.

Elisabeth, the mother of plaintiff and defendant, lived since the death of her husband and their father several years ago in a two-story, seven-room dwelling house in San Francisco belonging to her. She owned a life insurance policy for $500, taken out to cover funeral expenses, of which plaintiff was the beneficiary. In May, 1940, Elisabeth made a will leaving her property equally to her two sons and naming defendant executor without bonds. On November 27, 1946, she executed an endorsement on the insurance policy making defendant the beneficiary. In September, 1946, she went to Mr. Jean Arees, a notary public and an old friend of thirty years standing, and had him prepare a will, which she executed, leaving the home to defendant and the residue of her estate to both sons. On December 17, 1946, she conveyed the home to defendant. Plaintiff was not informed of these transactions. In 1944 Elisabeth suffered a major stroke, leaving a partial paralysis on the left side. Dr. McClure testified that since that time she had been deteriorating mentally and physically. In the fall and winter of 1946 her reasoning powers were below normal and her memory was defective. He advised the family she should not live alone. It was difficult for her to coordinate her talk at times. Mr. Serresseque testified that she was crippled, could not do much work, and forgot a lot, forgetting something said to her only three hours previously. On shopping trips, however, she was able to take care of her business affairs and she paid her bills, and collected from her roomers. Mrs. Fitzpatrick took care of decedent for six months in 1944 when she had her first stroke. Her speech was such that she did not use the correct words in her conversation. Mrs. Calinet, sister of decedent, testified that after decedent had her stroke in 1944 she became "vague." She suffered a second stroke for which she remained in the hospital from November 12 to December 8, 1946. She lived alone until defendant moved in with her in July, 1947.

Mr. Arees, the notary who prepared the gift deed, testified by deposition that decedent phoned his wife asking that the deed be prepared and for an appointment. He did not talk to defendant about the deed. Decedent told him that she did not want to divide the property between her sons as plaintiff "doesn't do anything for me." Arees had prepared a will for decedent in September, 1946, giving the home to defendant. (This will was destroyed by her direction prior to her death.) Both Arees and his wife testified that at the time of making the deed, decedent appeared to know what she was doing.

While decedent lived alone most of the time, defendant testified that she had made the appointment with Arees before defendant returned home from work. At that time defendant had not moved in with his mother but was "staying there." She told him about it and he told her to forget it. She said that if he would not go with her to Arees she would go there alone on a street car. Rather than have her go out alone in the rain he went with her. He told her he did not want any part of the property. At Arees' office he remained in a room other than the one in which the deed was drafted and executed. Arees reminded decedent that she had two sons and she said that defendant was the one who did everything for her so she left the house to him. Defendant admitted that over a period of three, four or five months he had discussed with her the fact that she wanted to give him the house, but she gave him no reasons why. There were discussions with his mother about defendant and his wife moving in with her, but he could not remember whether the subject of her giving him the house and the subject of their moving in were discussed at the same time. He denied that she ever asked him to take care of her for the balance of her days—he "volunteered to do that."

Witness Noucue testified that in May, 1946, defendant asked him if Arees could draw up some legal papers for his mother and stated that as soon as she gave him a deed he was going to move in with her. When the witness asked if the brother knew about this, defendant stated that he would take care of himself—let the brother take care of himself.

Defendant's former wife, Ursulla, testified that "Finally it came up; she said she wanted him to have the home and everything that was in it"; "* * * they had an argument about it for some time, approximately three or four months, but the last month they decided that—he decided, and she decided that she would give him a deed." Defendant said he wanted no part of it. Decedent stated that because plaintiff had not come to see her for some long period of time and because plaintiff owed defendant $400 decedent was hurt and wanted to give defendant the property. The deed was executed December 17, 1946. Defendant and his then wife stayed overnight at the mother's home from the latter part of December, 1946, on. The mother wanted them to live there, but while they ate and slept there they continued to maintain their own apartment until July 1, 1947, when they moved in. In August, 1948, defendant had marital difficulties with his then wife and left the home, agreeing to return when his wife left. He visited and phoned his mother each day. It was when he left home that the mother asked for the deed back. Prior to 1946 plaintiff's wife took care of decedent's affairs, paying expenses by an allotment sent by plaintiff and by renting rooms in decedent's home. Defendant also sent his mother an allotment while he was in the service. From 1946 on defendant took care of his mother's affairs, collecting rentals for her. Plaintiff's wife paid the premiums on the $500 policy with the understanding that decedent was to pay French Hospital dues for her. When the wife learned that decedent did not pay these dues, she returned the policy and records to decedent who thereafter took care of the premiums. Plaintiff testified that he visited his mother once or twice a week from 1945 until her death.

At first, the defendant testified that his mother never told him her reasons for making the conveyance, and never asked the defendant to care for her, but he later testified that his mother contended that since defendant was taking care of her, defendant should get the house and it was her idea that defendant was going to take care of her, but when this idea was expressed, defendant told her, "No, I do not like that idea; that is a bad idea." Defendant admitted that his mother may have told him that she was giving the house to him because he was taking care of her. Defendant's ex-wife, Ursulla, testified that she never promised the decedent that she would take care of her and made no such agreement. The only reason she moved into the home was because the decedent and Dr. McClure requested it.

On the question of intent, the testimony of Mr. Flaherty, an attorney, and of Mrs. Fitzpatrick and Mrs. Calinet, was admitted. Mr. Flaherty testified that the decedent came to his office (shortly before her death) greatly upset because the deed could not be destroyed as could the will; that she told him that she made the deed with the understanding that defendant would take care of her for the balance of her life, and she would not have to work any more because the defendant and his wife were to move into the house and take care of everything, and look after her. Mr. Flaherty testified that he talked to defendant on the phone and told him that his mother had come to see him in an effort to get her property back, and the defendant is quoted as saying, "If that is my mother's wish, I will execute the deed." The next time Flaherty phoned defendant, Flaherty was referred to defendant's attorney (in a pending divorce proceeding with Ursulla). Flaherty testified that this attorney agreed to a return of the property as soon as the divorce was taken care of. Decedent told Mrs. Calinet that she gave the defendant the house thinking he would take care of her the rest of her days; that he did not do anything but give her a lot of grief; that he promised to take care of the decedent. Mrs. Fitzpatrick testified that she visited decedent in the hospital just before she died and while so visiting the defendant entered his mother's room, and his mother excitedly asked defendant for "the papers to my house," and defendant replied that he would give her the papers as soon as his divorce was over. Mrs. Calinet, decedent's sister, testified she talked with the defendant over the phone and he said he would give the deed back as soon as his divorce was finished. Defendant testified that had his brother gone to live with decedent and had she wanted plaintiff to have the house he would have deeded it to plaintiff; that it was decedent's feeling that whoever took care of her should have the house; also that the mother's idea was that if defendant would take care of her properly it was only fair that he have the house. Defendant also testified that prior to her death he had agreed to reconvey the house to her.

[3] The evidence was conflicting and would have supported a finding that the mother was acting freely and voluntarily and without any fraud or undue influence of defendant. This conflict, however, was resolved by the court in plaintiff's favor and we, of course, are bound thereby. There is sufficient evidence to support the court's

finding that decedent was suffering from severe illnesses; that defendant had falsely represented that he would take care of her for the remainder of her days and relieve her of her cares and worries in consideration of her transferring the house to him; that the representations were false and that he did not perform as agreed; also that she placed the highest trust and confidence in him. Defendant's own testimony as related above, together with the other facts in the case, support this finding.

As to the finding of undue influence, the facts support it, too, particularly when the presumption which arises from the confidential relationship between defendant and the decedent is borne in mind. This presumption required the defendant to show by clear and unequivocal evidence that the advantage he obtained over his mother was not due to undue influence. This he did not do. The lack of independent advice to the mother and the fact that he admitted his mother's idea was that whoever took care of her should get the house, which he did not do, and the fact that he had agreed to reconvey the house to her, lends color to the claim that she was unduly influenced in making the conveyance.

[4, 5] While, of course, the burden is upon plaintiff to prove undue influence by clear, satisfactory and convincing evidence, Sherman v. Sandell, 106 Cal. 373, 39 P. 797, that burden is met when advantage gained by a defendant through reliance by a grantor upon a confidential relationship is shown and the defendant fails to go forward with evidence to dispel the presumption of undue influence arising therefrom. See Myrick v. Bruetsch, 13 Cal.App.2d 219, 56 P.2d 591. See also Payne v. Payne, 12 Cal.App. 251, 107 P. 148, where the court upheld a finding of the trial court of undue influence even though "[t]he evidence does not show any intentional fraud or deceit on the part of defendant * * *." 12 Cal.App. at page 252, 107 P. at page 149.

While the evidence in Campbell v. Genshlea, supra, 180 Cal. 213, 180 P. 336 was stronger than here, the language of the court concerning the daughter applies to defendant. The court said, 180 Cal. at page 224, 180 P. at page 341: "It is to be remembered that in a case involving a purported gift *inter vivos,* based upon an alleged consideration of love and affection, where the donee is a daughter having the control and direction of the aged doner, a strong presumption of confidential relation arises which would place upon the beneficiary in the transaction the burden of showing fairness in dealing and full understanding on the part of the person parting with the property. Nobles v. Hutton, 7 Cal.App. 14, 93 P. 289." Nessen v. Nessen, 218 Cal. 59, 21 P.2d 415, cited by defendant, is not applicable. There the trial court found that no undue influence was exercised on the mother by her son. In upholding that finding the Supreme Court stated that there was no showing of anything but the mother and son relationship and that such relationship alone was not sufficient to show undue influence. In our case, in addition to the blood relationship, the evidence shows the imposition of trust and confidence by the mother in the son, which confidence was abused.

3. Subsequent Declarations.

[6, 7] Three witnesses testified to the same general effect, that after the execution of the deed, and out of the presence of the defendant, the decedent stated that she had made the deed with the understanding that defendant would take care of her for the balance of her life; that she believed that at any time defendant did not carry out his promises she could destroy the deed as she did the will made at the same time. This testimony was admitted solely on the question of intent. This was proper, "'* * * when the intention or state of mind of the alleged doner is involved, evidence of declarations made by him before or after the transaction is admissible though the declarations were not made in the presence of the adverse party. [Citing cases.]'" Katz v. Enos, 68 Cal.App.2d 266, 275, 156 P.2d 461, 466. See also Dinneen v. Younger, 57 Cal.App.2d 200, 134 P.2d 323, where Mr. Presiding Justice Peters compiled the California cases upholding the rule that where intent is a material element of a disputed fact, declarations of a decedent made after

as well as before an alleged act that indicate the intent with which he performed the act, are admissible in evidence as an exception to the hearsay rule. See also In re Estate of Anderson, 185 Cal. 700, 198 P. 407; 10 Cal.Jur. p. 1073, § 315, and § 319, p. 1078.

4. Insurance Policy.

[8-10] In the action brought by Alfred personally, he set up, in addition to charges of fraud concerning the real property, that defendant obtained an endorsement to himself of the life insurance policy originally payable to Alfred. The court ruled that plaintiff take nothing in that case. The life insurance policy is not mentioned in the pleadings in the action brought by the administrator, which is the only action before this court. However, in the findings and judgment in this action the court found that the endorsement of the policy was obtained by fraud and undue influence; that the policy is held by defendant in trust for the administrator, and ordered defendant to assign it to the administrator. The situation is quite unusual. While the court denied plaintiff, individually, any relief, it did find, in effect, all of the allegations of fraud and undue influence set forth in his complaint (the same as those set forth in the administrator's complaint) to be true. The findings were joint for the two actions. The issue of the validity of the assignment of the insurance policy was before the court. It felt that the fraudulently obtained property, real property and insurance policy, should be returned, not to plaintiff individually, but to the administrator, thereby making them available for creditors, if any, and eventually for them to be distributed to the two brothers. So far as the insurance policy is concerned, defendant obtained a benefit by this action of the trial court. In view of its findings of fraud in the assignment to defendant of the policy, technically, the court, in the individual action, should have caused the policy to be reassigned to plaintiff, as he was the sole beneficiary before the fraud was practiced. But the court in effect has made the policy available for both parties. Alfred is not complaining. In view of the fact that the issue was before the court, that the findings are joint as to the two actions, and that the court's action is just and equitable, this action was within the court's equity power. "It is one of the firmly established rules of equity that the court will, in one action, grant all the relief to which the parties are entitled, although at law such a result might strictly require several actions." Mau v. McManaman, 29 Cal.App.2d 631, 635, 85 P.2d 209, 210. Here the court in one action gave relief which it might have given in the two actions. "It is the policy of the law to allow a party to obtain in one action all the relief to which he may be entitled on account of a single transaction, although such relief may be of a character that would require several suits under the strict rules relating to the forms of common law actions prior to the adoption of the codes." Newport v. Hatton, 195 Cal. 132, 153, 231 P. 987, 994. Here was a proper situation for the application of the rule that where equity has acquired jurisdiction for one purpose it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the causes of action presented.

5. Findings and Judgment.

The court found that decedent was "an elderly person suffering from severe illnesses and consequent pain and incapacitation, who had abandoned hope of an extended further life * * *." Defendant contends there is no support for this finding. The evidence fails to disclose her age although there is some intimation that at the time of the execution of the deed she was 53. She was suffering from severe illnesses (having had two strokes) and consequent pain. The doctor testified that she had gradually deteriorated both mentally and physically. There was some incapacitation. While the finding as a whole may have been stronger than the evidence fully warranted, that fact is unimportant. The other findings would support the judgment even in the absence of this finding. As to the finding that plaintiff made the representations without intent to perform, such finding is a reasonable inference from the facts. Again, while the court found that after the delivery of the deed defendant "in nowise car[ed] for her," and the evidence shows that to some extent he did, it also shows that he did not care for her or lift her burdens or obligations as agreed; in fact, he made her burdens heavier.

[11] In view of the presumption which followed the relationship of trust and confidence and the facts in the case we find nothing wrong with the findings on undue influence. While love and affection can constitute a sufficient consideration for a conveyance of real property, the evidence here shows that it was not the true consideration for the deed and that the finding that there was no consideration for the deed is well supported. It is not necessary to consider each specific finding complained of by defendant, which includes practically every one of the findings, for the reason that those necessary to support the judgment are based on the evidence and any which are not fully so based are not necessary to the judgment.

Technically speaking, the judgment may have gone too far. It held that defendant held the title to the real property and the insurance policy in trust for plaintiff *as administrator,* ordered defendant within a limited period to reconvey the real property and assign the insurance policy to plaintiff *as administrator* and decreed that in the event of a failure so to do title would vest in the administrator. This was proper. The judgment then provided that defendant and all persons claiming under or through him be restrained and enjoined from asserting any right, title or interest in the real property or policy. If this means only, and undoubtedly the court intended it so, that defendant is restrained from making any claim to either as against the administrator during probate, then the wording is proper. On the other hand, if it means that as an heir defendant is not entitled to claim on distribution his share as an heir, then it is wrong. Except in a highly technical way, we do not see how such a construction can be given the judgment. As an heir (in the absence of a will otherwise disposing of the property) title vested in defendant, subject, however, to the administration of the estate. Therefore, the only construction that reasonably can be given the judgment is that defendant's right to claim half of the property and policy on distribution is not affected.

[12] The judgment did not specifically order defendant to surrender possession of the real property to the administrator. It did so indirectly by giving the administrator judgment for $500 (apparently for his possession of the property after the mother's death) and $100 per month until such surrender is made. The record fails to disclose how the trial court arrived at these figures. Defendant moved into the premises about two and a half months after his mother's death and has continued to reside there. The trial started May 2, 1950. We are permitted to take judicial notice of the estate proceedings. It there appears that the first publication of notice to creditors was had on October 25, 1948. Therefore, at the time of trial the time to file or present claims had expired. Section 581 of the Probate Code provides that after such time has expired, as to "any heir who has succeeded to the property in his possession" (and defendant has so succeeded to a half interest therein), the administrator may not recover possession unless he proves that such possession is necessary for the payment of debts, legacies or expenses of administration, or for distribution to some heir entitled thereto. There is no such proof here. Therefore, this award must fall. While Alfred is a co-owner of the title with defendant, subject to administration, the administrator cannot bring an action for possession from a co-owner. His right as administrator to bring such action for the estate has terminated. Nor is this action one for rents, issues and profits due to the estate under section 581. The question of whether plaintiff individually as coheir with defendant may require an accounting from defendant is not before us in this action.

That portion of the judgment awarding plaintiff $500 and the sum of $100 per month until defendant surrenders possession of said property is reversed. In all other respects the judgment is affirmed. Each party will bear his own costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

113 Cal.App.2d 132

BEHLEN v. MACKIE (PHILLIPS, third party claimant and respondent).

Civ. 18976.

District Court of Appeal, Second District,
Division 3, California.
Sept. 17, 1952.

Don Behlen, doing business as Professional Business Counselors, brought action against Robert F. Mackie, Jr., and secured a judgment against the defendant. Execution was levied by plaintiff on an automobile, and George C. Phillips, third party claimant, filed a third party claim alleging that he was owner of automobile. The Superior Court of Los Angeles County, Otto J. Emme, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that third party claimant was owner of automobile and that plaintiff was not entitled to have execution levied on automobile.

Judgment affirmed.

1. Fraudulent Conveyances ⚷135

Statute providing that every transfer of personalty is conclusively presumed, if made by one having at time possession or control of personalty, and not accompanied by immediate delivery, and followed by actual and continued change of possession of personalty, to be fraudulent and void as against creditors, was not intended to create interests in a seller greater than those he possessed at time of transfer. Civ. Code, § 3440.

2. Fraudulent Conveyances ⚷132(2)

Where A got B to finance purchase of automobile for A, and automobile was registered to A as registered owner and B as legal owner, and B retained possession of automobile, and when A was unable to pay note given to B, A applied to C for financial assistance, and automobile was driven to bank where A and B released their interests in automobile and caused it to be reregistered in name of bank as legal owner and C as registered owner, and bank took chattel mortgage from C for part of purchase price of automobile and gave B check for rest of purchase price, and C paid B balance due B, and possession of automobile was turned over to A, judgment creditors of A were not entitled to levy execution on automobile because C did not receive or retain possession of automobile. Civ.Code, § 3440.

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J. Wesley Mieras, Los Angeles, for appellant.

No appearance for respondent.

SHINN, Presiding Justice.

Don Behlen, doing business as Professional Business Counselors, appeals from a judgment of the superior court in a third party claim proceeding determining that George C. Phillips is the owner of a 1951 Cadillac Club Coupe, engine No. 516206361, and directing the Marshal to release the automobile to Phillips. Respondent Phillips is not represented by counsel and has filed no brief.

Behlen secured a judgment against one Robert F. Mackie, Jr. for a sum in excess of $4,000. Execution was levied on the automobile and Phillips filed a third party claim alleging that he was the owner and entitled to possession of the car, that he had acquired it by purchase from James R. Proper on the 20th day of April, 1951, and had paid Proper therefor the sum of $4,110.32. In January, 1951, Mackie had acquired the car from a dealer in the following manner: Proper had financed the purchase; the car was registered to Mackie as the registered owner and to Proper as the legal owner. Mackie gave Proper his note for $4,310.25. The car was retained by Proper in his possession to be turned over to Mackie upon payment of his debt. Macie, being unable to pay the note, applied to Phillips for financial assistance. The car was driven to the Bank of America where the following took place: Proper and Mackie released their interests in the car and caused the same to be re-registered in the name of Bank of America as legal owner, and Phillips as registered owner. The bank took a chattel mortgage on the car from Phillips for $2,911.25 to secure a note payable at the rate of $194 per month. The bank issued its check to Proper for

$2,740. The difference in the two amounts, $171.25, represented the bank's charge for financing. The difference between $2,740 and the amount due Proper (in the neighborhood of $1,500 was paid to Proper by Phillips. Title then stood in the names of Phillips, as registered owner, and Bank of America, as legal owner, and so stood at the time execution was levied.

Mackie did not have possession of the car until the foregoing transfers were made, but continuously thereafter had exclusive possession of it. The car was not, at any time, in the possession of Phillips. The contention on the appeal is that the transfer from Mackie to Phillips was void for the reason that it was not accompanied by an immediate delivery and followed by an actual and continued change of possession as required by § 3440, Civil Code, which reads, in part: "Every transfer of personal property * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession * * *."

Actually, although Mackie was the registered owner, he had paid nothing and had only a contract to buy the car from Proper. He did not have possession or control of it. Phillips testified that he bought the car and allowed Mackie to use it with the understanding that he could buy it by paying some $1,500 and assuming the debt to the bank. It appears that Mackie paid nothing to Phillips and defaulted in payments due the bank.

Since Mackie did not have possession or control of the car it was not necessary that Phillips receive or that he retain possession of it in order to be protected against the claims of Mackie's creditors. Cosby v. Cline, 186 Cal. 698, 200 P. 801.

[1, 2] It is not the purpose of § 3440 to create interests in a vendor greater than those he possessed at the time of the transfer. Under the facts in evidence the transaction was essentially one in which A would buy an automobile from B, take title in his own name and allow C to use the car with the privilege of buying it. Any interest of C would be subject to the rights of the owner-vendor. Appellant does not contend that Mackie acquired any interest in the car under his agreement with Phillips, other than a right to buy it, and since he paid nothing to Phillips it is apparent that the agreement was of no value to him or his creditors.

The court did not err in determining that the transfer to Phillips was valid and that he is the owner of the car.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

113 Cal.App.2d 115

PEOPLE v. ONE 1949 CADILLAC CONVERTIBLE COUPE.

Civ. 15278.

District Court of Appeal, First District, Division 2, California.

Sept. 15, 1952.

Hearing Denied Nov. 13, 1952.

Action by the People of the State of California to forfeit one 1949 Cadillac Convertible Coupe under the Narcotics Law. The legal and registered owners of the automobile, which was being sold under a conditional sale contract when seized, intervened. From a judgment of the Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., forfeiting the automobile to the State, the registered owner appealed. The District Court of Appeal, Jones, J., pro tem, held that the evidence sustained the trial court's findings that the automobile was used by one of two occupants thereof, who were found dead therein, to keep, deposit, conceal and transport narcotics and that such narcotics were unlawfully possessed by the other occupant.

Judgment affirmed.

1. Forfeitures 🔑5

Evidence of possession, control and occupancy of automobile by registered owner thereof or one to whom its use was entrusted by such owner at time of finding therein of concealed contraband narcotics, of presence of which such owner or entrustee or both knew is sufficient to support judgment forfeiting automobile to state. Health and Safety Code, § 11610.

2. Forfeitures 🔑5

Innocence of owner of automobile used for unlawful purpose, without owner's knowledge, by one using it with owner's consent, is no defense to proceeding for forfeiture thereof because of such unlawful use.

3. Forfeitures 🔑5

In State's proceeding to forfeit automobile under Narcotics Law, evidence that finding of packages of heroin on floor of automobile near body of deceased occupant thereof and in fold of front seat behind body of deceased driver, who had been using automobile with permission of registered owner thereof, was sufficient to sustain trial court's findings that automobile was used by such driver to keep, deposit, conceal and transport narcotics and that such narcotics were unlawfully possessed by other occupant of automobile, in absence of any denial of his possession of narcotics or evidence that any other person than decedents placed narcotics in such positions. Health and Safety Code, § 11610.

4. Forfeitures 🔑5

The Attorney General's filing with county clerk of notice of seizure and intended forfeiture of automobile in accordance with provisions of Narcotics Law gave Superior Court of county jurisdiction over subject matter of forfeiture proceeding. Health and Safety Code, § 11612.

5. Forfeitures 🔑5

A registered owner of automobile, by answering notice of seizure and intended forfeiture of automobile under Narcotics Law, filed with county clerk by Attorney General, waived any claim of superior court's lack of jurisdiction over parties to forfeiture proceeding, and such court's jurisdiction became complete so far as such owner was concerned. Health and Safety Code, § 11612.

6. Forfeitures 🔑5

The statutory provisions as to seizure of automobile by peace officer when making arrest for violation of Narcotics Law relate to matters of evidence, not to court's jurisdiction of proceeding to forfeit automobile under such law. Health and Safety Code, § 11611.

◆

Mancuso, Herron & Winn, Vernon W. Humber, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of the State, Ralph W. Scott and Charles A. Barrett, Deputy Atty. Gen., for respondent.

JONES, Justice pro tem.

This action is one in which a judgment forfeiting the defendant automobile to the State has been entered under the provisions of section 11610 of the Health and Safety Code, commonly referred to as the Narcotics Law. The car was being sold under a conditional sales contract at the time it was seized by the San Francisco police. The legal owner and the registered owner defended separately. The legal owner and holder of the conditional sales contract has accepted the judgment below and has not appealed. The appeal is by the registered owner alone. Two grounds are urged for a reversal of the judgment. It is first contended that the evidence does not sustain the findings and, secondly, that the court never acquired jurisdiction in the case.

The finding which is challenged as being without sufficient evidence is that the car "was used by one Edwin Cavness, now deceased, to keep, deposit, conceal and transport narcotics, to-wit: Heroin, and said narcotics were unlawfuly possessed by an occupant of the car, to-wit: One Kenneth Greenway, now deceased."

The automobile in question, a Cadillac coupe, was found by the police early on the morning of October 22, 1950, parked near a byway on Twin Peaks in San Francisco.

Two dead men were in the front seat. One was Edwin Cavness, and the other Kenneth Greenway. Each man had died as a result of a bullet wound, and one Sherman Arnold was afterward tried and convicted for killing these men. People v. Arnold, 108 Cal.App.2d 719, 239 P.2d 449.

When the police inspector approached the car, the body of Cavness occupied the driver's position behind the steering wheel. The body of Greenway was also on the driver's seat to the right of Cavness. On the floor of the car and within about two inches of Greenway's outstretched hand was a bindle of heroin. Another package of heroin was found concealed in the fold of the front seat directly behind the body of Cavness. The Settled Statement of Facts On Appeal recites that: "There was no evidence offered or produced by either one of the interveners in this case showing or tending to show or indicate, directly or indirectly, that any person other than the deceased Cavness and the deceased Greenway had placed the narcotics in the position in the automobile in which they were found." Appellant, the mother of Cavness, and the registered owner of the Cadillac, testified that he had her permission to use the car on the occasion of his death. The fact that her consent and permission was so given is not disputed.

[1] In People v. One 1940 Chrysler, 77 Cal.App.2d 306, 175 P.2d 585, the registered owner had given one of the occupants of the parked car permission to use it. At the time of their arrest both occupants were in the back seat. Two marihuana cigarettes were found beneath the floor mat in front of the driver's seat. Both occupants denied having any knowledge of these cigarettes. The car was decreed forfeited to the State, and both the legal and registered owner appealed. Based upon the concealment of the marihuana beneath the floor mat of the car which was in the possession of the person permitted to use it, the court there said 77 Cal.App.2d at page 315, 175 P.2d at page 591: "We are, therefore, of the opinion that the evidence in the instant case was sufficient to prove at least prima facie that appellant Pennewell (registered owner) and Miss Reader (entrustee), or both, had knowledge of the presence of the marihuana cigarettes in said automobile. Our attention has been called to no case, and we know of none, in which a judgment of forfeiture has been reversed upon the ground of the insufficiency of the evidence, where the automobile was in the possession and control of the owner or his entrustee, and the owner or his entrustee was in the automobile at the time the contraband narcotic was found concealed therein." In this case no denial of possession of the narcotics has been made and, as the Statement of Facts shows, "no evidence" was "offered or produced * * * showing or tending to show or indicate, directly or indirectly, that any person other than the deceased Cavness and the deceased Greenway had placed the narcotics in the position in the automobile in which they were found."

[2, 3] As it is said in People v. One 1937 Buick Coupe, 89 Cal.App.2d 556, 562, 201 P.2d 402, 405, "It is now established law in this state that the innocence of the owner is no defense to a forfeiture proceeding where the owner has consented to the use of his automobile by a person who, without the owner's knowledge, uses it for an unlawful purpose", citing People v. One 1937 Plymouth 6, 37 Cal.App.2d 65, 98 P.2d 750. See also, People v. One 1941 Buick Sport Coupe, 28 Cal.2d 692, 171 P.2d 719, and People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 507, 159 P.2d 641. Appellant's contention that the findings are without substantial evidentiary support fades in the light of the foregoing authorities.

[4, 5] Equally untenable is the contention that the court below was without jurisdiction. The Attorney General on behalf of the State, and in accordance with the provisions of section 11612 of the Health and Safety Code, filed with the County Clerk of the City and County of San Francisco Notice of Seizure and Intended Forfeiture. In this manner the action against the Cadillac was instituted and the court given jurisdiction over the subject matter. Harrington v. Superior Court, 194 Cal. 185, 228 P. 15; Sampsell v. Superior Court, 32 Cal.2d 763, 773, 197 P.2d 739. By answering the notice appellant waived any claim of lack of jurisdiction over the parties, Sampsell v. Superior Court, supra and, in so far as she is concerned the jurisdiction of the court became complete.

[6] The provisions of section 11611 with reference to the seizure of an automobile when making an arrest for a violation of the Narcotics Law relate to matters of evidence and not to jurisdiction.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

113 Cal.App.2d 139

IMHOFF et al. v. TITLE INS. & TRUST CO. et al.

Civ. 18828.

District Court of Appeal, Second District, Division 3, California.

Sept. 18, 1952.

Action by Ben Imhoff and another, assignee of note and deed of trust, against the Title Insurance and Trust Company and others, holders of a subsequent deed of trust, and Val Swenson, who claimed a materialman's lien, to quiet title to personal property representing the proceeds of sale of real property to which liens related, and for declaratory relief. The Superior Court, Los Angeles County, Fred Miller, J., entered judgment for plaintiffs and one unnamed defendant, and Val Swenson appealed. The District Court of Appeal, Wood, J., held, inter alia, that recordation of plaintiffs' deed of trust, which stated that it was to secure future advances, was notice to subsequent encumbrancers that it constituted a lien for further advances, and plaintiffs' lien had priority over defendants' claims which arose out of transactions occurring before advances were made by plaintiffs under the deed, in absence of notice to plaintiffs of such claims before the advances were made.

Affirmed.

1. Mortgages 🔑154(1)

The lien of a trust deed does not operate to secure optional advances which are made, under the trust deed, after the beneficiary has acquired actual notice of an encumbrance subsequent in point of time to the trust deed, and does not defeat or impair the rights of the subsequent encumbrancer.

2. Mortgages 🔑186(5)

In action involving priority of liens, evidence established that at times of trust deed and advances subsequently made thereunder, holders of trust deed had no knowledge of claim for materials furnished property to which trust deed related or subsequent trust deed executed to third person.

3. Mortgages 🔑186(5)

In action involving priority of liens created by advances made under trust deed and intervening materialman's lien and trust deed to third person, evidence established that the advances had been made under the terms and conditions of the trust deed rather than as separate loans.

4. Mortgages 🔑171(5)

Where property owner executed note and trust deed to secure loan and future advances by beneficiary of deed, and deed recited that beneficiary meant owner and holder of note, recordation of deed was notice to subsequent encumbrancers that it constituted a lien for further advances, and assignee of note had priority over holder of subsequent deed of trust and over claim for materials for advances made under the deed without actual notice of such other liens, though, the assignment being unrecorded, assignee was not beneficiary of record.

◆

Riedman & Silverberg and Ven O. Fahrney, Long Beach, for appellant.

F. Henry NeCasek, Long Beach, for respondents.

PARKER, Justice.

Action to quiet title to personal property (proceeds of sale of real property under a trust deed), and for declaratory relief. Judgment was for plaintiffs and defendant Martin. Defendant Swenson appeals from the judgment.

Appellant contends that his materialman's lien is prior to plaintiffs' alleged lien under a deed of trust for future advances of money.

On October 20, 1947, Merle J. Olson executed a promissory note for $1,300 and a trust deed covering two lots on Summit Avenue in Long Beach. The note was payable to parties other than plaintiffs, and the deed recited that it was made for the purpose of securing the indebtedness evidenced by the note and "payment of such additional sums with interest thereon, as may be hereafter borrowed from Beneficiary by the maker of said note, when evidenced by another promissory note." The deed also recited that: "The term Beneficiary shall mean the owner and holder, including pledgees, of the note secured hereby, whether or not named as Beneficiary herein." The trust deed was recorded on October 30, 1947.

On May 13, 1948, the beneficiaries under the trust deed assigned it and the note to the plaintiffs herein, husband and wife. The assignment was not recorded. Also on said May 13th Olson executed his promissory note for $1,140.32 (payable to plaintiffs) and a second trust deed covering the said two lots as security for the payment of the note. The second trust deed was recorded on July 8, 1948. Thereafter plaintiffs lent Olson additional sums of money as follows: $1,000 on June 1, 1948; $500 on July 25, 1948; and $500 on November 9, 1948. Olson executed promissory notes for said amounts. At the top of the note for $1,000 there is handwriting as follows: "First Trust Deed on property at 1518 W. Summit as Security. Long Beach, Calif."

On August 20, 1948, Olson executed another trust deed covering said lots to secure payment of his note for $1,075 which was payable to defendant Martin. Said trust deed was recorded on August 23, 1948.

On February 24, 1949, the appellant (Swenson) recorded a notice that he claimed a mechanic's lien upon the lots. On May 24, 1949, he filed an action against M. J. Olson, One Doe and Two Doe to foreclose the lien. In the complaint (Exhibit 10) it was alleged that appellant (plaintiff therein), under an agreement with Olson, began to furnish plumbing material and labor on said property on June 18, 1948; that he completed said plumbing on November 18, 1948; and that $1,200.49 was due appellant for said material and labor. No further proceeding was had in that action.

On July 27, 1949, the plaintiffs herein recorded a notice of default and election to sell under the terms of the trust deed first referred to herein. On December 2, 1949, the Title Insurance and Trust Company, as trustee, sold the property for $5,200. Plaintiffs then commenced this action to quiet title to $5,119.08, the net proceeds of the sale, and thereafter the title company deposited said sum with the clerk of the court.

Plaintiff Ben Imhoff (who was the only witness) testified that at the time he lent Olson the additional sums of money he had no actual notice that a trust deed had been executed in favor of defendant Martin or that mechanics' liens were "filed" against the property; he did not know Martin or the appellant, and neither of them talked to him prior to the time he made the advances or prior to the time he foreclosed; he purchased the first trust deed before he made the loan which was secured by the second trust deed; and the loan was made through escrow. He testified further that before he purchased the first trust deed he saw the property; at that time the house, which had been moved onto the lots, was "sitting on a couple of pins," and no work whatsoever was done; Olson borrowed the money from him in order to put the house in a livable condition; Olson told him that in order to eliminate the expense he was going to do the work himself, and that it would take around $3,500; he (witness) told Olson he thought he could let him have that amount but not all at one time—that he (Olson) would have to take it as he (witness) could accumulate it; thereafter he (witness) made the advances; when he made the first two advances he did not look at the house and did not know whether any work had been started; he had a conversation with Olson on July 25, 1948, when he made the second advance, and Olson said that he had "gotten material" and put a foundation under the house and he needed another $500; he (witness) did not ask Olson if the bills were paid; before he made the last advance he saw the house, and work had been done at that time; Olson told him (witness) that he needed the last advance to complete the plumbing. It was stipulated that the advances were optional, and that nothing had been paid on any of the notes which plaintiff held. The court found that all the sums of money mentioned in the complaint and all advances were valid liens against the fund on deposit in court and prior to claims of all defendants; that defendant Martin's claim was secondary to plaintiffs' claims; and that Swenson's claim was without right. Judgment was that plaintiffs were owners of the $5,119.08 on deposit herein "to apply on the indebtedness" of $4,555.08 principal, $508.03 interest, and $225.65 advances for taxes and costs of sale.

[1, 2] Appellant contends, as above stated, that his mechanic's lien is prior to respondents' (plaintiffs') alleged lien for future advances; that the advances made by plaintiffs were made with notice of his mechanic's lien and are subordinate to it. He asserts, in substance, that where advances under a trust deed are optional and the advances are made with notice that material is being furnished to the trustor for which mechanics' liens may attach, that each advance is to be regarded as a new encumbrance subsequent to the liens of materialmen who had commenced furnishing material prior to the time the advances were made. The lien of a trust deed does not operate to secure optional advances which are made, under the trust deed, after the beneficiary has acquired actual notice of an encumbrance subsequent in point of time to his trust deed, so as to defeat or impair the rights of the subsequent encumbrancer. Oaks v. Weingartner, 105 Cal.App.2d 598, 600, 234 P.2d 194. Appellant, in support of his argument that plaintiffs had actual notice that his mechanic's lien would attach, refers to the testimony of Mr. Imhoff that he knew the house had been moved onto the lots, that he lent the money in order that work might be done to make the house livable, and that he saw the property twice while the work was being done. As above shown, Mr. Imhoff testified that he had no actual notice regarding the mechanics' liens when he made the additional loans; that Olson told him that he was going to do the work himself and that it would take around $3,500. There was no evidence that plaintiffs knew at the time they made the advances that labor had been furnished by appellant or anyone, or that materials delivered had not been paid for. Olson told Mr. Imhoff that he needed the last advance to complete the plumbing. Appellant alleged, as above shown, that he began furnishing labor and materials on June 18, 1948. Prior to that time the first trust deed (which provided that it was security for additional sums thereafter borrowed from the beneficiary) had been recorded. Appellant did not communicate with the plaintiffs, and it appears that he made no inquiry to ascertain whether plaintiffs had made any further advancements. The trial court found that at the times the trust deed of May 13, 1948, and the advances were made the plaintiffs had no knowledge of any of the claims of defendants. That finding is supported by the evidence.

In the case of Oaks v. Weingartner, supra, 105 Cal.App.2d 598, 234 P.2d 194, the appellant contended that his materialman's lien was superior to the lien of a deed of trust securing certain advances made after the deed was recorded, since the beneficiaries were not obligated, by the terms of the trust deed or at all, to make any additional advances. The court therein held that the lien of the trust deed covering the advances was superior to the materialman's lien, and it stated that the rule which applies to mortgages is applicable to trust deeds. It was stated therein 105 Cal.App.2d at pages 600–601, 234 P.2d at pages 196, that: "To the extent of advances made without actual notice, the mortgage has priority over all liens subsequent to its execution. Recordation of the mortgage is notice to subsequent encumbrancers that it constitutes a lien to the sum therein named. If they desire so to do, they may ascertain the actual condition of the security and by notice to the holder of the prior mortgage prevent any additional encumbrance of the property for future advancements by giving notice of their liens, in which case they are entitled to have the senior mortgagee limited to the recovery of such advances as he has made under his mortgage prior to receipt of actual notice of the vesting of the junior liens, but if they do not give notice, their rights must be held subject to the mortgage to the full extent of advancements made."

[3, 4] Appellant also contends that since plaintiffs failed to record their assignment they are not in a position to assert that the optional advances made by them are superior to appellant's claim of lien. It seems that appellant's argument is that he was not required to give notice to plaintiffs since they were not the beneficiaries of record. As above shown, the trust deed recited that the term "Beneficiary shall mean the owner and holder" of the *note* whether or not such holder was named as beneficiary in the deed. Recordation of that deed was notice to subsequent encumbrancers that it constituted a lien for further advances thereunder. It was stated in Tapia v. Demartini, 77 Cal. 383, at page 387, 19 P. 641, at page 643 that: "If the mortgage discloses upon its face that it is to stand as security for future advancements, the amount of the advances to be made need not be set out. It is sufficiently definite to put subsequent incumbrancers on inquiry, and they must ascertain the extent of the lien, or suffer the consequences." There is no evidence that appellant made any attempt to determine the identity of the holder of the note. The trial court found that the advances were made under the terms and conditions of the trust deed; and that they were valid liens against the fund on deposit in court and prior to the claims of all the defendants. Those findings are supported by the evidence.

Appellant also asserts in effect that in any event his lien is prior to the loan of $1,140.32, which was secured by the second trust deed made on May 13, 1948, and recorded on July 8, 1948. He argues that since that trust deed was not recorded prior to the time appellant started to furnish material and labor on June 18, 1948, his (appellant's) lien is prior thereto; and that the taking of the second trust deed is evidence that plaintiffs did not rely on the provisions of the first trust deed regarding advances. At the trial the attorney for plaintiff asserted that the second trust deed was merely surplusage and that the $1,140.32 was advanced under the provisions of the first trust deed. Plaintiff, Mr. Imhoff, testified that he made the loan of $1,140.32 after he had obtained the assignment of the first trust deed; he had no intention of lending the money under any consideration other than that he was covered by the first trust deed; later on, after making the loan of $1,140.32, he discovered that a second trust deed had been written up in the escrow; and he did not record the second trust deed until July 8th because he was informed that the first trust deed covered everything. As above stated, the court found that all the sums of money mentioned in the complaint and all advances were prior to the claims of defendants. It also found that all the allegations of the complaint are true. In the amended complaint it was alleged that the said sum of $1,140.32 was an advance under the first trust deed; and that "all of said advances" are secured by said first trust deed. The evidence was sufficient to support the finding that the loan of $1,140.32 was an advance under the first trust deed.

Appellant contends further that his materialman's lien is superior to the lien of the trust deed held by defendant Martin. The trial court found that Martin's claim to the deposited fund was secondary to the claim of plaintiffs. Since the judgment was that plaintiffs were the owners and entitled to all the money on deposit, no useful purpose will be served by discussing this contention further.

In view of the above conclusions, it is not necessary to consider other contentions of appellant. Also, in view of those conclusions, it is not necessary to consider the contention of respondents that appellant's notice of lien was not filed within the time required by law.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

113 Cal.App.2d 67

HARRAH v. CRAIG.

No. 15233.

District Court of Appeal, First District,
Division 1, California.
Sept. 12, 1952.

Action by William Harrah against Edward E. Craig on a Nevada judgment taken against defendant for checks cashed in a Nevada gambling house operated by plaintiff. The Superior Court, County of Alameda, S. Victor Wagler, J., entered judgment against defendant, and he appealed. The District Court of Appeal, Bray, J., held that the Constitution of the United States required enforcement of the judgment even if it would have been contrary to public policy of California to allow action on the original claim.

Judgment affirmed.

1. Judgment ⇨823

Constitution of the United States requires a State of the United States to enforce a valid judgment for the payment of money if it was rendered in another state of the United States, although it would have been contrary to the public policy of the forum to allow action on the original claim.

2. Judgment ⇨823

In suit upon a Nevada judgment, court had no authority to look behind the judgment to determine whether it was based upon a gambling debt and, having so determined, to refuse to enforce it.

3. Gaming ⇨25

Gambling debts are unenforceable in both Nevada and California.

4. Gaming ⇨19(1)

The cashing of check in a Nevada gambling house where there is no condition imposed that the proceeds must be used for gambling is not necessarily illegal.

5. Gaming ⇨26(5)

Defendant, who contended that a Nevada judgment taken against him for checks cashed in plaintiff's Nevada gambling house was invalid because based on gambling debt, could not counterclaim for his own money which he lost in plaintiff's gambling house and, in addition, for money which he won in plaintiff's gambling house and subsequently lost.

Edward E. Craig, Berkeley, pro per.

Eugene T. Nebiolo, Oakland, for respondent.

BRAY, Justice.

Defendant appeals from a judgment against him based upon a Nevada judgment.

Question Presented.

The effect in California of a final judgment of a Nevada court based upon the cashing of checks in a Nevada gambling house.

Facts.

On January 16, 1948, plaintiff recovered judgment against defendant for $500 and interest in the Second Judicial District Court of Nevada. This judgment was affirmed by the Nevada Supreme Court in Craig v. Harrah, Nev., 201 P.2d 1081. See also Craig v. Harrah, 65 Nev. 294, 195 P.2d 688. Plaintiff then filed in the Justice's Court of Oakland Township, California, this action upon that judgment. Defendant answered, alleging that the Nevada action was a suit on a gambling obligation and against public policy. He also counterclaimed for money had and received by defendant in the sum of $3,250. Because this amount exceeded the jurisdiction of the justice's court the case was transferred to the superior court. At the trial, over the objection of plaintiff, testimony was taken of the circumstances of the transaction upon which the actions are based, and a transcript of the testimony in the Nevada case was admitted in evidence.

Plaintiff owns and operates Harrah's Club in Reno, Nevada, a bar and gambling house, licensed for gambling under the laws of that state. Defendant entered the club for the purpose of gambling. He had approximately $80 in cash which he lost in gambling. As a courtesy to the club's patrons its cashier cashes checks. The cashier cashed personal checks of defendant totalling $750. Defendant used this money for gambling and won the sum of $2500, represented by chips, which the cashier exchanged for currency of a like amount. Defendant subsequently lost it all in gambling there. Defendant testified that all the money he received from the checks he cashed he spent in gambling, except for some amount spent at the bar. Defendant stopped payment on $500 of the checks. These actions were brought for the recovery of that sum. In cashing defendant's checks no requirement was made that he spend the proceeds in Harrah's Club, nor was any restriction placed on their use. Cash, and not chips or tokens, was given for the full amount of the checks. As in the Nevada trial court, the court below found that the judgment was not based on a gambling obligation and was not against the public policy of either California or Nevada, denied defendant relief upon his counterclaim, and gave judgment in favor of plaintiff.

[1, 2] This appeal is without merit. Defendant's first contention is that the California court has the authority to look behind the Nevada judgment to determine the validity of the original cause of action, and that having determined its invalidity, it may refuse to enforce the judgment. (It should be pointed out that here the superior court did look behind the judgment but did not find it invalid.) Fauntleroy v. Lum, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039, held, in effect, under the full faith and credit clause of the United States Constitution, that where a state court has jurisdiction of the subject matter of an action and of the parties (as the Nevada court did here), its judgment, even though based upon a mistake of law, is conclusive upon a sister state. This rule is stated in Restatement, Conflict of Laws, section 446, as follows: "The Constitution of the United States requires a State of the United States to enforce a valid judgment for the payment of money * * * if it was rendered in another State of the United States, although it would have been contrary to the public policy of the forum to allow action on the original claim." It should be pointed out that defendant in his opening brief summarized section 445 of the Restatement as supporting his contention but failed to disclose that the section begins, "Except as stated in § 446 * *." Thus section 445 is wholly inapplicable here.

[3, 4] Defendant's second contention is that the original transaction, namely, the cashing of the checks, was illegal in Nevada and would be illegal in California, whereas in the Fauntleroy case the transaction was only illegal in the state of the forum. It is true that gambling debts are unenforceable in both Nevada and California. West Indies, Inc., v. First Nat. Bank of Nevada, Nev., 214 P.2d 144; Hamilton v. Abadjian, 30 Cal.2d 49, 179 P.2d 804. But the issue of illegality has already been decided adversely to defendant by the Nevada judgment and is res judicata, and, of course, under the rule of the Fauntleroy case cannot be attacked in this state. While the trial court should not have gone behind the Nevada court's determination that the checks were not issued as part of a gambling transaction, it did find adversely to defendant upon a review of the facts. It has been held in California that the cashing of checks in a Nevada gambling house where there is no condition imposed that the proceeds must be used for gambling is not necessarily illegal. Hamilton v. Abadjian, supra, 30 Cal. 2d 49, 179 P.2d 804.

[5] Defendant has a strange conception of public policy and of the fitness of things. He asks that recovery be denied plaintiff of the amounts given for his checks because he claims they were part of a gambling transaction; yet in his counterclaim he asks the court to award him, in addition to his own money which he lost,

$2500 which he won from plaintiff and subsequently lost in gambling.

In Pacific Debenture Co. v. Caldwell, 147 Cal. 106, 107, 81 P. 314, plaintiff filed a bill in equity to enjoin enforcement of a judgment taken against it by default on the ground that the contract upon which the judgment was based was one in which the parties agreed to engage in the unlawful business of conducting a lottery and hence was against public policy. The lower court sustained a demurrer to the bill. Plaintiff appealed. The Supreme Court imposed a penalty for a frivolous appeal, stating 147 Cal. at page 107, 81 P. at page 315, "* * * plaintiff, proclaiming itself a wrongdoer and a violator of the law, asks equity to restrain a creditor who has obtained a judgment in law against it, because forsooth, its business is illegal, and therefore courts of law and of equity will refuse their aid to either party."

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

* * *

113 Cal.App.2d 135

ALLIN et al. v. INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES & MOVING PICTURE MACHINE OPERATORS OF UNITED STATES & CANADA et al.

Civ. 19066.

District Court of Appeal, Second District, Division 3, California.

Sept. 17, 1952.

Hearing Denied Nov. 13, 1952.

Action by William H. Allin, and others against the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada and others to compel restoration of plaintiffs to membership in International and Local Unions and to recover damages. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that denial of plaintiffs' demand for jury trial was not reviewable on appeal in absence of exception to ruling or conduct equivalent to an exception.

Judgment affirmed.

1. Appeal and Error 🔑257

Denial of plaintiffs' demand for a jury trial was not subject to review on appeal from judgment for defendants, where plaintiffs took no exception to the ruling and did nothing to indicate that they did not acquiesce in, or that they intended to make such ruling the basis for appellate review.

2. Appeal and Error 🔑181, 248

Some affirmative declaration or action after ruling has been made sufficient to point out clearly the error complained of and fairly direct court's attention thereto and apprise court that party adversely affected by ruling does not acquiesce therein is necessary to reserve the matter for review on appeal.

3. Appeal and Error 🔑883

One who by his conduct accepts a ruling of the court under circumstances amounting to acquiescence therein may not complain of such ruling on appeal.

4. Appeal and Error 🔑277

An exception must be taken to denial of a request for jury trial in order to reserve the matter for review on appeal, since such ruling is not among the orders and rulings specified in statute as those to which exception is deemed to have been taken. Code Civ.Proc. § 647.

5. Appeal and Error 🔑277

Where affirmative action, consisting of noting an exception or conduct equivalent thereto, is required to reserve an adverse ruling for review on appeal, mere silence must be taken as acquiescence, and upon appeal, claim of error in such ruling will not be considered.

Kenny & Morris, Eleanor V. Jackson, Los Angeles, for appellants.

Bodkin, Breslin & Luddy, Orville W. McCarroll, Michael G. Luddy, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiffs are former members of the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, and Local 683 thereof. They were expelled from the Unions and brought this action seeking mandamus to compel their restoration and for damages and loss of earnings due to their alleged wrongful expulsion. Defendants are The International Alliance, Local No. 683, certain individuals, officers and agents of the Unions, and numerous defendants sued under fictitious names. The Unions and the officers and agents who were served with process answered. Plaintiffs gave notice of a motion to set the cause for trial and demanded a jury. At the time of trial defendants objected to trial by jury, their objection was sustained and the cause was tried to the court, resulting in findings and judgment in favor of defendants. Plaintiffs appeal, contending the ruling was erroneous.

[1, 2] The briefs contain learned discussions of the law with respect to the right of trial by jury. Plaintiffs say that their action is in mandamus, that mandamus was triable by a jury under the English common law of 1850, and that the common law as it existed in 1850 is the rule of decision in this State. The argument of plaintiffs on this point is vigorously opposed by the defendants. We have concluded, however, that the question is one which does not require decision in this action for the reason that the point was not reserved for review on appeal by an exception to the rulings of the court. Both sides quote from and rely upon the decision of this court in Grossblatt v. Wright, 108 Cal.App.2d 475, at page 480, 239 P.2d 19, at page 23, in which it was said: "The purpose of an exception is not ritualistic; it is real. It 'is only a formal type of objection'. It does not have to be in any particular form. It is sufficient if it points out clearly the error complained of. The test of its sufficiency is whether it fairly directs the attention of the court to the claimed error. It is sufficient if it apprises the court in some way that the party does not acquiesce in the ruling or action of the court." Manifestly, this calls for some affirmative declaration or action after the ruling has been made. The question here is whether this test has been met by the plaintiffs. We believe it has not been met. Defendants say: "The record in the instant case establishes beyond cavil that nothing was done by appellants to indicate to the trial court that they were dissatisfied with, or that they did not acquiesce in, or that they intended to make its ruling denying them a jury trial the basis for appellate review. And, as appears from such record, appellants did not say or do anything which gave the trial court an opportunity to reconsider the ruling involved. Consequently there is no room for the application of the 'conduct equivalent to an exception' rule in the instant case and the denial of a jury trial cannot be reviewed by this Court." This position seems to be well taken.

At the time of trial, in reply to the objection of defendants, plaintiffs took the position that they were entitled to a jury as a matter of right, stating: "It would only be should we be denied a jury as a right that I might then make a motion for an advisory jury." The question was argued at length as to what issues might or might not be submitted to a jury. After an adverse ruling by the court counsel for plaintiffs stated: "Now, your Honor, at this time we ask that your Honor impanel an advisory jury and we move the Court to that effect." Whereupon the court stated: "The ruling in connection with the request for an advisory jury is as follows: that the request for an advisory jury upon all issues is denied and that if plaintiffs desire an advisory jury on the issue of damages only, the ruling upon that request will be reserved until after the Court has tried the other issues in the case or tried the issue of liability," and the following discussion took place:

"Mr. Kenny: I do not intend to press further the request for an advisory jury.

I think probably it will be better to proceed, that is, take one bite of the cherry, because we will have the problem of calling witnesses back, and they are working people, and what I propose to do is to put the witnesses on, get them to tell their story and compute their damages so that Mr. Luddy can develop that, and we have subpœnæd several people in the motion picture industry who are busy, who have trips planned, and so probably—this is off the record. (Discussion outside the record.)

"The Court: Then in view of your presently stated position, Mr. Kenny, I think the Clerk's minutes need merely show then that the request for advisory jury upon all of the issues has been denied.

"Mr. Kenny: That is correct."

A comparison of the proceedings in the Grossblatt case, as set out in the opinion, with those outlined above, demonstrates the inapplicability of our holding in the former case, where it was said, 108 Cal. App.2d at page 483, 239 P.2d at page 25: "Defendant made it perfectly clear to the trial court that he did not assent to or acquiesce in the ruling, but, on the contrary, that he considered it erroneous; with the court's knowledge he made what attempt he could in the time allowed him to obtain a writ of prohibition; the court had ample opportunity to reconsider and correct the ruling if it deemed it erroneous; defendant unequivocally indicated, and it appears clear that the court fully understood, he intended to make the ruling the subject of appellate review if judgment went against him." Here there were two requests, (1) for a jury to try the general issue, and (2) for an advisory jury. In denying these the court reserved the right to plaintiffs to ask for an "advisory" jury on the issue of damages only, after other issues had been determined. The request for an advisory jury was in effect withdrawn, and no exception was taken to either ruling, nor was there in the proceedings any conduct upon the part of plaintiffs' counsel which could be deemed the equivalent of an exception.

[3–5] One who by his conduct accepts a ruling of the court under circumstances amounting to acquiescence therein, may not complain of it on appeal. Exceptions serve the purpose of protecting the objector against the claim of acquiescence in adverse rulings. Although § 647, Code of Civil Procedure, specifies the orders and rulings to which exception is deemed to have been taken, denial of a request for a jury trial is not among them. It was therefore necessary for plaintiffs to take an exception. In re Estate of Magerl, 201 Cal. 162, 167, 256 P. 204; Snidow v. Hill, 100 Cal.App.2d 31, 36, 222 P.2d 958; Glogeau v. Hagan, 107 Cal.App.2d 313, 237 P.2d 329; Boone v. Hall, 100 Cal.App. 2d 738–741, 224 P.2d 881. Where affirmative action, consisting of noting an exception, or of conduct equivalent thereto is required, mere silence must be taken as acquiescence when, upon appeal, the ruling is assigned as error. The claim of error will not be considered. We are therefore obliged to hold that the sole point urged by plaintiffs upon appeal is not subject to review.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied CARTER and TRAYNOR, JJ., dissenting.

39 Cal.2d 561

CHAS. L. HARNEY, Inc. v. CONTRACTORS' STATE LICENSE BOARD et al.

S. F. 18224.

Supreme Court of California, in Bank.
Sept. 23, 1952.

Action by Chas. L. Harney, Inc., a general engineering contractor licensed to do specialty contract work against Contractor's State License Board and others for adjudication as to validity of regulations of defendant requiring separate specialty licenses for each of 31 alleged classes of specialty work, unless the work was connected with a general project. The Superior Court, San Francisco County, Franklin A. Griffin, J., entered judgment for defendant on the pleadings, and plaintiff appealed. The Supreme Court, Gibson, C. J., held that when plaintiff was qualified to perform specialty work, but was prohibited from undertaking any contract therefore without obtaining specialty licenses, plaintiff was an interested party entitled to maintain action.

Judgment reversed.

Prior opinion, 238 P.2d 637.

1. Declaratory Judgment 🔑292

Engineering contractor which was qualified under Business and Professions Code to perform specialty contract work, but which was prohibited by rule of Contractor's State License Board, requiring separate license for each of 31 alleged classes of work, from taking any specialty contract without obtaining specific specialty licenses, unless work was part of general project, was an interested party within meaning of statute providing that any interested party may obtain judicial declaration as to validity of any regulation by bringing action for declaratory relief. Business and Professions Code, §§ 7055, 7056, 7058; Code Civ.Proc. § 1060; Government Code, § 11440.

2. Declaratory Judgment 🔑213

Where engineering contractor who was qualified under Business and Professions Code to do all classifications of specialty contract work brought action for declaration as to validity of regulation of Contractor's Licensing Board, requiring separate license for each of 31 alleged classes of specialty work unless performed in conjunction with general project, allegation of bid by contractor on specialty work was not prerequisite to grant of declaratory relief, since it is not required that administrative regulation be violated and that one be subjected to possible criminal prosecution or disciplinary action in order to obtain declaration of rights and duties under administrative regulation. Business and Professions Code, §§ 7055, 7056, 7058; Code Civ.Proc. § 1060; Government Code, § 11440.

3. Declaratory Judgment 🔑201

Statute providing that any interested person may obtain a judicial declaration as to validity of any regulation by bringing an action for declaratory relief manifests legislative intent to permit persons affected by an administrative regulation to test its validity without having to first enter into contracts with third persons in violation of terms of regulations, or subject themselves to prosecution of disciplinary proceedings. Government Code, § 11440.

4. Declaratory Judgment 🔑326

Where complaint was legally sufficient and set forth facts and circumstances showing that declaratory adjudication was appropriate, entry of judgment for defendant on the pleadings was improper.

◆

Gardiner Johnson, Roy D. Reese and Thomas E. Stanton, Jr., San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondents.

GIBSON, Chief Justice.

This appeal was taken from a judgment on the pleadings for defendants in an action for declaratory relief, and the sole question to be determined is whether plaintiff corporation has alleged facts which entitle it to a declaration of its rights and duties.

The complaint alleges that plaintiff is licensed as a general engineering contractor and is qualified to perform all types of construction requiring special skill, including all classifications of "specialty contract work" as defined in the Business and Professions Code.[1] Defendant board has adopted a regulation, rule 732, which subdivides all specialty contracting work into 31 classes and requires a separate license to perform each class of work.[2] The board has informed plaintiff that all general engineering contractors, prior to bidding on, contracting for or performing any class of work referred to in the rule must apply for and obtain the specialty licenses required thereby. The several departments, divisions and agencies of the state and all political subdivisions having to do with public work have been notified that general engineering contractors have no right to bid on, contract for or perform specialty construction work unless they are holders of the appropriate specialty licenses. Plaintiff corporation has never applied for any specialty licenses, and it asks for a declaratory judgment with respect to its right to perform the types and classifications of work referred to in rule 732.

There is no statute which requires licensed general engineering contractors to obtain additional specialty licenses as a condition to performing the types of jobs which are listed in rule 732, and it is not claimed that the rule requires such additional licenses where the general engineering contractors undertake specialty work as a part of a larger project which they are entitled to perform. The rule, however, operates to prohibit a licensed general contractor from undertaking any contract which involves specialty work alone, unless the general contractor first obtains the appropriate specialty license. Plaintiff, by this action in declaratory relief, is seeking to test the validity of the administrative regulation.

Section 1060 of the Code of Civil Procedure provides that an interested person may obtain declaratory relief "in cases of actual controversy relating to the legal rights and duties of the respective parties". Section 11440 of the Government Code, which is a part of the Administrative Procedure Act, provides that any "interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief * * * in accordance with the provisions of the Code of Civil Procedure * * *."

[1–3] Plaintiff corporation is qualified to perform specialty work, but it is prohibited by rule 732 from undertaking any contract therefor without obtaining a specialty license, unless the work is part of a general project. It is, therefore, an interested party within the meaning of the sections cited above. Defendants contend, however, that plaintiff has failed to show that an actual controversy exists because there is no allegation that it has bid or intends to bid on work for which a specialty license is required by the board. Although plaintiff does not specifically allege that it intends to bid on such work, it is clear from a reading of the complaint as a whole that it desires to do so. With respect to plaintiff's failure to allege that it has bid on specialty work, we are of the view that such an allegation is unnecessary. As we have seen, plaintiff as an interested party is entitled under section 11440 of the Government Code to obtain a judicial declaration as to the validity of rule 732 in accordance with the provisions of section 1060 of the Code of Civil Procedure which specifically authorizes a declaration of rights or duties "before there has been any breach of the obligation in respect to which said declaration is sought." Plaintiff, therefore, is not required to violate the administrative regulation and thereby subject itself to possible criminal prosecution or disciplinary action in order to obtain a declaration of its rights and duties. See Bus. & Prof.Code §§ 7028, 7030, and 7090. In this connection, it may be noted that if plaintiff performed the work in violation of rule 732, it would run the risk of being unable to maintain a suit to recover therefor. See Bus. & Prof. Code § 7031. The Legislature, by enactment of section 11440, must have intended to permit persons affected by an administrative regulation to test its validity without having to enter into contracts with third persons in violation of its terms or to subject themselves to prosecution or disciplinary proceedings. See Div. of Adm. Proc., 3d. Biennial Report [1951] p. 18.

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[1] Bus. & Prof.Code, § 7055, provides, "For the purpose of classification, the contracting business includes any or all of the following branches:

"(a) General engineering contracting.
"(b) General building contracting.
"(c) Specialty contracting."

At the time this action was commenced, Bus. & Prof.Code, § 7056, provided, "A general engineering contractor is a contractor whose principal contracting business is in connection with fixed works for any or all of the following divisions or subjects: Irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, railroads, highways, tunnels, airports and airways, sewerage and bridges."

Bus. & Prof.Code, § 7058, provides, "A specialty contractor is a contractor whose operations as such are the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts."

[2] Rule 732 provides in part: "Specialty contractors are classified into the following subclassifications:" then follows a list of 31 classifications, including such classes as "Cement and Concrete"; "Excavating, Grading, Trenching, Paving, Surfacing"; "Sewer, Sewage Disposal, Drain, Cement Pipe Laying"; and "Classified Specialists." See 16 Cal. Adm. Code 732.

[4] Since the complaint is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is appropriate, it was error for the trial court to enter a judgment for defendants on the pleadings. Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 762, 161 P.2d 217, 162 A.L.R. 747.

The judgment is reversed.

SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice.

I concur in the judgment of reversal solely upon the ground that judgment on the pleadings should not have been granted without leave to amend. As I read the complaint, it does not state any facts showing that Harney has a sufficient legal interest to maintain the action. However, the plaintiff should not have been foreclosed from a further attempt to state facts justifying the relief sought. MacIsaac v. Pozzo, 26 Cal.2d 809, 815–816, 161 P.2d 449.

Only an "interested person" may obtain declaratory relief to determine the validity of an administrative regulation. Govt. Code § 11440. The bare allegation that Harney is qualified to do specialty contracting work, without more, does not constitute a showing of any interest in the challenged rule. The plaintiff should be required to allege facts showing its interest. These might be, for example, that it had an opportunity to bid on some particular specialty contracting work but was prevented from doing so by the rule, or that, prior to the promulgation of the rule, it regularly bid on the type of work now covered thereby.

To allow Harney by its present pleading to obtain a determination as to the validity of the rule of the administrative agency in effect provides a convenient method for securing an advisory opinion from this court. This is beyond the scope of the statute and contrary to established judicial procedure.

113 Cal.App.2d 124

PEOPLE v. EVANS.

Cr. 854.

District Court of Appeal,
Fourth District, California.
Sept. 15, 1952.

Rehearing Denied Sept. 30, 1952.

Defendant was convicted in Superior Court of Tulare County, Glenn L. Moran, J., of statutory rape, and he appealed. The District Court of Appeal, Mussell, J., held that evidence of similar acts of defendant with sister of prosecutrix was admissible.

Affirmed as eight counts and reversed as to one.

1. Criminal Law 🔑369(8)

In criminal prosecution involving sexual offenses, general rule is that evidence of similar acts with other persons is ordinarily inadmissible.

2. Criminal Law ⚿371(9)

In prosecution for statutory rape, where evidence showed that prosecutrix, age 14, occupied same room with her older sister, and had witnessed similar acts of defendant with sister, prior to acts alleged by prosecutrix, when sister was about 14 years, evidence of similar acts with sister was properly admitted.

3. Witnesses ⚿372(1)

Questions which have a tendency to show bias of a witness are competent, and great latitude in cross-examination should be allowed in developing existence of such bias.

4. Criminal Law ⚿1170½(5)

In proscecution for statutory rape, district attorney's cross-examination of prosecutrix' mother as to whether she remembered telling attorney that she believed statements made by prosecutrix in her presence, did not constitute reversible error.

5. Criminal Law ⚿1170½(5)
Witnesses ⚿277(2)

In prosecution for statutory rape, district attorney's cross-examination of defendant as to how many attorneys had represented him since prosecution started, although improper, was not reversible error.

◆

J. M. Lopes, Visalia, for appellant.

Edmund G. Brown, Atty. Gen., and Frank Richards, Asst. Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged in an Information with nine counts of statutory rape of Mary Frances Evans, his stepdaughter. A jury trial resulted in verdicts of guilty on all counts and a recommendation of imprisonment in the State prison. Defendant's application for probation was denied and the court ordered the sentences to be served concurrently with the sentence pronounced on the first count contained in the Information.

Appellant's contentions on appeal are that the court erred in admitting testimony of other offenses and that the District Attorney was guilty of prejudicial misconduct.

At the time of the commission of the offense alleged in the first count of the Information, Mary Frances Evans, who was born August 14, 1934, was almost fourteen years of age and was living in a four room house in Porterville with her mother and the defendant. Mary testified that the defendant accomplished many acts of sexual intercourse with her commencing some time in 1948, and that all of these acts of intercourse occurred with her at night in the home; that she had been sharing a room with her sister, Artie; that they had separate beds and that she had seen the defendant in bed with her sister several times. Except as to the charge contained in count seven of the Information, the dates when these acts occurred were fixed by the prosecutrix with reference to a diary which she kept of events occurring during the time involved.

Artie Bell Evans testified that she was born June 8, 1931; that she had lived with her mother, her sister, Mary, and the defendant at the home in Porterville for about fourteen years; that the defendant had sexual intercourse with her several times at the family residence; that these acts of intercourse first occurred when she was about thirteen or fourteen years of age and continued for about a year.

[1] Defendant's principal contention is that the court erred in permitting the sister of the prosecutrix to testify, over objection, as to acts of sexual intercourse with the defendant. The general rule is that evidence of such similar acts with other persons is ordinarily inadmissible. However, there is a well recognized exception to the rule when the evidence in question is relevant to the issues in the case and is otherwise admissible. People v. Carmelo, 94 Cal.App.2d 301, 304, 210 P.2d 538. In People v. Boyd, 95 Cal.App.2d 831, 833, 213 P.2d 724, where the defendant was convicted of a violation of section 288 of the Penal Code, evidence of similar acts was held to be admissible for the purpose of showing defendant's lewd and lascivious intent, his disposition to commit the act charged, the probability of his having committed it and as tending logical-

ly and by reasonable inference to prove the commission of the act charged. And in People v. Zatzke, 33 Cal.2d 480, 483, 484, 202 P.2d 1009, 1011, the court said:

> "Unquestionably evidence of other crimes and degrading practices unrelated to any issue on the trial is inadmissible. Proof of bad character has never been allowed as a step in the proof of guilt on a particular charge. But it is well settled that where such proof is relevant to an issue in the case it is admissible although it also tends to show immoral conduct or the commission of other crimes. 'If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence, simply because it involves the commission of another crime.' People v. Sanders, 114 Cal. 216, 230, 46 P. 153, 157. The reasons for the approved doctrine and the many cases in support thereof are fully set forth in People v. Peete, 28 Cal.2d 306, at page 314 et seq., 169 P.2d 924. See also People v. McMonigle, 29 Cal. 2d 730, 742, 177 P.2d 745."

[2] In the instant case the evidence shows that the defendant married the mother of the prosecutrix when she and her sister were of the ages of three and seven years; that the prosecutrix was the younger of the two girls; that they slept in the same room but in separate beds in their home in Porterville; that when Artie arrived at the age of fourteen years, defendant got in bed with her on several occasions, which were witnessed by the prosecutrix. When the prosecutrix arrived at the age of fourteen, defendant engaged in the same course of conduct toward her. We conclude that under the circumstances shown, the conduct of the defendant with the sister of the prosecutrix, witnessed by her, is relevant to the issues in the case, under the exception to the general rule, and was properly admitted.

[3-5] The alleged misconduct of the District Attorney consists of questions asked by him on cross-examination of Mrs. Evans, mother of the prosecutrix, and the defendant. Mrs. Evans was asked the following question:

> "Q. Mrs. Evans, the only reason you are testifying in behalf of your husband is because you feel guilty about this yourself, isn't it?"

The court sustained an objection to this question and it was not answered by the witness. The following questions were then asked:

> "Q. Well, do you remember telling me, Mrs. Evans, that you did believe what your daughter was saying?"

and

> "Q. Did you tell me that he (defendant) had promised to deed you over the property if you stuck beside him?"

Objections to these questions were overruled. The witness answered the first question in the affirmative and denied having made the statement attributed to her in the second question. Apparently the questions were asked in good faith for the purpose of impeachment and to show bias. Questions which have a tendency to show bias of a witness are not only competent, but great latitude in cross-examination should be allowed in developing its existence. People v. Pantages, 212 Cal. 237, 255, 297 P. 890. The defendant was asked the following question on cross-examination:

> "Q. How many attorneys have represented you since this matter came up?"

An objection to this question was sustained by the court and no answer to it was returned. While the question was improper, as were the questions as to whether Mrs. Evans believed the statements made by others in her presence, it does not appear that a miscarriage of justice resulted or that the asking of such questions constituted reversible error.

The evidence is insufficient as a matter of law to sustain a conviction on the charges set forth in count seven of the Information and the judgment as to that count is reversed. The judgment and order denying a new trial as to the remaining counts in the Information are affirmed.

GRIFFIN, Acting P. J., concurs.

PEOPLE v. LOGAN.*

Cr. 4805.

District Court of Appeal, Second District, Division 3, California.

Sept. 17, 1952.

Rehearing Denied Oct. 1, 1952.

Hearing Granted Oct. 16, 1952.

An accused was convicted in the Superior Court of Los Angeles County, Ellsworth Meyer, J., of assault with a deadly weapon and of robbery of the first degree and he appealed from the judgment and from order denying motion for a new trial. The District Court of Appeal, Wood, J., held that certain photographs were improperly admitted in evidence but that error in receiving such photographs in evidence was not prejudicial to defendant in view of strong case against defendant.

Judgment and order denying motion for new trial affirmed and purported appeal from sentence dismissed.

1. Criminal Law ⚷1023(10)

An accused was not entitled to appeal from sentence.

2. Criminal Law ⚷438

Generally photographs are admissible in evidence in criminal prosecution, within discretion of trial court, for purpose of depicting scene of crime, position and physical condition of victim, and kind of weapon allegedly used.

3. Criminal Law ⚷438, 1169(1)

In prosecution for robbery and assault with a deadly weapon, brought against a defendant who allegedly struck a woman with baseball bat and stole her purse, photograph taken at scene of crime, some time after commission of crime, showing bandaged victim sitting on ground with officers and others, including defendant, standing around, and photograph showing victim lying on stretcher at scene of crime with officers and others, including handcuffed defendant, standing around, and photograph taken at police station showing defendant standing back of counter facing downward at a baseball bat and lady's purse upon counter, were improperly admitted in evidence because of defendant's presence in photographs, but error in receiving such photographs was not prejudicial to defendant under record.

4. Criminal Law ⚷706

Where attorney for defendant charged with assault with a deadly weapon and with robbery brought matter of prior conviction of defendant for assault and battery to attention of jury by cross-examination of police officer, deputy district attorney was not guilty of misconduct in cross-examining defendant's character witnesses relative to their knowledge of previous arrest and conviction of defendant.

5. Criminal Law ⚷736(2)

Whether a confession was voluntarily made without any previous inducement or by reason of any intimidation or threat is a preliminary question addressed to trial court which has considerable amount of discretion in determining it.

6. Criminal Law ⚷531(3)

In prosecution for assault with a deadly weapon and for robbery, substantial evidence indicated that written confession was given freely and voluntarily by defendant, and confession was properly received in evidence, notwithstanding defendant's testimony to effect that police officers had used force, threats and coercion to obtain confession.

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William B. Esterman, Hollywood, and Richard L. Rykoff, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Dan Kaufmann, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

[1] Defendant was accused in count 1 of assault with a deadly weapon and in count 2 of robbery. The jury found defendant guilty as charged in each count, and it found that the offense charged in count 2 was robbery of the first degree. Defendant's motion for a new trial was denied. The notice of appeal recites that defendant appeals from the order denying his motion for a new trial, and from the judg-

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* Subsequent opinion 260 P.2d 20.

ment and sentence. Since an appeal from a sentence is not authorized, the purported appeal therefrom will be dismissed. People v. D'Elia, 73 Cal.App.2d 764, 766, 167 P.2d 253.

Some of appellant's contentions are: that the court erred in receiving three photographs in evidence; the deputy district attorney committed prejudicial misconduct in cross-examination of character witnesses; and the court erred in receiving defendant's alleged confession in evidence.

On May 12, 1951, about 1:40 a. m., police officers Judd and Bunda were in an automobile, traveling east on Venice Boulevard in Los Angeles. As they approached the intersection at Thurman Avenue, they saw a 1935 Ford automobile, without lights, proceeding north on Thurman and approaching said intersection. One of the officers testified that when he first saw the automobile it was about 100 feet from the intersection and traveling about 20 miles an hour. There was a stop sign at the intersection, requiring traffic on Thurman Avenue to stop. The headlights of the Ford were turned on when the Ford arrived at the intersection, and the Ford, without making the boulevard stop, turned to the right and proceeded east on Venice about 20 feet ahead of the police automobile. A red light, which was on the police automobile, was turned on and then the Ford increased its speed to approximately 40 miles an hour. The officers followed the Ford, sounded the horn, and flashed a spotlight. The Ford turned to the right onto Curson Avenue, which is two blocks from Thurman, and when on Curson it turned to the right again and went into a private driveway on Curson and crashed through a wire gate which was about 5 feet high. It then continued along the driveway, swerved to the side of the garage and came to a stop against the south fence in the rear yard. The officers stopped their automobile in the driveway and went into the rear yard. Defendant got out of the right side of the Ford. One of the officers testified that as defendant got out of the automobile he threw an article over the south fence and then ran toward the rear (west) fence; he commanded the defendant to stop and defendant stopped against the rear fence; he asked defendant what was wrong with him and what he had thrown over the fence, and the defendant stated that he was drunk and that he had not thrown anything over the fence. They handcuffed the defendant and, while one officer took him to the police car, the other officer went into the adjoining yard to a place, about 40 feet from the Ford, where he found a lady's red purse. He took the purse to the police car and asked defendant where he got it. The officers testified that defendant replied that he had taken it from a parked automobile. One of the officers searched the Ford and found a baseball bat in the rear of it. The officers took defendant to the police station.

Officer Barclay, who questioned defendant at the station about 2:45 a. m., testified that defendant stated that he took the purse from the seat of an automobile, and then he stated that he took the purse from a woman; he asked defendant if he struck the woman, and defendant said, "Yes"; the defendant stated that he struck the woman with his fist, she did not scream, she fell down and did not get up; he thought he could direct the officers to the vicinity of the happening. Then the defendant and the officers, who arrested him, left the station in an automobile. One officer testified that they went to Venice and Thurman and asked the defendant if he could recognize the place where he struck the woman; defendant replied that everything looked about the same; then they went to a motel, at an address which was found in the purse, but no one was home; they returned to Thurman and drove toward Venice; when they were about 300 feet south of Venice, the defendant stated that a bush on the parkway looked familiar; they saw a lady, Adalyn Hickson, lying on the lawn; she was unconscious; blood was on her head, face, and clothing, and on the sidewalk; defendant said, "She isn't dead, is she? She's dead? Why don't you shoot me"; other officers arrived at the scene and he (witness) heard one of them ask defendant what he hit the lady with, and defendant said that he hit her wth a baseball bat; the other officer asked where the bat was, and the defendant replied that he left it in the rear of his car. Another officer testified that about 3:45 a. m. he removed a baseball bat from defendant's car.

Officer Fitzsimon testified that he had a conversation with defendant on the sidewalk near the place where the victim was lying; he asked defendant if he was responsible for the condition of the woman who was lying on the lawn, and defendant replied, "I guess so," and said, "I don't know what made me do it."

The officers and the defendant returned to the police station about 4:30 a. m. Officer Barclay testified that at 5:30 a. m. he had a conversation with defendant in the presence of officer Fitzsimon and a stenographer; after the conversation the questions and answers were typed by the stenographer; he (officer) handed the typewritten document, consisting of five pages, to defendant, told him to read it, and requested him to sign each page of the document if it was O.K.; defendant signed his name at the bottom of each page of the document; the statements of the defendant in said conversation were made freely and voluntarily; no promises were made to him, no force was used, and no threat was made. In said document, which was signed by defendant, it was stated that the defendant and a bunch of fellows got together and celebrated a wedding; defendant had six or seven drinks of whisky; when defendant left the party he went to his brother-in-law's house to see if his (defendant's) wife had returned from another wedding party; his wife had not returned, and defendant drove toward Culver City; when he was beyond Helms Bakery and on a street, which he thought was Venice Boulevard, he turned around and started back to the place where he was to get his wife; when he was driving down that street he saw this woman (the victim), who had just turned the corner from Venice Boulevard, walking along the sidewalk on a side street; defendant pulled around the corner, at Venice and the side street, and stopped his car; he got out of the car with a baseball bat in his hand, walked up behind the woman and hit her on the head; after she fell he grabbed her purse, and then he ran; when he was driving away he dropped the purse on the floor of the car; he was on Venice when the radio car officers started to chase him; he turned the corner, lost control of the car, could not stop it and could not steer it; he hit something and his car stopped; he jumped out of the car and threw the purse away; he went with the officers to assist them in locating the victim; he did not know exactly the location where the woman was lying; they just cruised the street until he saw something; he recognized some shrubbery, and the location appeared to be the same location where he was before. The officer testified further that the statements of the defendant in the said document were statements which the defendant made in said conversation with the officer.

Officer Brennan testified that at 10:30 a. m. on May 12th he showed the said five-page statement to defendant and asked him if his signature was on each page; defendant replied, "Yes"; he asked defendant if the statement was a true statement of what had occurred, and defendant replied that it was as true as he could remember; he asked defendant to tell again what had taken place; defendant then said, among other things, that he saw a woman go down a side street, he turned down the side street and followed her with his car, parked the car, picked up the bat which he had in the back of the car, hit her on the head, knocked her down and took her purse, then got in the car and drove away; the police car chased him and his car got smashed up; he threw the purse away; the officers caught him and brought him to the station.

Mrs. Hickson testified that on May 12, 1951, about 1:30 a. m., she got off the bus on the north side of Venice Boulevard, walked to the south side of Venice, then walked one block east on Venice to Thurman; then she walked south on the west side of Thurman; she heard light footsteps behind her, and before she had time to look around she was struck; at the time she was struck she was carrying her purse in which there were two social security cards, a billfold, a cosmetic case, a pen and a watch; the purse, exhibit 1, is her purse and she was carrying it when she was struck.

A physician testified that he examined Mrs. Hickson at the hospital; she had an extensive cut in the back part of her head and a fracture of the left side of her skull; and the cut probably was made by something blunt.

Officer Allen testified that he had been assigned to the scientific investigation bureau of the police department as a chemist for about 11 years; he examined the baseball bat, exhibit 3, and found that there was human blood on it about 4 inches from the end, and that there is still evidence of the bloodstain thereon.

Defendant testified that he is 25 years of age; he was employed by Los Angeles County as a playground director; on May 11th, when he left the playground, athletic equipment, including a baseball bat, was in his car; on that day he arrived home about 7:30 p. m., and then waxed the floors of his house; about 10 p. m. he left his home and went to a party that was being given for a friend who was to be married the next day; he had six or seven drinks of whisky at the party; his wife attended a wedding party at another place; he left his party about 1:30 to get his wife, who was to meet him at the home of his brother-in-law; when he arrived at that place his wife was not there; then he drove west on Washington Boulevard to Culver City and then went north to the Helms Bakery on Venice Boulevard; then he went east on Venice Boulevard approximately two miles at which place he noticed the reflection of a red light in his rear view mirror and he became aware that a police car was behind him; at that time he was about 100 feet west of Curson Street and he was traveling about 25 miles an hour; he then tried to stop his car but the brakes failed, and the car continued on at the same speed; he thought of jamming the car against the curb to stop it, but at that time he was at the corner of Curson so he "swung around the corner to put my [his] plan into action"; he swung too wide and a front wheel hit the opposite (or east) curb of Curson, and the impact swung the car back into the street and he went into a driveway on the west side of Curson, through the gate, into the rear of the property, and up against the south fence; he got out on the right side of the car because there was no door handle on the left side; he heard some one say, "Halt," and an officer asked him if he was drunk; the officer placed handcuffs on him, took him to the other officer who was there and they took him to the police car; one of the officers went into the adjacent yard, and when he returned he showed a lady's purse to the defendant and asked him if he had seen it; he (defendant) replied that he had never seen it; the officers took him to the police station; officer Barclay examined the contents of the purse, and gave officer Judd a card with an address on it and told him to take the defendant to that address and see if the person there could identify him; officers Judd and Bunda took him to a motel which was in the general direction of Curson Street but no one was home; then they went north on Thurman toward Venice; while they were on Thurman, officer Judd said that he thought he saw something; then he jumped out of the car and ran across the street, and said something about finding a woman; they took defendant to the place where the lady was lying on the lawn; they told him to stand behind the lady, and then they took some pictures; he (defendant) denied that he hit the lady; they took him to the police station and told him to stand in the corner facing the wall; he stood in the corner for a considerable time, and then photographers came and said they wanted to get some pictures; the bat and the purse were placed upon the desk in front of him, and pictures were taken; then he was required to stand in the corner for 45 minutes; then, after taking his fingerprints, he was required to stand in the corner about 40 minutes; during the time he was in the corner, the officers would not allow him to sit or lie down or get cigarettes or a drink of water; about 5:30 a. m., officer Barclay, after telling him that if he would cooperate he would get the softest bed in the house, took him to another room and, in the presence of officer Fitzsimon and a stenographer, told defendant he was going to take a statement; then the officers began to formulate the questions and type of answer they wanted; defendant was very tired and sleepy at that time; they asked him questions, and he gave answers; about an hour after questioning him, one of the officers placed a document before him and told him to sign it; he signed each of the five pages of the document without reading them. Defendant denied that he told officer Brennan or any one that he saw the woman, or that he followed her, or that he hit her or took her purse.

On rebuttal, officer Judd testified that he drove defendant's car out of the rear yard, and he was able to stop it satisfactorily.

[2, 3] Appellant contends, as above stated, that the court erred prejudicially in receiving in evidence three photographs, exhibits 4, 5 and 6. The photographs, exhibits 4 and 5, were taken by newspaper photographers at the scene of the crime, after the officers and the defendant had been to the police station and had returned to Thurman Avenue. Exhibit 4 shows: (1) the victim sitting on the ground, with a white bandage around her head, with her left hand on her forehead, and with dark spots, which appear to be blood, on her face, hand and clothing; (2) two uniformed police officers and another man standing around and facing the victim; and (3) the defendant standing back of one of the officers, facing directly toward the ground where he is standing (not toward the victim), with his left hand upon his forehead. Exhibit 5 shows: (1) the victim lying on a stretcher (on the sidewalk), with a bandage on her head; (2) five uniformed police officers and two other men standing around and facing the victim; (3) the defendant and a uniformed police officer standing about 10 feet from the victim,—the defendant, facing away from the victim, and having a handcuff on his right hand, and the officer holding the other end of the set of handcuffs. Exhibit 6, which was taken at the police station, shows: (1) the defendant standing back of a counter in a small room, facing downward; and (2) a baseball bat and a lady's purse upon the counter. Appellant argues that the photographs conveyed to the jury inferences as to which no one could properly testify; that exhibits 4 and 5, by depicting appellant close to the bleeding victim, served to connect the appellant with the victim in a graphic manner; that exhibit 6, by "depicting the appellant with a baseball bat in his hands," etched upon the minds of the jurors the connecting link between appellant and the crime; that thereby "a feat which no admissible evidence could accomplish directly was perpetrated in an indirect and backhanded manner." The general rule is that photographs are admissible, within the trial judge's discretion, for the purpose of depicting the scene of the crime, the position and physical condition of the victim, and the kind of weapon allegedly used. See People v. Smith, 15 Cal.2d 640, 649, 104 P.2d 510. The photographs herein do not purport, of course, to be photographs taken during the commission of the crime. The photographs referred to as exhibits 4 and 5 were taken after the defendant had been taken from the police station to the scene of the crime. It was not necessary to have the defendant in those photographs in order to depict the scene of the crime, or the position or physical condition of the victim; and it was not necessary to have him in the other photograph, exhibit 6, in order to depict the kind of weapon allegedly used. (It is to be noted, with respect to that photograph, that the defendant did not have the bat "in his hands," as asserted in appellant's brief.) Under the circumstances here, the photographs should not have been received in evidence. The presence of the defendant in the photographs, under the circumstances here, did not possess any evidentiary value and did not tend to clarify any of the evidence presented. His presence therein was not relevant, and the admission of the photographs in evidence placed an additional and uncalled for duty upon the jurors to disregard the presence of the defendant in the photographs. His presence therein would tend to create confusion in the matter of separating such irrelevant evidence from the relevant evidence therein as to the scene of the crime, the position and condition of the victim, and the kind of weapon allegedly used. The portrayal of such irrelevant evidence in combination with such relevant evidence might tend to excite the indignation and prejudice of jurors and prevent them from dispassionately considering

material evidence. Also, such a portrayal might tend to create an inference that defendant was connected with the crime. The deputy district attorney is not to be commended for offering the photographs in evidence. It cannot be said, however, in view of the overwhelming evidence of guilt, that the error in receiving the photographs in evidence was prejudicial. Even if it be assumed that the photographs created an inference that defendant was connected with the crimes, they added very little to the strong case against the defendant.

Appellant asserts that the argument of the deputy district attorney compounded the error in admitting photographs in evidence. The deputy argued to the effect that one of the pictures shows that the condition of the woman was very bad at the time she was found; another picture shows "everybody at the scene, including the defendant"; and there is the picture of the defendant which was taken later at the police station. The error in receiving the photographs in evidence was not rendered prejudicial by the deputy's argument. Even if it should be assumed that it was misconduct to argue that one of the photographs showed defendant at the scene, it cannot be concluded that a miscarriage of justice resulted. In People v. McCracken, 39 Cal.2d 336, 246 P.2d 913, 920, it was said: "While the misconduct of the district attorney was serious, we cannot, in the face of the overwhelming evidence of defendant's guilt, come to the conclusion that it was so prejudicial as to have caused a miscarriage of justice."

Appellant also contends, as above stated, that the deputy district attorney committed prejudicial misconduct in cross-examining defendant's character witnesses. Defendant's brother and sister testified, in substance, that defendant's reputation for peace and quiet was good.

In cross-examining the sister, the deputy district attorney asked her if she "ever heard of him being arrested." She replied, "Yes." He asked her how many times she had heard about him being arrested. She replied, "When he was in Richmond," and that she did not know what it was but she heard that it was dismissed. He asked her if she heard about him being arrested for anything else. She replied, "No." He asked if she heard about him being arrested for assault and battery in 1942. An objection to that question was sustained.

In cross-examining the brother, the deputy asked him if he had heard that his "brother was convicted of an offense." He replied, "No." The deputy then asked him if he had heard that from any one. He replied that when he (witness) was in San Francisco some fellows said something about defendant having a little trouble in Los Angeles, that he was in a little scrape. The deputy asked him if what he had heard would change his opinion as to defendant's reputation for peace and quiet. He replied, "No."

Appellant argues that the deputy had no reasonable grounds for believing that appellant had been convicted, that the deputy did not act in good faith in asking the questions, and that such cross-examination could leave no doubt in any juror's mind that appellant had been convicted of assault and battery in Los Angeles in 1942. The record shows that prior to the time said character witnesses testified a police officer had testified regarding a conversation he had with appellant after his arrest in the present case; that the attorney for appellant, in cross-examining the officer, asked if the appellant said anything else in that conversation; that the officer replied that he asked appellant if he had been arrested before or if he had done any big time; that appellant replied that he was arrested in 1942 for assault and battery and he had done three months locally, and he was arrested in Richmond but the case was dismissed. Then the attorney for appellant asked the officer if he had inquired concerning the 1942 arrest any further than he had just stated. The officer replied, "No." Then the attorney asked if the appellant had also told the officer that at that time (1942) two policemen had beaten him into unconsciousness. The officer replied, "No." The attorney asked him if appellant said that in 1942 he was beaten up by two policemen who knocked out some of his teeth. The officer replied, "No." The attorney asked if a record indicated where the appellant did the three months. The officer replied that appellant said he did the three months locally.

[4] It thus appears that, prior to the cross-examination of said character witnesses, the attorney for appellant brought the matter of prior conviction to the attention of the jury by his cross-examination of the officer. The deputy district attorney was not guilty of misconduct.

Appellant also contends, as above stated, that the court erred in receiving the alleged confession in evidence. He argues that the circumstances under which the alleged confession was obtained negate its having been given freely and voluntarily and without force. That argument is based upon testimony of the appellant to the effect that prior to obtaining the confession he was roughly handled by officers while handcuffs were on him and as a result his wrists were bleeding; the handcuffs had been applied too tightly; abusive language was used toward him by the officers; there was a continuous course of questioning him from the time of his arrest at 1:30 a. m. until he signed the confession at 6:30 a. m.; he was not permitted to lie down or sleep until after the confession was signed; he had had only a few hours' sleep on the previous night; he was subjected to force and brutality by the police.

[5, 6] Officer Barclay, who was present when appellant made the statements which are in the confession, testified that the statements of defendant were made freely and voluntarily, that no promises were made to him, no force was used and no threat was made; he (officer) made no statement of any kind to induce appellant to sign the statement; he (officer) handed the typewritten statement to defendant, told him to read it, and requested him to sign each page thereof if it was O.K. The officers, who were charged by appellant with using force, threats, and coercion to obtain the confession, denied those charges. Whether a confession was voluntarily made without any previous inducement or by reason of any intimidation or threat "is a preliminary question addressed to the trial court [citations], and a considerable measure of discretion must be allowed that court in determining it." People v. Mehaffey, 32 Cal.2d 535, 548, 197 P.2d 12, 19. As above shown, there was a conflict in the evidence as to the voluntariness of the confession. In the Mehaffey case, supra, it was stated 32 Cal.2d at page 554; 197 P.2d at page 23: "[N]ot only did the trial court upon conflicting evidence determine in the first instance the matter of the free and voluntary nature of defendant's several confessions, but the jury in its deliberations likewise reached the same result in its final analysis of the question under the court's charge, and the issue as so resolved against defendant will not be disturbed on appeal." In People v. Dabb, 32 Cal.2d 491, at page 497, 197 P.2d 1, at page 4, it was said: "It was the function of the jury to weigh the testimony of the defendants and that of the police officers in determining whether the confessions were voluntarily given [citation], and the verdict of guilty shows that the conflict was resolved by the jury against the defendants." There was substantial evidence that the confession was given freely and voluntarily. The court did not err in receiving the confession in evidence. The implied finding of the jury that the confession was voluntarily and freely given will not be disturbed on appeal.

Other contentions of defendant are not substantial and do not merit particular discussion.

The judgment and the order denying the motion for a new trial are affirmed. The purported appeal from the sentence is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

113 Cal.App.2d 128

DIENELT v. MONTEREY COUNTY.

Civ. 15072.

District Court of Appeal, First District, Division 2, California.

Sept. 17, 1952.

Action by Margaret Musser Dienelt against The County of Monterey for declaratory relief. The Superior Court, County of Monterey, Henry G. Jorgensen, J., entered judgment adverse to plaintiff. Plaintiff moved to vacate the judgment, and the motion was denied. Plaintiff appealed from the order denying the motion and from the judgment. The District Court of Appeal, Jones, J. pro tem., held that where maintenance of plaintiff's resort business in residential area constituted a nonconforming use under zoning ordinance construction by plaintiff of 1560 square feet of heated outdoor concrete floor space which was surrounded on three sides by wood and glass walls was an enlargement of the premises in violation of the zoning ordinance.

Affirmed.

1. Municipal Corporations ⟹601(3)

Ultimate purpose of zoning is to confine certain classes of buildings and uses to particular localities and to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected.

2. Municipal Corporations ⟹601(25)

Courts follow a strict policy against the extension or enlargement of nonconforming uses found within an area properly zoned by municipality.

3. Municipal Corporations ⟹601(25)

Where maintenance of plaintiff's resort business in residential area constituted a nonconforming use under zoning ordinance, construction by plaintiff of 1,560 square feet of heated outdoor concrete floor space which was surrounded on three sides by wood and glass walls was an "enlargement" of nonconforming use in violation of the zoning ordinance.

See publication Words and Phrases, for other judicial constructions and definitions of "Enlargement".

Edmond M. Sullivan, Monterey, for appellant.

Burr Scott, Dist. Atty. of Monterey County, Salinas, for respondent.

JONES, Justice pro tem.

This is an action for declaratory relief and arises out of a controversy between the County of Monterey and the plaintiff with respect to the effect of a zoning ordinance of said county upon the property of plaintiff. The case was submitted to the trial court upon a stipulation of facts, and the court found substantially the facts so stipulated. From the facts found the court concluded that the property of plaintiff was being put to a use condemned by the ordinance and entered judgment accordingly. The plaintiff then moved, in accordance with the provisions of sections 663 and 663a of the Code of Civil Procedure, to vacate and set aside the judgment upon the ground that the conclusion reached by the trial court is erroneous and is inconsistent with and not supported by the findings of fact. This motion was denied. The appeal is from the order denying the motion and also from the judgment. For reversal appellant urges the same grounds as were urged in support of the motion. No point is made that the findings are not in accordance with the stipulated facts. As identical grounds are urged for a reversal of the order as are urged for a reversal of the judgment, what is said with respect to the one applies as well to the other.

The property of plaintiff comprises about 50 acres of land situate adjacent to City of Carmel-by-the-Sea and within Monterey County. It is known as "The Mission Ranch". The property is improved with numerous buildings and is devoted to resort purposes, and has been licensed under the Alcoholic Beverage Control Act, Gen. Laws, Act 3796, for the sale of liquors thereon since 1935. Food, lodging, entertainment, sports and recreation generally are furnished to the public by the plaintiff. The property is situated in a residence zone as established by the ordinance in question, and as the court found, "It is agreed that the * * * district in which the premises owned by the plaintiff are situated, does not permit the use and business enterprise to which the plaintiff's premises are devoted."

The validity of the county zoning ordinance is not questioned, and it is conceded that plaintiff's use of the property is a non-conforming use. We are concerned primarily with the question as to whether, under the terms of the ordinance, certain alterations of the premises made by plaintiff effect an expansion of this non-conforming use.

The material provisions of the ordinance as found by the trial court are, that, "Except as otherwise provided in this section, (Section 33) the lawful use of land existing at the time of the adoption of this Ordinance, although such use does not conform to the regulations specified by this ordinance for the district in which such land is located, may be continued; provided, however, that no such non-conforming use shall be enlarged or increased, nor shall any such non-conforming use be extended to occupy a greater area of land than that occupied by such use at the time of the adoption of this ordinance; * * * No existing building designed, arranged, or intended for or devoted to a use not permitted under the regulations specified by this ordinance * * * shall be *enlarged, extended, reconstructed*, or *structurally altered* unless such use is changed to a use permitted under the regulations specified by this ordinance * * *," (Emphasis added.)

By its finding numbered V the court found that: "On or about the first day of August, 1950, adjacent to one of said buildings located on plaintiff's said property, the plaintiff caused to be placed an area of concrete, rectangular in shape, approximately thirty (30) feet by fifty-two (52) feet, having a thickness of approximately four (4) inches, in which concrete are laid pipes for the purpose of providing heat to said concrete area. In addition thereto the plaintiff caused this concrete area to be surrounded on three (3) sides by a wall of wood and glass. There is no roof or covering over this area."

The conclusion which appellant contends is inconsistent with and not supported by the findings of fact is, "Whereupon the court concludes that the construction and maintenance of the concrete area by the plaintiff, together with the surrounding wall of wood and glass, is and constitutes a violation of Section 33 of the so-called Zoning Ordinance of Monterey County, being known as Ordinance No. 568."

[1–3] It cannot be consistently contended that the addition of fifteen hundred and sixty feet of heated floor space would produce a diminution of plaintiff's non-conforming business, or, if, as appellant argues but the findings do not disclose, the improvement was merely the substitution of warmed concrete floor for flagstones, that it was not a *reconstruction* in violation of the zoning ordinance. The ultimate purpose of zoning is to confine certain classes of buildings and uses to particular localities and to reduce all non-conforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected. Any change in the premises which tends to give permanency to, or expands the non-conforming use would not be consistent with this purpose. As is said in County of San Diego v. McClurken, 37 Cal.2d 683, 687, 234 P.2d 972, 975, "Given the objective of zoning to eliminate nonconforming uses, courts throughout the country generally follow a strict policy against their extension or enlargement."

The facts found by the trial court indicate an enlargement of the non-conforming use of the premises by the appellant, and positively establish an expansion in the area devoted to such use. It follows that the conclusion of the trial court that the improvement constitutes a violation of the zoning ordinance of the defendant county is correct.

The order and judgment appealed from are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

113 Cal.App.2d 90

PEOPLE v. KERR.

Cr. 4842.

District Court of Appeal, Second District, Division 1, California.

Sept. 12, 1952.

Prosecution for robbery. The Superior Court, Los Angeles County, entered judgment of conviction and denied defendant's motion for new trial. No appeal was taken. Defendant moved 5½ years later to vacate the judgment of conviction. The Superior Court, Los Angeles County, Clement D. Nye, J., denied the motion, and defendant appealed. The District Court of Appeal, White, P. J., held that a motion to vacate judgment, like a writ coram nobis, would not lie to review judgment of conviction for irregularities which could have been corrected on motion for new trial or by appeal.

Affirmed.

1. Criminal Law ⚷636(9)

Denial of defendant's written request for his release from state penitentiary to appear in person to urge his motion to set aside judgment of conviction on ground that trial court was without jurisdiction was proper.

2. Criminal Law ⚷998

Motions to vacate judgments of conviction are applications for relief in the nature of writs of error coram nobis.

3. Criminal Law ⚷997

Purpose of a writ of error coram nobis is to secure relief when no other remedy exists from a judgment of conviction rendered without consideration of facts which would have prevented rendition of judgment had such facts come to trial court's attention and when no negligence or fault of accused obscured facts and they were not known to court at time of rendering judgment.

4. Criminal Law ⚷997

Writ of error coram nobis does not lie to correct an error of law nor to redress an irregularity occurring at the trial which could have been corrected on motion for new trial or by appeal.

5. Criminal Law ⚷1144(8)

In absence of showing that trial court denied accused statutory right to challenge any of the jurors, District Court of Appeal will assume that trial court complied with statutory requirements. Pen.Code, §§ 1066, 1078.

6. Criminal Law ⚷998

A motion to vacate judgment of conviction cannot be utilized to serve the purposes of an appeal, and when the question raised by the motion to vacate could have been presented on appeal, trial court has no jurisdiction to grant such motion after time for appeal has expired.

7. Criminal Law ⚷998

In prosecution for robbery in which no appeal was taken, defendant's motion to vacate the judgment 5½ years after judgment was entered for irregularities in selecting jurors which irregularities could have been presented on appeal or by motion for new trial was properly denied.

8. Criminal Law ⚷998

Accused cannot accept a jury, remain silent in face of claimed irregularities in its selection and impanelment, speculate on obtaining a favorable verdict, and 5½ years later challenge the irregularities by motion to vacate the judgment, and by so doing he is deemed to have waived the irregularities. Const. art. 1, § 13; U.S.C.A. Const.Amend 14; Pen.Code, §§ 1066, 1078.

9. Criminal Law ⚷998

Delay of 5½ years in filing motion to vacate judgment was unreasonable.

◆

William D. Kerr, in pro. per.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County on May 23, 1946, defendant was charged with the crime of robbery, a felony, committed on or about the 6th day of May, 1946.

The information further charged the defendant with two prior convictions.

On May 27, 1946, the public defender was appointed by the court as counsel for the defendant, and the latter was duly arraigned and waived reading of the information. On motion of defendant, the time to plead was continued to May 29, 1946.

On the last-named date defendant with his counsel present regularly entered his plea of "not guilty as charged in the information". He denied the prior convictions as alleged, and the trial of the cause was set for July 18, 1946.

On the latter date the trial was had by jury, and the defendant, outside the presence of the jury, admitted each prior conviction as alleged in the information. The jury returned a verdict finding defendant guilty of robbery, a felony, as charged in the information, and found the offense to be robbery of the second degree. Defendant made a motion for new trial which was denied. He waived time for sentence, and no legal cause appearing why judgment should not be pronounced, the court sentenced defendant to the state prison for the term prescribed by law.

The court also adjudged the defendant to be an habitual criminal pursuant to the provisions of section 644, subdivision (a), of the Penal Code.

On February 4 and 13, respectively, 1952, defendant filed in the Superior Court a notice of motion and motion to annul, vacate and set aside the judgment on the ground that the trial court was without jurisdiction to render judgment against him, in that he was denied the right to challenge or select any of the jurors that tried the cause and, therefore, he was deprived of his constitutional right to due process of law as guaranteed by the Constitution of the State of California, art. 1, § 13, and the 14th Amendment to the Constitution of the United States. A hearing on said motion was held on March 3, 1952, and the same was denied. From the order denying said motion defendant prosecutes this appeal.

[1] At the time the motion to set aside the judgment was filed appellant made a written request that he be released from the state penitentiary at Folsom for the purpose of appearing in court to argue said motion. This request was denied by the trial court and it is now urged by appellant that his constitutional right to appear and defend in person was denied him. The failure of the trial court to order appellant's presence at this proceeding, brought to review or set aside a judgment, was not error, since there is no constitutional or statutory right of an accused to demand his presence at such a proceeding. People v. Russell, 139 Cal.App. 417, 419, 420, 34 P.2d 203; People v. Martin, 78 Cal.App.2d 340, 343, 344, 177 P.2d 813.

Appellant contends that he was denied the right to challenge or to "select" the jury before whom he was tried, and that because of this the trial court was without jurisdiction to proceed with the trial of the action.

[2–4] Motions to vacate judgments of conviction are applications for relief in the nature of writs of error *coram nobis,* and this is a remedy of narrow scope. The purpose of such a writ is to secure relief where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the accused, was not then known to the court. People v. Gilbert, 25 Cal.2d 422, 442, 154 P.2d 657; People v. Adamson, 34 Cal.2d 320, 326, 210 P.2d 13; People v. Cook, 97 Cal.App.2d 284, 285, 217 P.2d 498. The writ does not lie "to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on motion for new trial or by appeal." People v. Martinez, 88 Cal.App.2d 767, 771, 199 P.2d 375, 378.

Appellant asserts in his brief that he "was denied the statutory right to challenge any of the jurors", and that, "therefore, all the trial proceedings were null and void". He directs our attention to the fact that it does not appear from the record that any challenges were made.

[5] The record is silent as to whether or not the trial court complied with sections 1066 and 1078 of the Penal Code. In the instant proceeding there is no af-

firmative showing that the trial judge neglected to do what the statutes required of him, and it must therefore be assumed that in the court below the requirements of the statutes were complied with. We perceive no good reason why the general rule is not applicable here. Nor does the failure of the minutes to indicate action by the trial court as to the matters covered by sections 1066 and 1078 of the Penal Code afford any evidence of failure to act as against the well-settled presumption we have already referred to. People v. Russell, 156 Cal. 450, 457, 458, 105 P. 416.

[6] Where, as here, the judgment is regular on its face, the motion to vacate it must be denied. Just as a writ of error *coram nobis* cannot be used to review matters that could have been passed upon on an appeal, a motion to vacate cannot be utilized to serve the purposes of an appeal. And, where the question raised could have been presented by an appeal, after the time for appeal has expired, the trial court has no jurisdiction to grant such a motion. People v. Ward, 96 Cal.App.2d 629, 633, 216 P.2d 114. The writ of error *coram nobis* cannot be used to cure irregularities occurring at the trial except under circumstances of extrinsic fraud which actually deprive the accused of a trial on the merits. The writ is issued, as heretofore pointed out, to correct an error of fact existing at the time of trial but unknown to the trial tribunal through no fault of the accused, and which fact, had it been known, would have resulted in a different judgment, or would have prevented the rendition of the challenged judgment. People v. Martinez, supra, 88 Cal.App.2d at page 771, 199 P.2d 375.

[7] The case of People v. Barrett, 207 Cal. 47, 276 P. 1003, relied upon by appellant, does not aid his cause. In the case just cited, an appeal was taken from the judgment and the order denying a new trial. In the instant case, appellant moved for a new trial, which motion was denied. No appeal was taken by him from either the judgment or the order denying his motion for a new trial. He cannot now, some 5½ years after judgment, substitute the writ of error *coram nobis* or a motion to vacate the judgment for the available remedy provided by statute.

[8] Furthermore, an accused cannot be permitted to accept a jury, remain silent in the face of claimed irregularities in its selection and impanelment, speculate on obtaining a favorable verdict, and then, some 5½ years later, challenge those claimed irregularities by a writ of error *coram nobis* or a motion to vacate the judgment. If an accused omits at the proper time to interpose his objections to any irregularities, he is deemed to have waived them. People v. Coffman, 24 Cal. 230, 234.

[9] An additional reason for affirming the order may be found in the unreasonable delay (5½ years) on the part of appellant in filing his motion. People v. Shorts, 32 Cal.2d 502, 512, 197 P.2d 330; People v. Harincar, 49 Cal.App.2d 594, 596, 121 P.2d 751.

For the foregoing reasons, the order appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.

113 Cal.App.2d 231

PEOPLE v. ENOCHS.

Cr. 4820.

District Court of Appeal, Second District,
Division 2, California.
Sept. 24, 1952.

From a judgment of guilty in the Superior Court, Los Angeles County, W. B. Neeley, J., for forcible rape and robbery, defendant appealed. The District Court of Appeal, McComb, J., held there was substantial evidence to support the trial court's finding that defendant forcibly raped and robbed the prosecutrix.

Judgment affirmed.

1. Rape 🔑51(4, 7)

Evidence was sufficient to establish identity of defendant as attacker and to sustain conviction for forcible rape.

2. Robbery ⚷24(1, 3)

Evidence was sufficient to establish identity of defendant as offender and to sustain conviction for robbery.

◆

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of (1) forcible rape and (2) robbery, after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

Facts: On January 16, 1951, the prosecuting witness, a young woman 5 feet, 2 inches tall and weighing about 95 pounds, who had two days previously been released from the hospital, entered a cafe near 4th and Olive streets in Los Angeles for dinner. While eating she was accosted by defendant to whom she had previously been introduced, who bothered her to the extent that she complained to the bartender about defendant's behavior. The bartender asked defendant to leave the prosecutrix alone and defendant said he would.

About 9:30 p. m. the prosecutrix left the cafe and shortly thereafter defendant also left. The prosecutrix took a bus and alighted therefrom at Temple and Edgeward Road which was near her home. After she had walked about a block and one half, defendant, who was about 5 feet 9 inches in height and weighed about 190 pounds, came up behind her, grasped her, and after a struggle she was forced to the ground whereupon he tied a handkerchief over her mouth, told her to "shut up" and then without her consent, she being in fear of him, had an act of sexual intercourse with her.

Afterward he took $22 and a fountain pen from her purse and fled.

Questions: First: *Is there substantial evidence to sustain the trial court's finding that defendant forcibly raped the prosecutrix?*

[1] *Yes.* The prosecutrix testified that defendant grasped her from behind, tied a handkerchief over her mouth, threw her to the ground and while she was in fear of him had an act of sexual intercourse with her. This evidence was sufficient to sustain the trial court's finding that defendant had forcibly raped the prosecutrix.

[2] Second: *Did the evidence support the trial court's finding that defendant robbed the prosecutrix?*

Yes. The prosecutrix testified that defendant, after raping her and while she was still in fear of him, took $22 and her fountain pen from her purse. Clearly this sustains the finding.

Third: *Did the evidence establish the identity of defendant as the attacker?*

Yes. The prosecutrix, who had met defendant previously to the night in question, positively identified him as the perpetrator of the crime. This testimony which was believed by the trial judge was sufficient to sustain this questioned finding. (People v. Newman, 102 Cal.App.2d 302, 305 et seq., 227 P.2d 470.)

Fourth: *Was the testimony of the prosecuting witness improbable?*

No. Testimony of the prosecuting witness was credible, contained no inconsistencies or equivocations, was given in a straight forward and direct manner and was corroborated in many important details by independent evidence, including that of the bartender at the cafe where the prosecutrix had dined earlier in the evening, to the effect that defendant had annoyed her and that the bartender had requested him not to bother the prosecutrix.

The record is free from error and fully sustains the judgment.

The judgment and order are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

CASON v. GLASS BOTTLE BLOWERS ASS'N OF UNITED STATES AND CANADA et al.

Civ. 18957.

District Court of Appeal, Second District, Division 1, California.

Sept. 25, 1952.

As Modified on Denial of Rehearing Oct. 23, 1952.

Hearing Denied Nov. 20, 1952.

Alfred B. Cason brought action against Glass Bottle Blowers Association of the United States and Canada, etc., and others to recover damages for alleged wrongful ouster of plaintiff from his position as president of local union, and for writ of mandate. The Superior Court of Los Angeles County, Allen W. Ashburn, J., entered an order amending satisfaction of judgment nunc pro tunc to provide that it applied only to money award in favor of plaintiff and not to portion of judgment relating to issuance of writ of mandate, and defendants appealed. The District Court of Appeal, White, P. J., held that Superior Court properly amended the judgment.

Order affirmed.

See also Cal.App., 243 P.2d 801.

1. Judgment ⚷898(1)

A satisfaction of judgment, which had been filed and entered, may be set aside by appropriate proceedings for proper cause. Code Civ.Proc. § 473; Civ.Code, §§ 1576, 1578.

2. Judgment ⚷363

Statutory provision that court may, on such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, should be liberally construed to meet ends of justice. Code Civ.Proc. § 473.

3. Judgment ⚷897

Where there were two separate awards in judgment for ousted president of local union in action against national union and union officials, one an award for money and one an award commanding national union to grant ousted president a fair trial before tribunals of national union, and surety company, which was interested only in award for money, prepared satisfaction of judgment, and ousted president signed satisfaction of judgment on advice of attorney that it discharged national union and officials only from their obligation with respect to money awarded, court properly amended nunc pro tunc satisfaction of judgment to provide that it applied only to money award and not to that portion of judgment relating to issuance of writ of mandate. Code Civ. Proc. § 473; Civ.Code, §§ 1576, 1578.

V. P. Lucas, Los Angeles, for appellants.

George D. Higgins, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff was a member and president of a local union affiliated with defendant Glass Bottle Blowers Association, a national labor union. He was suspended from membership in the union by order of the national president thereof. Following subsequent proceedings before the national union tribunals, plaintiff was denied reinstatement therein.

Thereafter, plaintiff commenced an action against defendant national labor union, an affiliated local, and certain union officials. The trial court found that plaintiff had been denied a fair hearing before the union tribunals, and its judgment awarded him damages as against the union and granted a writ of mandate directing his reinstatement. From such judgment defendants appealed, Cason v. Glass Bottle Blowers Ass'n, 37 Cal.2d 134, 231 P.2d 6, 21 A.L.R.2d 1387.

In its decision on appeal the Supreme Court affirmed that portion of the judgment awarding plaintiff damages as against the national union, but modified that portion of the judgment relating to the issuance of a writ of mandate ordering plaintiff's reinstatement, by directing the trial court to strike from the judgment all of the paragraph therein relating to the issuance of said writ of mandate, and to insert in lieu thereof the following: "That the clerk of this court is hereby directed to issue a peremptory writ of mandate commanding defendants to afford plaintiff a full and fair hearing or to reinstate him to membership in the Glass Bottle Blowers Association of the United States and Canada and in Local Union No. 190 thereof." As so modified, the judgment was affirmed.

On June 15, 1951 the remittitur of the Supreme Court was lodged in the office of the clerk of the Superior Court of Los Angeles County where it was entered and docketed on June 18, 1951.

Thereafter, on July 27, 1951 a satisfaction of judgment signed by plaintiff and his attorney was filed in the office of the clerk of the superior court, the pertinent part thereof reading as follows: "The judgment herein having been paid, full satisfaction is hereby acknowledged of said judgment entered March 21, 1949, Book 2020, Page 55, of Judgments, in favor of Alfred B. Cason against The Glass Bottle Blowers Association of the United States, and the clerk is hereby authorized and directed to enter full satisfaction of record in said action."

Following the filing of the aforesaid satisfaction of judgment, plaintiff caused to be issued out of the Superior Court of the State of California, in and for the County of Los Angeles, a writ of mandate directing the defendants, the Glass Bottle Blowers Association of the United States and Canada, James McDonald, Robert Hoye and James Armstrong to appear in Department 10 of the court on September 28 to show cause why they should not reinstate the said Alfred B. Cason or give him a fair trial before the tribunals of the national association.

Because the foregoing writ of mandate did not contain the signature of a judge of the Superior Court of the State of California, but contained the name of the Chief Justice of the Supreme Court of the State of California purportedly authorizing the issuance of the writ, the individual defendants James McDonald, Robert Hoye and James Armstrong filed a notice of special appearance and notice of motion to quash the service of the peremptory writ and to recall the same which said notice and motion were set for hearing September 28, 1951, at the same hour and in the same department as said writ of mandamus directed said defendants to appear.

On September 28, 1951, the return of defendants to the writ of mandate came on for hearing and was continued to October 1, 1951 for further hearing. Upon the latter date a further hearing was had and the matter continued to October 8, 1951.

It appears that these continuances were ordered for the purpose of affording plaintiff an opportunity to file such motions as he deemed advisable. And, on October 4, 1951, plaintiff did file a "Notice of Motion to amend Satisfaction of Judgment *nunc pro tunc* under section 473, C.C.P.," by correcting the satisfaction of judgment to provide that the same applied only to the money judgment awarded plaintiff and not to that portion of the judgment relating to the issuance of a writ of mandate.

The notice of motion was supported by the affidavits of plaintiff and his attorney. Epitomizing the averments of plaintiff's affidavit, he stated therein that on or about July 25, 1951, in company with his attorney, he "went to the office of Attorney Joe Crider, by previous appointment, to collect from the surety company the amount of the money judgment and interest awarded to me by this honorable court;

"That the attorney for the defendants herein, Mr. V. P. Lucas, was not present and Attorney Joe Crider conducted the proceedings and presented the papers for the signature of myself and Mr. Higgins * * *."

Plaintiff further averred "that before signing said satisfaction of judgment, this affiant discussed the matter with his said attorney as to whether the satisfaction of the money judgment would affect the judgment and writ of mandate. After discussing the matter, we decided that since the surety company was not interested in the decree of mandamus and was obligated to pay the civil money judgment only, that the satisfaction of the money judgment would not apply to nor affect the mandamus proceedings;

> "That at the time this affiant signed and acknowledged said satisfaction of judgment, he believed and still believes that said satisfaction applied only, as intended, to the civil money judgment and not to the proceeding and writ of mandamus."

The gist of the affidavit filed by plaintiff's attorney was "That prior to the signing of said satisfaction, the said plaintiff inquired of this affiant if it was proper and 'all right' to sign said satisfaction, and whether the satisfaction of the 'money judgment' would interfere with the writ of mandate, and added, "If it will interfere with my reinstatement in the union and my return to work at the trade, I will not sign anything.'

"That thereupon this affiant told the plaintiff that in the opinion of this affiant, the signing of said satisfaction was for the purpose of satisfying the civil money judgment only and that it did not affect the equitable proceeding decree in mandamus, or the writ of mandate and that it would be safe and proper for him to execute the said satisfaction; that thereupon the plaintiff said, 'O.K., I will sign it,' and accordingly did so."

Following the hearing on October 8, 1951, the court made its order granting plaintiff's motion to amend the satisfaction of judgment *nunc pro tunc* and directed the clerk to note such amendments upon the satisfaction of judgment then on file.

As amended the satisfaction of judgment reads as follows, with the amendments thereto italicized:

> "The *money* judgment herein having been paid, full satisfaction is hereby acknowledged of said *money* judgment entered March 21, 1949 Book 2020, Page 55, of Judgments, in favor of Alfred B. Cason and against The Glass Bottle Blowers Association of the United States and Canada, etc., et al. and the Clerk is hereby authorized and directed to enter full satisfaction of record in said action *as to the money judgment only*."

Appellants earnestly urge that a satisfaction of judgment cannot be amended pursuant to the provisions of sec. 473 of the Code of Civil Procedure, and that the court acted in excess of its jurisdiction.

[1] It must be conceded that the general principle is well settled that a satisfaction of judgment is the last act and end of the proceeding. But, it is also true that a satisfaction of judgment which has been filed and entered may be set aside by appropriate proceedings for proper cause, 15 Cal. Jur. 273. We shall not review the cases cited by appellants because none of them hold that relief may not be obtained under section 473 with reference to a satisfaction of judgment, and in all of them it appeared that the satisfaction was executed after the signer had been fully or fairly advised of its true legal effect.

In view of the nature of the action now before us, we are persuaded that it is at once apparent that the satisfaction here involved was not a sufficient acknowledgment by plaintiff that he had received from the defendants all of the benefits to which he was entitled by the judgment. And defendants were not prejudiced by the action of the court. They took no part in the negotiations leading up to or at the time the satisfaction of judgment was signed. This was handled entirely by the attorney for the surety company who was interested only in satisfying the money award contained in the judgment and for the payment of which the surety company was apparently responsible.

[2, 3] Appellants contend that the only way the satisfaction of judgment could be attacked would be by a motion to set the same aside and that such a motion would have to be supported by an equitable showing. Under the facts of the case at bar we are impressed however, that under the expressed opinion of the courts that sec. 473 of the Code of Civil Procedure should be liberally construed to meet the ends of justice, the court below did not exceed its jurisdiction but exercised a reasonable and legal discretion in consonance with the foregoing views expressed by our courts when considering the applicability of sec. 473 of the Code of Civil Procedure.

As heretofore pointed out, the action taken by the court did not result in prejudice to the extent that appellants were deprived of a substantial right, nor were they placed in a position where it may be said that they were deprived of a fair hearing upon the portion of the judgment having reference to the writ of mandate.

Finally, appellants urge that the affidavits in support of the motion are insufficient in substance to bring the proceeding within the purview of sec. 473 of the Code of Civil Procedure.

In this regard appellants earnestly insist that the mistake of an attorney justifying relief under sec. 473 of the Code of Civil Procedure must be other than that arising from mere ignorance of the law. However, we are not here confronted with a situation wherein the attorney for respondent could readily and easily have ascertained the legal effect of the document in question by taking the trouble to read the provisions of the codes or decisions of the courts as was the case in Kammerer v. Marino, 66 Cal.App. 720, 226 P. 980; Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863; Garroway v. Jennings, 189 Cal. 97, 207 P. 554, and Porter v. Anderson, 14 Cal.App. 716, 113 P. 345, relied upon by appellants.

We are satisfied that the circumstances surrounding the instant case present a situation or condition wherein respondent was unexpectedly placed to his injury, without any default or negligence of his own or his attorney, which ordinary prudence could have guarded against. Under sections 1576 and 1578 of our Civil Code, mistake of law is, under certain conditions made a ground for relief equally with mistake of fact. And we are persuaded that the situation with which we are here confronted presents facts which must be held to amount at least to proof of mistake of law.

In the case at bar there were two separate awards in the judgment—one a money judgment, and the other a writ of mandate commanding appellants to grant respondent a fair trial before the duly established tribunals of the national union. It is certainly a debatable question as to whether the satisfaction of judgment entered herein, prepared by the surety company, was intended to or did discharge appellants from their obligation under the judgment, other than the award therein of a specific amount of money. Where, as heretofore pointed out, appellants will suffer no prejudice, we are persuaded that the jurisdiction of the court to make the challenged order and the sufficiency of the affidavits in support thereof must be sustained, in the light of the announced and approved spirit of liberality that is to be indulged by courts to the end that there may be a complete and just determination of civil actions.

For the foregoing reasons the order appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.

113 Cal.App.2d 186

McGUIRE & HESTER v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 15141.

District Court of Appeal of California,
First District, Division 1.

Sept. 24, 1952.

Hearing Denied Nov. 20, 1952.

Action by McGuire and Hester (a corporation) against the City and County of San Francisco, also known as San Francisco (a municipal corporation), for breach of contract for construction of water supply line. Defendant contended that plaintiff could not recover damages for defendant's failure to acquire rights of way prior to commencement of work as agreed, in view of contractual provision that no payment should be made to plaintiff for hindrance or delay from any cause whether avoidable or unavoidable. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Bray, J., held, inter alia, that such provision did not preclude recovery.

Affirmed in part, reversed in part.

1. Municipal Corporations 🔑374(5)

Provision of contract to construct water supply line that no payment should be made to contractor for hindrance or delay from any cause whether avoidable or unavoidable did not include delay caused by failure of city for whom work was being done to perform its agreement to obtain rights of way prior to commencement of work, and contractor was entitled to damages for the period of standing by while it did not have available to it the necessary right of way, and for additional expense caused by fact that delay caused work to extend into winter.

2. Municipal Corporations ⟹374(5)

Where contractor who was constructing water supply line for city was justified by statements of city's engineer in anticipating momentarily that necessary rights of way would be procured, failure to quit the job when city stopped the work because it did not have the necessary rights of way to enable continuation thereof was not a failure of contractor to minimize damage caused by city's breach.

3. Municipal Corporations ⟹1002

In order to recover interest against municipality, there must be some statutory provision authorizing it.

4. Municipal Corporations ⟹1002

Statute providing that every person entitled to recover damages certain or capable of being made certain by calculation is entitled to recover interest does not apply to municipalities acting in their proprietary capacity. Civ.Code, § 3287.

5. Municipal Corporations ⟹374(5)

Although contractor was entitled to damages for city's breach of contract for construction of water supply line, interest on the amount of such damages from contract completion date to date of judgment was not allowable.

◆

Dion R. Holm, City Atty., A. Dal. Thomson, Public Utilities Counsel, San Francisco, for appellant.

Gardiner Johnson, John A. Sproul, San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from a judgment awarding plaintiff $35,841.24 damages for breach of contract.

Questions Presented.

1. Do the terms of the contract prohibit recovery of damages incurred by plaintiff solely due to defendant's failure to obtain rights of way as agreed?

2. Did plaintiff fail to comply with its legal duty to minimize damages?

3. Was interest on the amount of damages from date of completion of contract recoverable?

General Facts.

[1] The case was tried upon an agreed statement of facts. Plaintiff, a general engineering contractor, entered into an agreement with defendant to construct a water supply line from Baden to Colma. The contract required plaintiff to complete the work within 150 calendar days after the first Monday subsequent to the city's notification to plaintiff to commence work. Specifications for the work were expressly made a part of the contract.

Section 70 provided: "In addition to certain lands which are already owned by the City, the City will acquire the other necessary right of ways or easements for the required construction *prior* to the time the Contractor commences work in the field."[1] On May 13, 1948, defendant notified plaintiff to commence work on the following Monday. Plaintiff had actually commenced work prior to receiving said notice. Due to the failure of the city to procure some of the necessary rights of way until some time after the commencement of the project, thereby delaying its progress and complicating it because the work extended on through the bad weather months of 1948 and 1949, the work was not completed until 182 days after the expiration of the 150 day period. Plaintiff sued for the damage caused it by defendant's delay in procuring the rights of way and for the additional expense caused by the winter weather.

1. Terms of the Contract.

Defendant's main defense is that under the terms of the contract plaintiff's only remedy for defendant's delay in obtaining the requisite rights of way was to apply for and obtain an extension of time to complete the work. The portions of the sections of the specifications upon which it bases its contention follow.

Section 44 provided that should the completion of the work be delayed the commission might grant the contractor additional time for completion, and if the commission believed that such delay was *unavoidable,* as unavoidable was thereinafter defined, the commission would grant such time.

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[1] Unless otherwise stated, emphasis is added by us.

Section 45 defined *unavoidable* delays as including all delays beyond the control of the contractor which he could not have provided against by exercise of care, diligence, etc. Orders of the commission changing the amount of the work, the manner in which it was to be prosecuted, unforeseen delays on the part of other contractors, and delay in securing materials, equipment, etc., due to action of the War Production Board, would be considered unavoidable delays. Delays due to adverse weather conditions would not be considered unavoidable.

Avoidable delays (section 46) would include all delays which might have been avoided by the contractor exercising care, diligence, etc. Reasonable loss of time due to submitting plans to the engineer for approval, interruptions on account of reasonable interference of other contractors and other unavoidable delays which did not delay the completion of the whole work beyond the time specified, would not be considered *unavoidable* delays.

Section 47 provided that whenever the contractor foresaw any delay or when it occurred, he should notify the commission and the engineer so that the commission might prevent such delay or continuance, and determine whether it was avoidable or unavoidable. After completion, the engineer would assume that all delays which had not been called to the commission's attention at the time and not found unavoidable by the commission, were avoidable. The contractor agreed that he would make no claim that any delay not called to the attention of the commission and engineer at the time of its occurrence, had been unavoidable.

Section 48 provides that if the contractor requires an extension he shall file an application therefor in the form therein set forth not later than 20 days before the date of the expiration of the time fixed for the completion of the work.

Section 49 provides: "Apart from granting the Contractor extensions of time for unavoidable delays, *no payment* or allowance of any kind shall be made to the Contractor *by way of compensation or damages on account of any hindrance or delay from any cause* in the progress of the work or any portion thereof, *whether such delay be avoidable or unavoidable.*"

It will be noted that the definitions of "unavoidable" and "avoidable" delays in the contract refer primarily to delays by, or beyond the control of, the contractor and not of the defendant, except to orders issued by defendant's commission changing the amount of work to be done, the quality of material to be furnished or the manner in which the work is to be prosecuted, and to delays due to other contractors. Nowhere is there the slightest suggestion that defendant will be absolved from damages caused by its not keeping its agreement to secure rights of way prior to the starting of the work. To construe that language in section 49, which says, "no payment * * shall be made to the Contractor" for "hindrance or delay from any cause * * * whether such delay be avoidable or unavoidable" to mean that it was thereby intended by the parties that the only remedy for the contractor, when the city broke its solemn agreement to procure rights of way in advance, was for the contractor to obtain an extension of time to do the work, would be to give the clause and the contract as a whole a strained, unreasonable and unfair interpretation. Particularly is this so, when it is remembered that the contract was drawn by defendant's attorney. Considerable portions of it are devoted to outlining what are avoidable and unavoidable delays and this type of delay is not included. Nor is there any provision for extension of time for *avoidable* delays. The delay here was avoidable. As said by the trial judge, Hon. Edward Molkenbuhr, in his excellent opinion: "It cannot be said that it was within the contemplation of the parties that the City would be permitted to delay the securing of right of ways for months, thereby causing plaintiff's expensive and heavy equipment to remain idle, finally causing them to complete the job under extreme adverse weather conditions, and then relegate it to an extension of time only.

If the City had such an intention then the contract should have so provided in explicit, unambiguous language. It is a fundamental rule that stipulations against liability are not favored and are to be strictly construed; * * *."

The cases relied upon by defendant are readily distinguishable from the case at bar. In Hansen v. Covell, 218 Cal. 622, 24 P.2d 772, 89 A.L.R. 670, where the court held the exclusive remedy of the contractor for the delay caused by the acts of the owner was an extension of time in which he might complete the contract, the contract provided, "the time during which the contractors may be delayed by *the acts or neglect of the owner* * * * shall be added to the time of completion." 218 Cal. at page 627, 24 P.2d at page 774. Again in Christhilf v. Mayor and City Council, 152 Md. 204, 136 A. 527, the contract expressly provided that for any delay due to the failure or inability of the city to obtain title to the land required, the contractor "shall be entitled to such an extension of time for the completion of the work as the engineer shall certify * * *" but "he shall have no claim or right of action against the city for damages or loss of profit for such delay * * *." 136 A. at page 528. Likewise, in Manerud v. City of Eugene, 62 Or. 196, 124 P. 662, the contract provided that "The contractor shall not be entitled to damages on account of delay, but if such delay be *occasioned by the city the contractor* shall be *entitled to an extension of time* in which to complete the work * * *." 124 P. at page 663. Rogers v. United States, 99 Ct. Cl. 393, is a case similar to the Manerud case. The specifications specifically provided that the government would not be responsible for any delay in furnishing rights of way, that where there was a possibility of delay the remedy was an extension of time.

Defendant relies greatly upon the fact that section 49 provides that no payment shall be made "by way of compensation or damages on account of any hindrance or delay *from any cause* * * *." In Hill v. City of Duluth, 57 Minn. 231, 58 N.W. 992, the contract had a provision which required the contractor, if he desired an extension of time, by reason of "any hindrance or delay from any cause whatever" to follow a certain procedure. In construing that language the court held that "The phrase 'from any cause whatever' must be held to refer to *any other cause than the act of the city.*" In Milovich v. City of Los Angeles, 42 Cal.App.2d 364, 108 P.2d 960, the time of completion of the contract was delayed by defendant's failure to furnish certain materials as agreed. In an action by plaintiff contractor for damages because of that delay, defendant claimed that extensions of time for the completion of the contract which plaintiff had obtained pursuant to the contract's terms were plaintiff's sole remedy. The court stated, 42 Cal.App. 2d at page 378, 108 P.2d at page 967: "To uphold appellants' contention in this regard would be to give to the language of the contract a construction at variance with equitable principles and to clothe the appellant department with an unconscionable advantage over the contractor, by permitting the former to make amends for its contractual derelictions, delays and neglect by simply extending the time within which the contract could be completed regardless of the financial loss accruing to the contractor. This we cannot do in the absence of a plain, unequivocal intention on the part of the contracting parties, as evidenced by the language of the contract, to restrict the remedy of the contractor to that of obtaining an extension of time." While there was a provision in the contract to the effect that the provision for extensions of time did not exclude the recovery of damages for delay by either party under other provisions in the contract documents, the court in its decision did not rely upon this latter provision. The court distinguished the case from that of Hansen v. Covell, 218 Cal. 622, 24 P.2d 772, supra, cited by defendant here. The court further said, 42 Cal.App.2d at page 377, 108 P.2d at page 967: "It would outrage every semblance of justice, fairness and equity to assume" that the paragraph of the contract which provided for extensions of time for causes beyond the contractor's control foreclosed the contractor from recovering damage sustained by him because of the city's failure to furnish the materials as agreed. The quoted language would apply in this case, were we to hold that "delay from any cause" in section 49 included delay caused by the failure of the city to perform its agreement. "The government should be an example to its citizens, and by that is meant a good example and not a bad one." Cruise v. City and County of San Francisco, 101 Cal.App.2d 558, 565, 225 P.2d 988, 993.

While there were two phases of plaintiff's recovery, one for the period of standing by while the plaintiff did not have available to it the necessary right of way, and the other for the additional expense caused plaintiff by the winter weather, damages for both of which the court allowed, we can see no reason for denying recovery of damages for the second phase any more than for the first phase. Both were damages suffered by plaintiff because of defendant's neglect. Nor is it important whether such neglect was not caused by bad faith on the part of defendant.

2. Duty to Minimize Damages.

[2] Approximately 90 days before what should have been the date of completion defendant stopped the work because it did not have the necessary rights of way to enable plaintiff to continue on. Defendant contends that because plaintiff did not then quit the job, declare the contract breached and sue for its damage, it failed to exercise its legal duty to minimize the damage, citing Restatement, Torts, section 918, and Jegen v. Berger, 77 Cal.App.2d 1, 174 P.2d 489, for the legal duty. The agreed statement shows that plaintiff was justified by the statements of defendant's engineer in anticipating momentarily that the necessary rights of way would be procured. Also it appears that plaintiff's equipment on occasions was moved from location to location, in some instances finding the right of way available but soon depleted, and in others finding none available; also that when it appeared that there would be considerable delay in getting the cemetery right of way, plaintiff moved most of its equipment to Oakland, leaving only such equipment as was necessary to do protective work upon the work which was then partially completed. The statement, too, justifies the court's finding, in effect, that plaintiff did not fail to minimize the damage. For its contention that plaintiff's only remedy for defendant's neglect was to declare the contract breached, defendant cites City and County of San Francisco v. Transbay Const. Co., 9 Cir., 134 F.2d 468, a case in which the work of the contractor was held up because of delays caused by the defendant city and county. Actually that case is authority to the contrary, for the court said, 134 F.2d at page 472: "Thus Transbay might have treated the contract as rescinded, ceased work thereunder, and sued for the value of labor and materials furnished to the date of the breach justifying the rescission. But we agree with Transbay that this was not the only course it might take without waiver of its rights. It might, we think, elect to proceed with the contract, advising the city of its election and reserving its right to claim damages for the unjustifiable delays suffered at the hands of the city. That Transbay in fact elected to pursue the latter course is evidenced by its going ahead with the main project of raising the dam * * *." There plaintiff failed to file his claim under the contract in time and hence could not recover under the first count, and because he had elected to proceed with the contract, it was held he could not recover on the other counts which were based on quantum meruit. The court pointed out, under the authority of a number of cases there cited, that the contractor who is required to do additional work because of the city's acts (if not barred by failure to file his claim on time), may sue for the damage incurred.

3. Interest.

[3] The court allowed interest at 5 per cent on the amounts allowed as damages from April 30, 1949, which was the date of completion of the contract, to date of judgment, amounting to $5,087.77. This allowance of interest was apparently upon the authority of section 3287, Civil Code. However, as said in Department of Water & Power v. Okonite-Callender Cable Co., 9 Cir., 181 F.2d 375, 24 A.L.R.2d 917, arising out of a breach of contract by the Department of Water and Power of the City of Los Angeles, 181 F.2d at page 381: "In

the case of Engebretson v. City of San Diego, 185 Cal. 475, 197 P. 651, it was held that 'in order to recover interest against a municipality, there must be some statutory provision authorizing it.' Cal.Civ.Code, section 3287, which was in effect at the time this case was decided, provides generally that every person entitled to recover damages certain, or capable of being made certain by calculation, is entitled to recover interest. However, the California court in that case held that similar code sections providing generally for interest do not apply to the State or any of its subdivisions. The rule of the Engebretson case was followed in Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 291 P. 839, 71 A.L.R. 161." See also Hopkins v. Contra Costa County, 106 Cal. 566, 39 P. 933. It was contended in the Okonite case that the cited cases dealt with contracts wherein the municipalities were acting in their governmental capacities, whereas the city of Los Angeles in that case was operating its department of water and power in its proprietary capacity, and therefore section 3287 would apply. The court held that the distinction made no difference in the application of the rule.

[4, 5] We find nothing in Irvine v. Reclamation Dist. No. 108, 24 Cal.2d 468, 150 P.2d 428, which supports plaintiff's contention that, contrary to the holding in the Okonite case, section 3287 does apply to municipalities acting in their proprietary capacity. In view of the definite holding in the Okonite case, the decision in Cranford v. City of New York, 2 Cir., 38 F.2d 52, allowing interest against municipalities under a general New York statute is not applicable here. Here interest to date of judgment was improperly allowed. Of course, plaintiff is entitled to interest on the balance of the judgment from the date of entry.

As to the $5,087.77 interest, the judgment is reversed. In all other respects the judgment is affirmed. Plaintiff will recover costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.

113 Cal.App.2d 160

In re WEBER'S ESTATE.

ATHENS MASONIC LODGE et al. v. LEEPER et al.

Civ. 8087.

Sac. 6215.

District Court of Appeal, Third District, California.

Sept. 20, 1952.

Proceeding in the matter of the estate of Frank Weber, deceased, wherein Athens Masonic Lodge and others filed contests of purported will offered for probate by Thomas B. Leeper and others. The Superior Court, Yolo County, C. C. McDonald, J., rendered judgment denying admission of purported will to probate and entered orders denying certain motions and Thomas B. Leeper appealed. The District Court of Appeals, Schottky, J. pro tem., held that evidence warranted jury's verdict that purported will was not executed by decedent.

Judgment and orders affirmed.

1. Wills ⚷312

When a will is contested before probate and either party demands jury trial of any issue as to which the right to a jury trial exists, trial court cannot proceed with any phase of hearing in absence of jury but must impanel jury at outset, and thereupon the proponents of will must make a prima facie showing that will was executed in all particulars as required by Probate Code. Probate Code, § 371.

2. Wills ⚷386

In reviewing sufficiency of evidence in an action involving a will contest, the test to be applied is whether there is any substantial evidence to support findings of jury or trial court.

3. Wills ⚷386

All questions of weight of evidence and credibility of witnesses in will contest are for jury and trial court, and if there is any substantial evidence to support verdict or finding, it cannot be set aside though reviewing court may believe the great preponderance of the evidence was the other way.

4. Wills ⟹386

On appeal from a judgment in a will contest, all conflicts must be resolved in favor of respondent and all legitimate and reasonable inferences indulged to uphold verdict if possible, and when two or more inferences can be reasonably deduced from facts, the court is without power to substitute its deductions for those of the trial judge or jury.

5. Wills ⟹384

On appeal from judgment in will contest all evidence most favorable to respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of the facts, and if the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.

6. Wills ⟹302(1)

Evidence warranted jury's verdict that purported will was not executed by deceased.

7. Wills ⟹297(2)

In will contest, admission of testimony that decedent told witness when decedent was patient in witness' hospital that decedent was leaving his property to a certain person and certain institutions was not error in view of other wills and declarations having been offered by both proponent and contestants and admitted by court for purpose of showing pattern decedent had in mind in disposing of his property.

8. Wills ⟹293(1)

Where execution of will is denied, any evidence tending to throw light on that issue, whether it also shows fraud or conspiracy, is relevant.

9. Witnesses ⟹276

Will contestants could call and interrogate as an adverse witness the person who was named as a coexecutor in contested will and who was a substantial beneficiary thereunder and who was served with copy of the contests and filed answers thereto, even though in his answers he denied the material allegations of contests on ground that he did not have sufficient information or belief to enable him to answer them. Code Civ.Proc. § 2055.

10. Appeal and Error ⟹1024(3)

Second judge's findings, based on conflicting evidence produced at hearing on proponent's motion to disqualify first judge trying will contests from sitting or acting on new trial motion or any further proceedings, that first judge was not during trial of contests or at any other time prejudiced against proponent and was not disqualified, were binding on reviewing court. Code Civ.Proc. § 170.

11. Trial ⟹29(1)
Witnesses ⟹246(2)

Within reasonable limits, it is trial judge's right and duty to bring out facts clearly by questioning witnesses and admonishing counsel not to interrupt witnesses before completion of their answers, so that important functions of judge's office may be fairly and justly performed and in that duty he may not be unreasonably hampered.

12. Trial ⟹305

Parties litigant or counsel should not entertain jurors after the trial.

13. Appeal and Error ⟹928(4)

Under rule requiring appellant to present a record on appeal which will support his claims of error, where record fails to disclose at whose request instructions have been given, it is presumed in support of judgment that instructions complained of have been given at appellant's request.

14. Wills ⟹409

Successful will contestants serving cost bills on proponent of contested will and seeking no judgment for costs against anyone else were not required to serve copy of cost bill upon any or all of the other legatees or devisees under contested will not participating in trial of contests. Code Civ.Proc. § 1033.

15. Wills ⟹409

The statutory requirement that memorandum of costs must be served not later than five days after the verdict does not apply to a will contest where only special issues are submitted to a jury and the judgment must be rendered by the court, but applies only to a case where there is a general verdict. Probate Code, § 373; Code Civ.Proc. § 1033.

16. Wills ⚷409

A cost bill filed within five days after the entry of judgment denying admission of will to probate or admitting a will to probate where a will contest has been tried before a jury is timely. Probate Code, § 373; Code Civ.Proc. § 1033.

◆

John C. Harris, Thomas B. Leeper, Sacramento, for appellant.

Downey, Brand, Seymour & Rohwer, Sacramento, for Masonic Lodge.

J. Clark Benson, San Francisco, and Fontaine Johnson, Sacramento, Chalmers, Cowing & Sans, Woodland, for Shriner's Hospitals.

Busick & Busick, Sacramento, for Oddfellows.

Carl E. Rodegerdts, Woodland, for Beltrami.

Means & Roach, Woodland, for Washington School.

White & Harber, Sacramento, for Sacto. Childrens Home.

SCHOTTKY, Justice pro tem.

Frank Weber, a resident of Yolo County and a large landowner, died on November 17, 1949 at the age of 83. He left an estate of the appraised value of $597,020.28. For the last 20 years or more of his life he roomed and boarded at the Beltrami Hotel in Broderick, Yolo County, the property being owned by Mr. Weber and the hotel being operated by his tenant, Mrs. Irene Beltrami. There were three sons in the Beltrami family, whose names and ages at the time of Weber's death were William, 27; Nichola, 30; and Dino, 32.

About two years prior to his death Weber began to gradually weaken physically, so that during the last seven or eight months of his life he had difficulty in walking alone and usually had someone accompany him and hold his arm so he would not fall. In October, 1947, Weber employed William Beltrami to take care of his books, drive him to his ranches and other places, and during the last year of Weber's life, as Weber's physical condition declined, William Beltrami assisted him to dress and acted as his nurse, companion and general helper, receiving for such services the sum of $200 per month. Weber had never married and left no issue or other heirs.

On November 22, 1949, William Beltrami filed a petition for probate of a will of Frank Weber dated May 27, 1949, which will made specific bequests to three children's homes, three lodges, to the members of the Beltrami family and to several other persons. The residue was left to three children's homes and lodges and William Beltrami was named as executor. Under this will Beltrami would receive approximately $70,000.

On December 8, 1949, appellant Thomas B. Leeper, who had been Weber's attorney for 35 years, filed a petition for probate of a document, dated July 20, 1949, purporting to be a copy of the will of Frank Weber, said petition alleging that the original will had been lost after the death of Weber. Said document made specific bequests to a number of children's and fraternal organizations, to the members of the Beltrami family, to appellant Leeper and a large number of other persons. The residue was left one-half to Leeper and one-half to William Beltrami, who were also named as executors. Under this will appellant Leeper would receive approximately $200,000, and Beltrami approximately $145,000.

Appellant Thomas B. Leeper filed a contest to the will of May 27, 1949, upon the ground that it was executed by Weber while under the undue influence of William Beltrami, and the respondents Athens Masonic Lodge, Shriners Hospital for Crippled Children, and Independent Order of Odd Fellows' Children's Home, who were legatees and residuary legatees under the May 27, 1949 will, each filed a contest of the purported July 20, 1949 will, opposing the probate of said last will on various grounds. However, prior to the trial each contestant dismissed all of the causes of action except the one that the deceased never executed the purported will of July 20, 1949.

[1] It was stipulated by the opposing parties that the contest to the July 20, 1949 will should be tried first, and that in the trial of said contest the order of proof should be as follows: "Proponents of said Will shall first introduce such evidence as they may desire to establish their prima facie case for the admission of said Will to probate. Such evidence shall be presented before the jury, and the witnesses testifying as a part of said evidence shall be subject to cross-examination by Contestants. After Proponents have presented their prima facie case, Contestants shall proceed to present their case, following which Proponents shall introduce such further evidence as they may desire. Opening statements may be made by both Proponents and Contestants prior to the introduction of any of the evidence.

In final argument Contestants shall open and close."

The procedure agreed upon by the parties is substantially in accord with that prescribed by our Supreme Court in the very recent case of Swift v. Superior Court, 39 Cal.2d 358, at page 364, 247 P.2d 6, at page 10, as follows:

> "In the interest of establishing a definite rule of procedure to be followed under such circumstances, we believe that it is appropriate for this court to declare that when a will is contested before probate and either party demands a jury trial of any issue as to which the right to a jury trial exists, Prob.Code, § 371, the trial court cannot proceed with any phase of the hearing in the absence of a jury but must impanel a jury at the outset. Thereupon, the proponents of the will must make a prima facie showing that the will was executed in all particulars as required by the Probate Code."

Following a trial before a jury a verdict was rendered on October 19, 1950, that the will of July 20, 1949, was not executed by Frank Weber, and thereafter, on November 3, 1950, the court made and filed its findings of fact and conclusions of law and its judgment denying admission of the purported will to probate. Proponent Leeper's motions for a directed verdict, judgment notwithstanding the verdict, disqualification of the trial judge to hear the motion for a new trial, and for a new trial were denied and he has appealed from the judgment and from the orders denying each of said motions. He has also appealed from the order refusing to retax costs against him.

[2-6] Appellant has filed an opening brief consisting of 192 pages and has filed no closing brief. Appellant has devoted 160 pages of his brief to his principal contention upon this appeal, which is that the evidence does not sustain the verdict and the judgment entered thereon.

As this court said in Estate of Trefren, 86 Cal.App.2d 139, at pages 141-142, 194 P.2d 574, at page 575:

> "In reviewing the sufficiency of the evidence in an action involving a will contest, the test to be applied by an appellate court is the same as that which applies on other appeals, namely, whether or not there is any substantial evidence to support the findings of the jury or trial court. All questions of the weight of the evidence and the credibility of the witnesses are for the jury and the trial court, and if there is any substantial evidence to support the verdict or finding it cannot be set aside by the reviewing court, although said court may believe the great preponderance of the evidence was the other way. See In re Pessagno's Estate, 58 Cal.App.2d 390, 136 P.2d 644; In re Estate of Downey, 51 Cal.App.2d 275, 124 P.2d 637; In re Estate of Hansen, 38 Cal.App.2d 99, 100 P.2d 776; In re Estate of Miller, 16 Cal.App.2d 141, 60 P.2d 492. As in other cases involving the sufficiency of the evidence to sustain a verdict or finding, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion of the trier of the facts. All conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. When two or more

inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial judge or jury. In re Estate of Bristol, 23 Cal. 2d 221, 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384.

"As was said in the Estate of Teel, supra, at page 527 of 25 Cal.2d, at page 388 of 154 P.2d: 'All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.'"

We shall first summarize briefly the evidence as testified to by the witnesses at the trial.

According to appellant and his witnesses, the following circumstances occurred as to the contested will of July 20, 1949. A few days prior to July 20th, Weber called on H. N. Mitchell, an attorney with offices on the second floor of the Mitau Building in Sacramento, adjacent to appellant, for the purpose of making a new will. He had with him the prior wills of April 5, 1946 and January 22, 1949. The new will was to contain minor changes, and Mrs. Mecum, secretary of Mitchell, made notes on the two former wills to indicate these changes. The July 20th will was then typed by her, no rough draft being made. Thereafter on July 20th, Weber returned to Mitchell's office at some time between 11:00 o'clock and noon. Mrs. Mecum testified:

"Mr. Huston: Mrs. Mecum, do you recall, on the July 20th, if—who accompanied Mr. Weber into Mr. Mitchell's office?

"The Witness: I believe it was the taxi driver.

"Q. And did he just bring Mr. Mitchell—I mean Mr. Weber—into the office and then depart? A. He was gone for a while. And then he came back before Mr. Weber left. He left right away after he brought Mr. Weber in, he helped him sit down, and then he left. And he came back quite a while before Mr. Weber was ready to leave. He stood in the hall for a while. He came in and sat down for a while."

Mr. Mitchell, in his deposition, stated:

"Q. [By Mr. Downey] Now, did Mr. Weber come right through the reception room into your room? A. No, he came to the reception room; somebody brought him upstairs and he came to the reception room, and Louise called me and told me he was there and I got up and went to the door.

"Q. Was he seated in the reception room when you first saw him? A. He, he was standing.

"Q. Was anyone standing there with him? A. Yes.

"Q. Who? A. I don't know, that taxi man.

"Q. And did Mr. Weber come on into your office then? A. Yes.

"Q. Did the taxi man come in with him? A. Yes, he assisted him in. He may not have been a taxi man I do not know."

The will was read aloud in the presence of Mitchell and Mrs. Mecum. Shortly thereafter Yost and Greene arrived, being called as witnesses. Greene read the will and it was again read aloud. There were four witnesses to the will—Mitchell, Mecum, Yost and Greene. They testified that Weber signed and acknowledged the document as his last will, and that they witnessed the will in his presence and in the presence of each other. After the will was executed it was left with Mr. Mitchell for safe-keeping.

Weber died on Thursday, November 17, 1949. Appellant Leeper came to Mr. Mitchell's office on Friday, November 18th. They got out Mr. Weber's will dated July 20, 1949. Leeper had not seen it before, and looked it over and read it. He then told Mr. Mitchell to prepare a petition for probate. Mr. Mitchell was to be the attorney. Mrs. Mecum made a petition for probate on the following Monday. She used the original will in making copies for use in the probate proceedings. On leaving the office Monday night she placed the will in the file and placed the file on Mitchell's desk. On the following day the file was there, but the original will was gone. It has never been found.

Other witnesses corroborated the testimony of appellant and that given by the witnesses to the purported will of July 20, 1949. In all, nine witnesses testified to facts consistent with the claims of appellant. Mr. and Mrs. Dunstan testified that they saw Weber on July 20th and he stated that he had just made a will; witnesses O'Dell and Henderson testified they saw Weber in the Mitau Building on July 20th. It is respondents' position that these witnesses lied. In addition, witnesses Bliss and Lewis testified that the office force in Mitchell's office made an extensive search for the purported will of July 20th. It is respondents' position that this search was a smoke screen.

The principal witness for the contestants was William Beltrami. Under the will proposed by appellant, William would receive cash and properties valued at approximately $145,000. Other members of the Beltrami family would receive approximately $100,000, a total of $245,000 for the family. Under the May 27, 1949 will William would receive approximately $70,000, and other members of the family would receive $135,000, a total of $205,000 for the family.

The appellant made a will for Weber dated August 31, 1948. Under this will as in former wills the appellant received nothing. According to Beltrami, appellant approached him shortly before the August 31st will was executed and suggested they appropriate a large part of the Weber estate to themselves. Beltrami testified this was to be accomplished in the following manner: "He [Leeper] said, 'Well,' he said, 'I am going to take the back page of the August will and connect it on there,' he said, 'I didn't have any trouble getting Mr. Weber to sign two wills the last time he made a will. I will just take that one and put in on there. If he doesn't sign but the one, you keep your eyes on it and you bring me the copy and I will take the back page off and put it on there. I am not going to number the pages. We can do that after while.'" Beltrami did not accept the offer. He testified: "Well, it was pretty tempting. And I went home that night and it bothered me a lot. I didn't sleep, hardly. The following day I went back up to his office. I told him I didn't want to have anything to do with it. I didn't want to take any chance of going to jail just to get hold of Weber's money. He said, 'There is no chance of going to jail. I have put a lot of people in this will to cast off a lot of suspicion. Mr. Weber didn't have any relatives. There is no one to start trouble.' And I said I didn't want to get mixed up in it. And he said, 'You will take $25,000.00, wouldn't you?' and I said, 'I will take $5.00 if it is left to me.' He said, 'Well, I will take care of that.'"

William testified as to Weber's whereabouts on July 20, 1949, the date upon which appellant's witnesses claimed the contested will was executed. Attorney Rodegerdts of Woodland, who had drawn the will of May 27, 1949, had suggested to William that he keep a diary giving the names of the persons Weber saw and when he saw them. William testified that on the morning of July 20th he helped dress Weber and then drove him to the office of Dr. Rovane in Sacramento where Weber had an 11:00 a. m. appointment; that Weber was in the doctor's office for an hour and a half, or more, and then he drove Weber to the Dunstan Ranch about 12 miles east of Sacramento, which ranch was owned by Weber and operated by the Dunstans. His recollection was that they purchased some cup cakes on the way out and arrived at the ranch about 1:00 p. m. and remained there until 3:30 or 4:00 p. m., when they returned to the Beltrami Hotel. William testified positively that Weber was not in either Mitchell's office or Leeper's office at any time on that date. William's testimony was corroborated by Dr. Rovane who brought his office records to show the appointment and the examination made on that day, and also by Rex Hoag, a State pear inspector, who testified to seeing Weber at the Dunstan packing shed about 1:00 p. m. on that day.

Other parts of the testimony will be referred to in the course of this opinion but the foregoing will suffice to show the widely divergent positions taken by the opposing parties at the trial and the sharp conflict in the evidence. It was the position of the contestants that the purported will of July 20, 1949, was fabricated by appellant and that two other wills, dated April 5, 1946 and January 22, 1949, which appellant claimed he prepared, were also fabrications. Appellant on the other hand contended that contestant's case was based almost entirely upon the testimony of William Beltrami and that his testimony was not worthy of belief.

Appellant has made a long and bitter attack upon the testimony of contestants' witnesses, and particularly upon the testimony of William Beltrami. Many statements are made which are not substantiated by the record, or are outside of the record, and it is apparent that appellant has to some extent drawn upon his personal recollection in his reference to asserted facts which do not appear in the record. It is to be noted that at the trial appellant was represented by an able and experienced member of the Woodland bar who conducted the entire trial, but that such counsel does not appear in any of the appeal proceedings, appellant's brief apparently having been prepared by himself.

Appellant's argument in effect is that the testimony of the four persons who testified that they witnessed the execution of the will, and the testimony of the other witnesses tending to corroborate them, was so strong as to render William Beltrami's testimony inherently improbable. If the verdict of the jury had been in favor of appellant his argument would be very helpful in pointing out evidence in support of such a verdict, but in view of the verdict of the jury upon the issue of the execution of the will the testimony pointed out by appellant merely accentuates the conflict in the testimony, and, as hereinbefore pointed out, it was the province of the jury to weigh the evidence. Therefore, we deem it unnecessary to discuss at any great length the argument of appellant as to the insufficiency of the evidence. And after a careful study of the record we are satisfied that the jury was fully justified in reaching its conclusion. For the testimony of appellant's witnesses discloses a situation and circumstances so unusual that even if such testimony were uncontradicted it could rationally be disbelieved by the jury.

[7] Appellant contends that the court erred in admitting testimony of Lorraine Williams to the effect that in November, 1948, when Weber was a patient in her hospital, she had a conversation with him. She testified:

> "In the meantime, he [Weber] told me he was leaving his property to he [William Beltrami] and the Masonic Home, the Crippled Children and the Odd Fellows Home, and that our conversation about that. He never mentioned Mr. Leeper at any time."

The court in overruling the appellant's objection to these declarations stated: "I am admitting them upon the same principle that I admitted those you offered," referring to the fact, as shown by the record, that former wills and declarations of Weber had been offered by both appellant and respondents and admitted by the court for the purpose of showing the pattern Weber had in mind in disposing of his property. There was no error in the admission of this testimony. Appellant himself testified at great length to numerous declarations of Weber which were favorable to him.

[8] Appellant contends also that, in view of the fact that Mr. John Downey, counsel for respondents, in his opening statement charged that appellant had concocted a plot to get the contested will accepted, fraud and conspiracy should have been alleged in the contests, and therefore evidence of fraud and conspiracy was improperly admitted. He asserts that the only issue raised by the amended contests is that the will was not executed. There is no merit in this contention because where the execution of a will is denied, any evidence tending to throw light upon that issue, whether it also showed fraud or conspiracy, would be relevant.

[9] Appellant urges also that the court erred in permitting contestants to call and interrogate William Beltrami under section 2055, Code of Civil Procedure. However,

Beltrami was named as coexecutor of the contested will and was a substantial beneficiary thereunder, and as such was served with a copy of the contests and filed answers thereto. Even though in his answers he denied the material allegations of the contests on the ground that he did not have sufficient information or belief to enable him to answer them, he was still an adverse party within the meaning of said section 2055. There is no merit in this contention.

[10] Following the filing of his motion for a new trial, appellant filed a motion under section 170 of the Code of Civil Procedure to disqualify the trial judge from sitting or acting upon the motion for a new trial or any further proceedings. Appellant in his affidavit in support of said motion alleged that the trial judge upon the invitation of contestants attended a victory celebration banquet at the end of the trial; that in the presence of a large group of people he directed the seating of the jury for the purpose of taking pictures, and that he sat with the jurors, making himself obvious and important, showing himself gleeful and happy that contestants had won. It is also alleged that the judge showed a belligerent attitude in questioning appellant's witnesses and his actions carried the implications that he did not believe them. The affidavit of Judge McDonald denied that the questions asked by him were intended to influence the jury against appellant, or that such questions were prompted by bias and prejudice. As to the dining room incident, the judge's affidavit states: "Further answering said Paragraph 4, alleges that, when the said Judge entered the said dining room, it was crowded; that among the first people he saw therein were Proponent and his counsel; that a long table was set in the center of the said room; that Mr. Fontaine Johnson invited said Judge to sit at said table; that said Judge took a seat at the southeast corner thereof and almost within arm's reach of Proponent and his said counsel; that some of the jurors were seated at other tables; that when the said photograph was taken, said Judge arose and stepped aside and permitted one of said jurors to occupy the chair formerly occupied by him to enable her to be photographed with the other jurors; that said Judge did not discuss the merits of the proceedings in the above matter with any of the jurors or with any of counsel."

Counsel for respondents, in his affidavit in opposition to the motion to disqualify the trial judge, denied that the luncheon referred to was a victory luncheon, but admitted that the Judge, the jury and the clerk and bailiff had been invited to lunch. Said affidavit stated further that the luncheon was in the main dining room of the Woodland Hotel; that the appellant Leeper and his counsel were at a table immediately adjacent to those occupied by the jurors, the Judge, the court attaches and attorneys for contestant; and that there was no discussion whatever of the trial or the facts of the case.

The motion for disqualification was heard by a distinguished trial judge of more than forty years' experience. After weighing the affidavits and hearing the arguments of respective counsel he found that Judge McDonald was not during the trial of the will contests or at any other time prejudiced against proponent Leeper and that he was not disqualified from acting in any proceedings theretofore had or to sit or act in proceedings had thereafter. These findings, based as they are on conflicting evidence, are binding upon us. Ryan v. Welte, 87 Cal.App.2d 888, 198 P.2d 351.

[11] While the record does show that the court did question some of the asserted subscribing witnesses to the contested will, the questions asked were all pertinent to the issue involved, and it does not appear that the trial judge showed any prejudice or bias against appellant. The following language from In re Estate of DuPont, 60 Cal.App.2d 276, at page 289, 140 P.2d 866, at page 873, is applicable to the instant case:

> "Counsel for appellants, Hollingsworth, Reid and Lamb, claim that the trial judge committed prejudicial error in questioning various witnesses, and in admonishing counsel not to inter-

> rupt witnesses before their answers were complete. In this specification counsel for the other appellants expressly refused to join. A reading of the entire record satisfies us that the case was fairly tried, and that the trial judge did not exceed the proper bounds either in seeking to elicit the facts or in maintaining the orderly procedure of the trial. It apparently cannot be repeated too often for the guidance of a part of the legal profession that a judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts. Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed. [Citing cases.] For the same reason the trial judge is not to be unduly or unreasonably hampered in his control and conduct of the trial. Commercial U[nion] A[ssurance] Co. v. Pacific G[as] & E[lectric] Co., 220 Cal. 515, 525, 31 P.2d 793."

[12] As to the luncheon incident, the finding of Judge Moncur was that there was no prejudice or bias on the part of the trial judge, and there is nothing in the record that would justify us in holding that such finding is unsupported. However, we are constrained to state that we believe it would be better to entirely abstain from such functions. The entertainment of jurors by parties litigant or by counsel is not to be commended. It is only natural that a litigant who has lost a case would view such a luncheon as was here given with displeasure and suspicion, with the result that motions to disqualify and possible appeals would result. Counsel and court should at all times be solicitous to preserve not only the substance of justice but every appearance of propriety.

[13] Appellant next contends that three improper instructions were given to the jury. Neither the instructions complained of nor any of the instructions given or refused are a part of the record on appeal and we would be justified in ignoring this contention of appellant, for as stated in Leenders v. California Hawaiian, etc., Corp., 59 Cal.App.2d 752, at page 759, 139 P.2d 987, at page 991:

> "Defendant is in no position to urge error in any of the instructions given by the court. The burden is on an appellant to present a record on appeal which will support his claims of error. Defendant has presented a transcript which fails to show at whose request any of the instructions were given and it must be presumed in support of the judgment that the instructions complained of were given at defendant's request. 2 Cal.Jur. 870."

However, we have examined and analyzed the instructions complained of and are convinced that as applied to the evidence in the instant case they were neither erroneous nor prejudicial.

Appellant's final contention is that the court erred in denying his motion to retax costs. On October 19, 1950, the jury rendered a verdict in favor of contestants. On October 23, 1950, copies of the memoranda of costs of contestant Athens Masonic Lodge and contestant Shriners Hospital for Crippled Children were personally served upon the attorneys for appellant, and on that date originals thereof were filed with the County Clerk. Thereafter, on November 3, 1950, the judgment in this action was entered and notice of entry of judgment was sent to counsel for all of the parties to the action, and on that same date, the same two contestants filed new cost bills and on November 6th contestant Independent Order of Odd Fellows' Children's Home served and filed a memorandum of costs upon appellant.

Appellant argues that the memoranda of costs of Athens Masonic Lodge and Shriners Hospital for Crippled Children served upon appellant on October 23d were defective because those two contestants did not serve these memoranda on all of the nominal proponents of the will. Secondly, appellant argues that the service of new cost bills by all of the contestants within five days after the entry of judgment was ineffective because such memoranda should have been filed within five days after the verdict.

It is contended by appellant that under Code of Civil Procedure section 1033, in all actions where the case is tried before a jury, the memorandum of costs must be served within five days after the verdict upon all parties to the contest.

[14] The cost bills of contestants were served upon appellant Leeper who was the proponent of the contested will. Contestants were seeking no judgment for costs against anyone else and it was not necessary, therefore, to serve a copy of the cost bill upon any or all of the other legatees or devisees under the contested will as they did not participate in the trial of the contest. In Hubbard v. Jurian, 47 Cal.App. 543, 190 P. 1052, the plaintiff contended that the trial court erred in refusing to strike a cost bill where two of the defendants did not serve the cost bill on another defendant as well as on the plaintiff. The court said, 47 Cal.App. at page 548, 190 P. at page 1055:

> "* * * The appellants filing the cost bill did not ask for judgment * * * against their coappellant. We must hold, therefore, that those appellants were not adverse parties to each other, that it was not necessary that the cost bill be served or the Maryland Casualty Company, and that the trial court properly refused to strike it out on that ground." Petition for hearing in the Supreme Court denied.

[15] We do not agree with appellant's contention that the cost bill must be served and filed within five days after the verdict of the jury in a will contest. Section 373 of the Probate Code provides that the jury must return a special verdict upon the issues submitted to them by the court and the court must render judgment either admitting the will to probate or rejecting it. We believe that the provision in section 1033, Code of Civil Procedure, that a memorandum of costs must be served not later than five days after the verdict does not apply to a will contest where only special issues are submitted to a jury and the judgment must be rendered by the court, but applies only to a case where there is a general verdict. In Whiting v. Squeglia, 70 Cal.App. 108, at page 116, 232 P. 986, at page 990, the court said:

> "On the return of the verdict by the jury on the special issues which had been submitted to it, on motion made by defendant for a judgment on the verdict, the final decision of the case was held in abeyance by the court. No formal stay order as such was ever entered as to the judgment which might be applicable to the verdict of the jury on the special issues. Thereafter the court filed its findings of fact in which the several answers to the special issues theretofore made by the jury were adopted by the court as its own findings, to which other findings by the court were added, and it was upon such combined findings that the judgment was ordered. The judgment was not entirely based upon the verdict by the jury, but was founded upon the ultimate findings and the conclusions of law thereon by the court. No complaint is made that defendant's cost bill was not served and filed within five days after 'notice of the decision of the court,' and assuming a compliance with such provision of the statute, it must be held that plaintiffs' objection to the filing of defendant's cost bill is not sustainable."

See, also, In re Estate of Marcus, 16 Cal.App.2d 183, 60 P.2d 469; Bedolla v. Williams, 15 Cal.App. 738, 115 P. 747.

[16] We therefore hold that a cost bill filed within five days after the entry of a judgment denying admission of a will to probate or admitting a will to probate where a will contest has been tried before a jury is within time.

In view of the foregoing the judgment and orders appealed from are affirmed.

VAN DYKE and PEEK, JJ., concur.

113 Cal.App.2d 119

PATTERSON v. ROWE et al.

Civ. 4298.

District Court of Appeal, Fourth District, California.

Sept. 15, 1952.

Action by Lucy A. Patterson against Stillman Rowe, Jr., and another, for injuries. A jury in Superior Court, San Diego County, Dean Sherry, J., returned verdict in favor of plaintiff for $6000, judgment was entered thereon, and plaintiff moved for new trial. The Court ordered new trial on sole issue of damages unless defendants should within ten days file an offer to pay plaintiff the sum of $10,000. Defendants refused to comply with the order, and the Court ordered a new trial on the sole issue of damages, and defendants appealed from both orders. The District Court of Appeal, Mussell, J., held that where evidence of defendants' negligence was sufficient, no evidence tending to show negligence on part of plaintiff had been introduced, and damages awarded were grossly disproportionate to plaintiff's special damages, granting of new trial on sole issue of damages was proper.

Orders affirmed.

1. Appeal and Error 🔑977(3)
New Trial 🔑6

Granting of motion for new trial rests within trial court's discretion, and its determination will not be disturbed by an appellate court unless a manifest and unmistakable abuse of discretion clearly appears.

2. Judgment 🔑343
New Trial 🔑75(1)

New trial may be granted or judgment may be set aside on ground of inadequacy of compensation awarded.

3. New Trial 🔑75(1)

It is trial court's duty in considering motion for new trial to weigh the evidence, to exercise its independent judgment, and to grant new trial if it clearly appears from the evidence that the damages were inadequate.

4. Appeal and Error 🔑979(5)

Only question presented on appeal from order granting motion for new trial on ground of inadequacy of damages awarded is whether trial court abused its discretion in determining that the damages were inadequate.

5. Damages 🔑130(4)

$6,000 to woman driver who was knocked out, suffered injuries including severe sprain of left ankle, chipped heel bone, lacerations of head, left ear, who was confined to bed for seven weeks with severe hip and back pains, and who incurred expenses of $1,044.71 for repair of automobile, $910.19 for medical and hospital services, and $3,150 estimated loss of earnings was inadequate.

6. New Trial 🔑9

In personal injury action in which evidence of defendant's liability was clear and no evidence of plaintiff's negligence was introduced, but damages awarded were grossly disproportionate to special damages, granting of new trial on sole issue of damages was proper.

7. New Trial 🔑161(1)

Court has power to require increase in jury's award over defendant's objections as condition to denying plaintiff's motion for new trial.

◆

Lindley, Lazar & Scales, George A. Lazar, Jr., San Diego, for appellants.

Clarence Harden, San Diego, for respondent.

MUSSELL, Justice.

Plaintiff commenced this action for personal injuries and property damage arising out of an automobile collision. A jury returned a verdict in her favor in the sum of $6,000 and judgment was entered in accordance therewith. Plaintiff then moved for a new trial on the ground that the damages awarded were inadequate and the court ordered a new trial on the sole issue of damages unless defendants should, within ten days, file an offer to pay plaintiff the sum of $10,000. Defendants refused to comply with this order and the court then ordered a new trial on the issue of damages only, on the ground of the insufficiency of the evidence to sustain the verdict in that the damages awarded to plaintiff were grossly inadequate. Defendants appeal from both orders. No appeal is taken from the judgment and no motion for a new trial was filed by the defendants.

Facts

At about 12:30 P.M. on February 23, 1951, defendant Rowe was driving north on highway 101 in Rose Canyon in the City of San Diego when his car skidded, crossed the center island of the highway and struck plaintiff's car which was then being driven by her in a southerly direction in one of the southbound traffic lanes of the highway. In the area where the collision occurred the highway is approximately 55 feet wide, with four traffic lanes, two north and two south, separated by a center island about four feet wide, enclosed in concrete curbings about six inches high, with an asphalt filled center area. There is an upgrade, gradual or sweeping curve for northbound traffic and the speed limit is 55 miles per hour.

Rowe testified that it was raining; that he was traveling north in the lefthand traffic lane at a speed of approximately 50 miles per hour and approaching a curve in the highway when his car started to slide and the rear end swerved to the right; that "the car turned completely around, backwards, and hit the center island sidewise, and there was a terrific jolt at that point, the impact with the curb, and from thereon I have no memory"; that the brakes and tires on his car were in excellent condition.

Plaintiff testified that she was driving the "outbound lane south", when she first saw Rowe's car, then about 600 feet distant; that it was raining and the pavement was wet; that his car was coming "quite fast"; that it started skidding backwards and struck plaintiff's car; that she was driving quite slowly, due to the rain and wet pavement, when Rowe's car started skidding and that at the time of the collision, she had brought her car to a complete stop.

Injuries

Plaintiff was rendered unconscious by the accident and was hospitalized from February 23rd to March 8th. She sustained a severe sprain in her left ankle, lacerations on the left side of her head, left ear and right side. A small chip was broken off her heel bone and at the time of the trial was still in the joint, causing pain with every step. She suffered severe pains in her hip and back and was confined in bed seven weeks after the accident. At the time of trial she was still suffering from pain in her foot, ankle and hip. There is a conflict in the evidence as to the duration of the effects of plaintiff's injuries. However, one physician, called by plaintiff, testified that in his opinion she would be able to go back to work, as a bus operator, in from four to six months.

Special Damages

It was stipulated that the damages to plaintiff's automobile amounted to $1,044.71 and the total medical, hospital and similar expenses were $910.19. In addition, plaintiff alleged loss of earnings in the sum of $3,150, based upon an estimated twelve and one-half months disability and loss of earnings at the rate of $250.00 per month. The total special damages claimed amounted to $5,104.90.

The principal question here presented is whether the trial court abused its discretion in granting a new trial on the sole issue of damages.

[1–5] The granting of a motion for a new trial rests within the discretion of the trial court and its determination will not be disturbed by an appellate court unless a manifest and unmistakable abuse of discretion clearly appears. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338; Brignoli v. Seaboard Transportation Co., 29 Cal.2d 782, 792, 178 P.2d 445; Kauffman v. De Mutiis, 31 Cal.2d 429, 433, 434, 189 P.2d 271. It is also well settled that a new trial may be granted or a judgment may be set aside on the ground of inadequacy of the compensation awarded. Collier v. Landram, 67 Cal.App.2d 752, 759, 155 P.2d 652. It is the duty of the trial court in considering such a motion to weigh the evidence, to exercise its independent judgment and to grant a new trial if it clearly appears from the evidence believed by it that the damages were inadequate, and if the motion is granted, the only question presented on appeal from the order granting such motion is the question of whether the trial court abused its discretion in determining that the damages awarded were inadequate. Belyew v. United Parcel Service, 49 Cal.App.2d 516, 519, 122 P.2d 73; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 17, 146 P. 2d 34. Where, as here, there was a conflict in the evidence as to the extent and permanency of plaintiff's disability and the evidence would justify the award of increased general damages, we cannot say as a matter of law that the trial court abused its discretion in granting a new trial on the insufficiency of the evidence. Since there is substantial evidence to support the conclusion of the trial court as to the inadequacy of damages awarded, its conclusion should not be disturbed by an appellate court. Clifford v. Ruocco, 39 Cal.2d 327 246 P.2d 651.

The next question presented is whether the trial court erred in limiting a new trial to the issue of damages. In Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324, it is said that the power of a trial or appellate court to order a new trial on fewer than all the issues is generally recognized; that the purpose of limited retrial is to expedite the administration of justice by avoiding costly repetition; that such retrials should be granted only if it is clear that no injustice will result; that a request for such a trial should be considered with the utmost caution; that the decision on limiting the new trial appropiately rests in the discretion of the trial judge; that it is presumed that in passing upon the motion he has weighed the evidence and the possibility of prejudice to the defendant and that his decision on appeal will not be reversed on appeal unless an abuse of discretion is shown.

[6] In Clifford v. Ruocco, supra, 39 Cal. 2d 327, 246 P.2d 651, it is said that where the evidence as to the liability is in sharp and substantial conflict and the damages awarded are so grossly inadequate as to indicate a compromise on the issues of liability and damages, the case should be remanded for a retrial on both issues. However, in the instant case the evidence as to the liability of the defendants is quite clear. Defendant Rowe was driving approximately 50 miles per hour upon a wet highway, in the rain, and entering a curve, when he caused or permitted his automobile to climb the curb, cross the raised island dividing the highway lanes and caused his car to turn around so that it headed in a southerly direction and collided with plaintiff's southbound car, which had been brought to a complete stop. Defendant Rowe stated at the scene that he had lost control of his car and that it started spinning. There is no evidence in the record tending to show contributory negligence on the part of the plaintiff. Under the circumstances, defendants' liability was well established and no abuse of discretion is shown.

[7] It is argued that the trial court was without authority to make an order granting a new trial conditioned upon appellant's acquiescence in the trial court's increase in damages. This argument is without merit as the court granted the motion for a new trial and both parties were given the right to a jury trial on the issue of damages. Dorsey v. Barba, 38 Cal.2d 350, 357, 358, 240 P.2d 604.

The orders granting a new trial are affirmed.

GRIFFIN, Acting P. J., concurs.

113 Cal.App.2d 269

JOBE v. HAROLD LIVESTOCK COMMISSION CO. et al.

Civ. 18964.

District Court of Appeal, Second District, Division 3, California.

Sept. 25, 1952.

Action by James M. Jobe against Harold Livestock Commission Company and others to recover for damages resulting from collision between defendant's automobile and plaintiff's autoette. The Superior Court of Los Angeles County, James H. Pope, Judge Assigned, entered judgment on a verdict in favor of defendants, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was insufficient to invoke last clear chance doctrine.

Judgment affirmed.

1. Negligence ⚷33.7

A primary element of last clear chance doctrine is that the one against whom it is asserted had actual knowledge of the perilous situation of the one who claims the benefit of doctrine.

2. Evidence ⚷514(2)

Expert testimony as to speed of automobile involved in collision based on length of skid marks and condition of highway was admissible.

3. Evidence ⚷555

Admission by witness that he could not express any opinion as to defendant's reaction time without making tests was sufficient to exclude opinion of witness as to distance between defendant's automobile and point of accident when defendant realized he should stop where such opinion was based on average time it takes all ages and classes of drivers to apply brakes after realizing they should do so.

4. Negligence ⚷135(6)

To invoke "last clear chance" doctrine, there must be substantial evidence that plaintiff, as a result of his negligence, was in a position of danger from which he could not escape, that defendant had actual knowledge of plaintiff's presence and knew, or in exercise of ordinary care should have known, plaintiff could not escape, and that defendant with such knowledge and by use of ordinary care could have avoided accident but failed to exercise such care.

See publication Words and Phrases, for other judicial constructions and definitions of "Last Clear Chance".

5. Automobiles ⚷244(59)

Circumstantial evidence that defendant could have seen plaintiff's autoette when it entered intersection was insufficient to invoke last clear chance doctrine, in absence of substantial evidence that defendant actually saw autoette.

6. Negligence ⚷122(1)

All the elements which go to make up the last clear chance doctrine must be affirmatively proved.

7. Negligence ⚷122(1)

Actual knowledge of injured person's presence as an essential element of last clear chance doctrine will be inferred where such knowledge is the only reasonable inference to be drawn from the evidence.

8. Automobiles ⚷171(13)

Motorist driving on highway protected by boulevard stop signs was entitled to assume that vehicles upon intersecting streets would not be driven onto through street in the path of vehicles on through street which were so close as to constitute an immediate hazard. Vehicle Code, § 552(a).

9. Evidence ⚷568(5), 589

Mere doubt as to credibility of a party or accuracy of his estimate of distance does not amount to affirmative evidence of any material fact.

10. Automobiles ⚷244(59)

"Last clear chance" doctrine was inapplicable in absence of substantial evidence that defendant, approaching intersection on through street, saw autoette entering intersection, and, in time to avoid collision by exercise of ordinary care, knew, or should have known, that autoette could not escape. Vehicle Code, § 552(a).

11. Trial ⚷260(7)

Refusal to give requested instructions that violation of any section of Motor Vehicle Code which defendant had a duty to obey would constitute actionable negligence and that an act or failure to act below the statutory standard is negligence per se was not error in view of instructions given.

◆

Edward Feldman, Los Angeles, for appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondents.

SHINN, Presiding Justice.

At about 11 o'clock a. m., October 19, 1949, plaintiff James M. Jobe and his wife, Mary, were riding in an autoette driven by Mr. Jobe. An autoette is a small three wheel vehicle operated by batteries. They were proceeding east on Walnut Street in the Bellflower district of Los Angeles County. They reached the intersection of Clark Street where they stopped. They then proceeded into Clark Street until their vehicle came into collision with an automobile of Harold Stiefel, doing business as Harold Livestock Commission Company, driven by his employee, Stiefel, Jr., hereinafter called defendant. Walnut Street is 34 feet wide, Clark Street is 54 feet wide. There was a stop sign on Walnut at the intersection of Clark. The point of the collision was about 9 feet north of the south curb line of Walnut and 13 feet west of the east line of Clark Street. The car of defendant left skid marks 58 feet long before it reached the point of collision and 14 or 15 feet beyond. The autoette came to rest about 5 feet southwest of the northeast curb intersection. Mrs. Jobe met her death in the accident and Mr. Jobe was injured. In this action for damages the verdict and judgment were in favor of Stiefel, Sr., doing business as Harold Livestock Commission Company and Stiefel, Jr. Plaintiff appeals. The points on appeal are the following: Refusal of plaintiff's requested instructions (1) on the doctrine of last clear chance; (2) that violation of sections of the Vehicle Code constituted negligence as a matter of law.

Mr. Jobe, 74 years of age, testified that at the time of the impact he was traveling 4 or 5 miles an hour. He did not see defendant's car. Stiefel, Jr. testified that he was traveling north on Clark Street along the white line between the center line and the east curb between 25 and 35 miles an hour. The weather was clear. He first saw the autoette as it approached the center line of Clark Street. He immediately applied his brakes and veered to the right; he was about 75 feet from the autoette when he first saw it. It was going slowly at that time. The roadway was level and dry. From the time he had crossed Arkansas Street a block south of Walnut he had been looking straight ahead. He did not see the autoette approach or enter the intersection. His brakes were in good condition. A police officer produced by plaintiff as an expert witness stated his opinion that a 1949 Buick (the Stiefel car), traveling on a dry level asphalt highway, which skidded 58 feet up to the point of impact and 15 feet after the point of impact would have been traveling at 39.1 miles per hour; that at 25 miles per hour it could have been stopped in 56.7 feet and at about 30 miles per hour it could have been stopped in 75 feet. The foregoing is all the evidence that had any bearing upon the applicability of the doctrine of last clear chance. We do not believe the court was in error in refusing to instruct in that doctrine. This was one of the unfortunate, but rather common, intersection collisions in which neither driver was alert to observe traffic conditions and approaching vehicles. It was a reasonable conclusion that Stiefel, Jr. was negligent in failing to observe the autoette between the time it left the west curb line and the center line of Clark Street and that Mr. Jobe also was negligent. There was nothing that would have obstructed their views of the intersection.

[1-3] A primary element of the doctrine of last clear chance is that the one against whom it is asserted had actual knowledge of the perilous situation of the one who claims the benefit of the doctrine. Plaintiff's argument upon the evidence, which he contends called for an instruction on the last clear chance doctrine, is based principally upon the expert testimony given by the officer. His estimate of the speed of defendant's car at 39.1 miles per hour, based upon the length of the skid marks and condition of the highway, was a proper use of expert testimony and would have warranted the jury in finding that defendant was traveling at about that speed. Other opinions of the witness were offered in an attempt to prove how far away defendant was from the point of the accident at the time he first saw plaintiff's car. The theoretical distance was computed by taking the length of the skid marks, estimating the speed of the car, and adding the distance a car would travel in three-quarters of a second at the speed indicated by the skid marks. The sum would be the theoretical distance between defendant's car, when he realized he should stop, and the point of the accident. The witness testified that three-quarters of a second

is the "reaction time," or the average time, it takes all ages and classes of drivers to apply their brakes after realizing they should do so. He did not explain the basis of this assumption of fact, nor whether it was based upon tests of drivers who knew or those who did not know they were under observation for the purpose of testing their reflex actions. He did testify, however, that he could not express any opinion as to defendant's "reaction time," without making tests. This was sufficient to have excluded the opinions of the witness which assumed a theoretical time within which defendant would have applied his brakes.

[4] In order to warrant an instruction on the last clear chance doctrine there must have been substantial evidence of the following: (1) Plaintiff, as a result of his negligence, was in a position of danger from which he could not escape; (2) defendant had actual knowledge of plaintiff's presence and knew, or in the exercise of ordinary care should have known, plaintiff could not escape; (3) with such knowledge defendant, by the use of ordinary care, could have avoided the accident but failed to exercise such care.

There was evidence of plaintiff's negligence; he either did not look for approaching vehicles as he drove into the intersection or did not look carefully, and did not see defendant's car. There was evidence that defendant knew of plaintiff's hazardous position and it could have been inferred that he realized or should have realized plaintiff could not escape from it. Defendant made a determined effort to stop. He was not relying upon plaintiff's stopping or clearing the intersection. We shall assume this was sufficient to supply the second element.

[5–8] We have narrowed our case down to the third question involved, namely, was there substantial evidence that defendant was far enough away from the point of the accident to have been able to avoid the collision after discovering that he should stop or turn aside, or, in other words, by reason of such distance did he have a last clear chance to avoid it in the exercise of ordinary care. We have to look to the evidence, direct and circumstantial, as to the location of plaintiff's car when defendant first saw it. The only direct evidence was that of defendant. The only circumstantial evidence was that defendant could have seen plaintiff's car when it entered the intersection. This was not sufficient. It was necessary that there be substantial evidence that defendant actually saw the car. All the elements which go to make up the last clear chance doctrine must be affirmatively proved. Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663. There are situations in which actual knowledge will be inferred because it is the only reasonable inference to be drawn from the evidence, and in such situations it is held that the person charged had actual knowledge because he must have seen the other vehicle, or the pedestrian, as the case may be. Selinsky v. Olsen, 38 Cal.2d 102, 237 P.2d 645, was such a case. A car pulled out from the curb and remained stationary for about a minute with a stalled motor. The "must have seen" rule was applied. Plaintiff cites the Selinsky case but does not point out wherein it applies, nor how the rule can be applied to an intersection collision case between two moving vehicles in the absence of circumstantial evidence sufficient to prove not merely that the accused driver could have seen the other vehicle but that he could not have failed to see it. There was no such circumstantial evidence here. Defendant was on a highway protected by boulevard stop signs. He had a right to assume, initially, that vehicles upon intersecting streets would not be driven onto Clark Street in the way of vehicles on the latter street which were so close as to constitute an immediate hazard. Vehicle Code, § 552(a). This was merely a circumstance which tended to excuse him from exercising the vigilance that would be expected of him if he had not been on a through highway, and to explain his failure to see the autoette as it entered the highway. The small size of the autoette was a fact to be considered. Among the many classes of motor vehicles, large and small, which are commonly encountered on the streets and highways, autoettes are but miniature or midget cars. They are unusual, and manifestly do not attract the same attention as would a larger car, nor is their presence to be as readily anticipated. People do not normally fail to take measures to avoid injury to themselves or others after they have discovered their danger, and have it within their power to escape from it. Finally, there was the fact that defendant did make a determined effort to stop and turn aside. All these considerations tended to disprove, rather than to prove, the claim that defendant wilfully or recklessly failed to use all available means to escape from the danger.

[9] Plaintiff says that under the formula of his expert witness for computing the distance traveled by defendant's car after he realized he should stop, "the jury could have formed the conclusion that defendant Stiefel was a greater distance away from plaintiff's vehicle than he testified," that he saw plaintiff's car enter the intersection, and therefore, "had a greater opportunity to avoid the accident and could have done so by exercising ordinary care." The argument merely points out that plaintiff's car could have been seen as it entered the intersection, which does not supply proof of actual knowledge of its presence. Moreover, the theory itself was nebulous, and even according to the witness was inapplicable to defendant, since it assumed the unknown factor of the speed of defendant's reflex actions. But in any event, the argument is unavailing. It only supposes an interval of time within which defendant would have traveled a theoretical distance before he normally would have applied his brakes, and is entirely consistent with the view that he applied them as quickly as he could within his supposed capabilities. Plaintiff has no other theory to support his argument that there was evidence from which the jury could have found that defendant had a last clear chance to avoid the accident. We are unable to discover any such evidence. In view of the fact that defendant did realize his danger and made a determined effort to stop, it would be wholly illogical and unreasonable for the jury to have found upon the circumstantial evidence that there was a considerable interval of time during which defendant realized the danger and made no effort to avoid the accident. Mere doubt as to the credibility of defendant or the accuracy of his estimate of distance would not amount to affirmative evidence of any material fact. An instruction on the doctrine of last clear chance would have been an invitation to the jury to speculate as to the existence of an essential fact of which there was no direct or circumstantial evidence.

Plaintiff cites our opinion in Hopkins v. Carter, 109 Cal.App.2d 912, 241 P.2d 1063 as support for his contention that a last clear chance instruction should have been given. Defendant's counsel say the case has caused "considerable bewilderment" among attorneys, themselves included. The misunderstanding of the import of our opinion on the part of counsel seems to be mutual. In that case the defendant observed each movement of the plaintiff's car and the jury would have been warranted in finding there was a degree of wilfulness in his increasing his speed instead of slowing down or stopping. For that reason refusal of the instruction was held to be prejudicial. Since the facts of that case bear no resemblance to those of the instant case, our former holding neither supports the contentions of the plaintiff here, nor contravenes those of the defendant.

[10] If the last clear chance rule has application to the present case it would apply in every intersection collision case where it could be said that neither party, in the exercise of ordinary care, could have anticipated the accident in time to avoid it. The defense of contributory negligence would be done away with in such cases. Upon this point we refer to the opinion in Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 246 P.2d 663, and the cases there cited. There was no error in refusing to give the last clear chance instruction.

[11] Plaintiff offered two general instructions to the effect that violation of any section of the Motor Vehicle Code, which

defendant had a duty to obey, would constitute actionable negligence, and that "an act or failure to act below the statutory standard is negligence *per se* or negligence as a matter of law." The court refused these instructions. An examination of the instructions given satisfies us that the jury was fully and fairly instructed and that it was not necessary to give the two instructions that were refused.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

113 Cal.App.2d 175

CHRISTENSEN v. HARMONSON.

No. 15213.

District Court of Appeal, First District, Division 1, California.

Sept. 23, 1952.

Hearing Denied Nov. 20, 1952.

Martin P. Christensen brought action against Doris Joyce Harmonson to recover for damages and injuries sustained in automobile collision. The Superior Court, Alameda County, H. A. Woolsey, J., entered a judgment for defendant, and plaintiff appealed. The District Court of Appeal, Bray, J., held that whether defendant was negligent was for jury, and that evidence was sufficient to support implied finding that plaintiff was contributorily negligent.

Judgment affirmed.

1. Automobiles 🔑245(14)

In action to recover for injuries and damage to automobile of plaintiff when it was struck at intersection by on-coming automobile of defendant as plaintiff attempted a left turn, whether defendant was negligent in not staying on her right side of street was for jury. Vehicle Code, § 525.

2. Automobiles 🔑244(43)

In action to recover for injuries and damage to automobile of plaintiff when it was struck at intersection by on-coming automobile of defendant as plaintiff attempted a left turn, evidence was sufficient to support implied finding by jury of contributory negligence on part of plaintiff.

3. Automobiles 🔑245(25)

In action to recover for injuries and damage to automobile of plaintiff when it was struck at intersection by on-coming automobile of defendant as plaintiff attempted a left turn, whether defendant violated statutes relating to a motorist driving while under influence of liquor, was for jury. Vehicle Code, §§ 501, 502.

4. Appeal and Error 🔑852

Where last clear chance doctrine was not suggested to jury in automobile collision case, and no instructions were requested or given on such doctrine, doctrine could not be considered for first time on appeal.

5. Automobiles 🔑157

Motorist could not be held liable in automobile collision case merely because she drank intoxicating liquor before collision, if liquor did not affect her driving in any appreciable degree, and fact that she drank the liquor should not bias or prejudice jury. Vehicle Code, §§ 501, 502.

6. Automobiles 🔑242(1, 7)

In an automobile collision case, evidence that at time of collision defendant motorist was under influence of intoxicating liquor raises a presumption of negligence and shifts to defendant burden of going forward with evidence to show that fact that defendant was under influence of intoxicating liquor was not a proximate cause of collision. Vehicle Code, §§ 501, 502.

7. Automobiles 🔑242(1)

The driving of an automobile by a motorist while he is under the influence of intoxicating liquor is presumptively a lack of ordinary care.

8. Appeal and Error 🔑1064(1)
Automobiles 🔑246(16)

In action to recover for injuries and damage to automobile of plaintiff when it was struck at intersection by on-coming automobile of defendant as plaintiff attempted a left turn, instruction which in effect told jury that before jury could consider effect of defendant's driving automobile after indulging in intoxicating liquor, jury must first find that drinking itself amounted to want of ordinary care, was erroneous, but was not reversibly erroneous, where there was ample evidence on which jury could, and probably did, find plaintiff guilty of contributory negligence. Const. art. 6, § 4½.

9. Automobiles ⚷246(60)

In automobile collision case, instruction that the legal position of a defendant who carries public liability insurance is no different from that of a defendant who carries no such insurance, and fact that defendant carries such insurance does not relieve plaintiff of burden of proving liability, was not erroneous, as contended by plaintiff, even though fact that there was insurance was brought out by defendant in cross-examining plaintiff.

10. Appeal and Error ⚷852

Where automobile collision case was tried on theory of contributory negligence, and no intimation was made in trial court that comparative negligence rule should be applied, District Court of Appeal on appeal would not consider plaintiff's contention that rule of comparative negligence is applicable within the state.

◆

Charles W. Fisher, Oakland, Augustin Donovan, Louis B. DeAvila, Oakland, for appellant.

Brown, Rosson & Berry, Oakland, for respondent.

BRAY, Justice.

Plaintiff appeals from a judgment in favor of defendant in an action for personal injuries and for damages to an automobile, arising from a collision between two automobiles.

Questions Involved.

1. Was there any evidence of negligence on the part of defendant and contributory negligence on the part of plaintiff?

2. Were the instructions (a) on driving while under the influence of intoxicating liquor, and (b) on insurance, erroneous?

3. Should this court apply the doctrine of comparative negligence?

Facts.

Plaintiff was driving southerly on Piedmont Avenue in Oakland, and was in the process of making a left turn at Montell Street, which intersects the easterly side of Piedmont Avenue. Plaintiff testified that, intending to turn left, he stopped at a point in the intersection about 30 feet past its northerly boundary, about 28 feet from its southerly boundary and on his right side of the imaginary center line between the Piedmont Avenue car tracks. He intended to enter a parking lot at the southeasterly corner of the intersection. He made a left turn signal, was pointed in a 45 degree angle headed toward that lot, and stopped west (his right side) of the middle of the street to let defendant pass. He saw defendant's car about 75 or 100 feet away. She, however, drove straight down the middle of the street with her car partly on her wrong side of the street and ran into his car. Two of plaintiff's witnesses testified they noticed defendant's car going down the center of the street at about 40 miles an hour, increasing its speed. Four witnesses testified that defendant appeared to be drunk. She pleaded guilty to a criminal charge of driving on the wrong side of the street.

Defendant testified she was driving north on Piedmont Avenue on her right side of the street. It had been raining and the pavement was wet. She saw plaintiff's headlights about half a block away. She saw no left turn signal. When she was about two car lengths away she became aware that plaintiff's car was making a left turn. She was going about 20 to 25 miles an hour. Assuming that plaintiff would complete his turn, she pulled to the left, only about 2 feet from the straight course. Plaintiff's car was broadside to her and approximately a quarter of it over the imaginary center line. When she saw he was stopped she put on her brakes. Her car skidded into plaintiff's car. She was knocked unconscious. Within approximately two hours before the accident she had three drinks of whiskey, two before and one after dinner. In her deposition she stated she had three or four. She was "very slightly" conscious of any degree of intoxication, although she experienced no difficulty in driving up to the point of the accident. The skid marks made by her car indicate that she was straddling the imaginary center line of the street. They started 82 feet south of the south curb line of Montell Street. For the first 52 feet they were in a straight line, then they veered to her right in a sort of arc for about 32 feet.

1. Sufficiency of the Evidence.

[1] Of course, we have no way of knowing the basis upon which the jury arrived at a defendant's verdict. Certainly there is ample evidence upon which it could have found defendant negligent. Plaintiff contends that the evidence as a matter of law demonstrates this, and also that plaintiff was not contributively negligent. Although the evidence of defendant's negligence is strong, we cannot say as a matter of law that she was negligent. Nor can we say as a matter of law that plaintiff was not. These were questions for the jury to determine.

[2] Plaintiff gave at least four versions of the accident. Immediately after it occurred he stated to the police officer that he was driving approximately 15 miles an hour and on seeing defendant's car approaching he drove to his right as near as possible to the parked cars to avoid the oncoming car, and that just before the collision defendant swerved into the front of his car. To an investigator, the next day, he stated that he was going about 20 miles an hour and as defendant's car approached, he tried to turn to the right but could not turn quickly because one of his wheels was on the car track; that he was not making a left turn but was headed south. The day after that he told the same witness that he was planning a left turn into the parking lot and stopped his car on a 45 degree angle in the center of the street; that a car to the right of defendant's car forced defendant into the middle of the street so that she hit him. At the trial he denied that any part of his car was over the center of the street or that any car forced defendant into him. A police officer testified that two days after the accident plaintiff came to the Police Department and stated he wished to change his statement regarding the accident, that he was actually making a left turn when it occurred and the reason he denied making such a turn to the officer at the scene was to avoid responsibility for the accident. At a former trial, in his deposition, and on the stand at this trial, his testimony varied as to the position of his car, its angle, how many stops he made, and in other particulars. We cannot say that as a matter of law he was or was not contributively negligent. Defendant's evidence, coupled with the contradictions in plaintiff's testimony and statements, was sufficient to support the implied finding of contributory negligence.

[3] Plaintiff contends that defendant in addition to violating sections 501 and 502 of the Vehicle Code, violated section 525, which requires that, with certain exceptions not applicable here, a car be driven on the right half of the roadway, and thereby was guilty of negligence as a matter of law. While it is true that there was evidence that defendant was violating section 525, it was for the jury to determine, first, whether there was such violation, and secondly, if there was, whether it was a proximate cause of the accident. She testified that she was on her right side of the highway; that plaintiff suddenly without warning made a left turn between blocks across her path; that she turned her car to her left assuming he would continue, thinking that she could better go behind his car than in front of it; that he suddenly stopped, whereupon she applied her brakes and her car skidded on the wet pavement. The effect of her plea of guilty to the charge of driving on the wrong side of the road, whether her story was true, and if so, whether she was justified in assuming what she claimed to have assumed, and acted prudently in a moment of peril, were matters for the jury to resolve. Again, it was a jury question whether defendant after first seeing the headlights of the plaintiff's car half a block away was negligent in not again seeing the car until she was about two car lengths away. Likewise whether she violated sections 501 and 502 was also a matter for the jury.

[4] Plaintiff further contends that under the last clear chance doctrine defendant is guilty of negligence as a matter of

law. This doctrine was not even suggested to the jury, nor were any instructions requested or given on it. It cannot be considered for the first time on appeal. Luna v. Ames, 108 Cal.App.2d 546, 239 P.2d 18.

2. Instructions. (a) *Intoxication.*

As stated, four witnesses testified that defendant was intoxicated. Defendant admitted to having had three drinks of whiskey and being "very slightly" conscious of any degree of intoxication. Thus the issue of her intoxication and its effect, if any, on the proximate cause of the accident was before the jury. The only instruction mentioning intoxication was the following: "The law will not permit the rights of a party litigant in an automobile accident case to be prejudiced by a mere showing that prior to the accident he had partaken of intoxicating liquor. While such evidence may be considered by you in determining whether or not defendant in this case was in the exercise of ordinary care at the time and place of the accident, you should not allow it to excite in your minds any bias or prejudice against the defendant. Unless such consumption of liquor by defendant affected in an appreciable degree her ability to operate her automobile in a careful and prudent manner, such consumption of liquor taken by itself did not amount to a lack of ordinary care upon defendant's part. Therefore, you must not permit any feeling of bias or prejudice excited by mere evidence of drinking, not in itself amounting to a want of ordinary care, to affect your verdict in this case in the slightest degree."

[5-7] It is true that defendant is not to be held liable merely because she drank intoxicating liquor *if* it did not affect her driving in an appreciable degree, nor should that fact bias or prejudice the jury. However, a reading of the instruction shows that the reference to a "feeling of bias or prejudice" in the last sentence does not mean bias or prejudice in the emotional sense, but a finding of fact. It says "* * * you must not permit any feeling of bias or prejudice excited by mere evidence of drinking, *not in itself amounting to a want of ordinary care,* to affect your verdict." (Emphasis added.) Thus, the instruction states, in effect, that if the drinking amounted to want of ordinary care, that fact *could* excite the jury's bias or prejudice. There is no place in any jury trial for bias or prejudice. Hence what the instruction meant was that mere evidence of drinking which in itself did not amount to a want of ordinary care should not be considered by them. As an abstract statement of the law this instruction is probably technically correct, but it overlooks the fact that evidence of driving while under the influence of liquor or causing injury while driving while under such influence raises a presumption of negligence and shifts to the defendant the burden of going forward with the evidence to show that such negligence was not a proximate cause of the accident. Section 502 of the Vehicle Code makes it a misdemeanor to drive while under the influence of liquor. Section 501 of the Vehicle Code makes it a crime for any person driving a vehicle while under the influence of liquor to neglect any duty imposed by law in the driving of such vehicle which act causes bodily injury to any other person. In Johnston v. Brewer, 40 Cal.App.2d 583, 105 P.2d 365, it was held that violation of a section of the Municipal Code of Los Angeles prohibiting a person from appearing on the street in a state of intoxication was negligence per se. "An act or failure to act below the statutory standard is negligence *per se,* or negligence as a matter of law." Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 588, 177 P.2d 279, 283. Thus driving while under the influence of liquor is presumptively a lack of ordinary care.

[8] The effect of the instruction was to tell the jury that before they could consider the effect of defendant's driving after indulging in intoxicating liquor they must first find that the drinking itself amounted to a want of ordinary care; and yet the combination of drinking and driving (if the jury believed that the drinking caused defendant to be under the influence of intoxicating liquor) itself raised a presumption of want of ordinary care. The instruction did not adopt the standard of care established by the Legislature and did not instruct the jury that violation of the statute constituted

prima facie evidence of negligence. While plaintiff offered no instructions to the effect that violation of either section 501 or 502 was negligence as a matter of law, that fact did not justify the giving of an instruction which gave the jury an erroneous idea of the effect of the evidence. In Stickel v. San Diego Elec. Ry. Co., 32 Cal. 2d 157, 195 P.2d 416, the refusal of the trial court to give an instruction which quoted the penal provisions of sections 501 and 502 and then stated a violation of either section constituted negligence as a matter of law, was held by the majority opinion correct, apparently because the instruction informed the jury that the violation of section 501 was a felony. Here, had the court given no instruction at all on the subject of intoxicating liquor, plaintiff could not complain. But the court gave the jury an instruction which in effect did away with the presumption which would immediately attach if the jury found that defendant was driving while under the influence of liquor, an erroneous statement of the law.

This brings us to the question of whether this erroneous instruction was prejudicial requiring a reversal of the judgment. Stickel v. San Diego Elec. Ry. Co., supra, 32 Cal.2d 157, 195 P.2d 416, is pertinent here. There the court held that the proposed instruction on sections 501 and 502 of the Vehicle Code was properly refused. It then stated, 32 Cal.2d at page 169, 195 P.2d at page 423: "An instruction specifically directed to drunken driving as negligence could have been given but, in the circumstances, the failure of the court to modify and give defendants' proposed instruction does not appear to have prejudiced them." As particularly applicable here, we have paraphrased the following language of the court by substituting "defendant" for "Mrs. Stickel," the name of the driver there, 32 Cal.2d at page 169, 195 P.2d at page 423: "The jury were adequately instructed in general terms as to negligence, contributory negligence and proximate cause. To assume that they did not consider the question of [defendant's] asserted intoxication under these general instructions would be to attribute to the jury a lack of ordinary intelligence or deliberate violation of duty."

As pointed out above, if the jury believed that defendant was driving while under the influence of liquor, she was presumed to be acting without ordinary care. However, the jury had another question to consider, namely, did that lack of ordinary care proximately contribute to the accident? The jury had before it the evidence of witnesses who said she was drunk and her own admissions on the subject so that the question of whether her drinking contributed to the accident was put squarely before it. Undoubtedly this issue was forcibly argued. It is not realistic to conclude that the jury did not seriously and fully consider the effect of her drinking, nor to assume that had the jury been told that the burden of going forward with the evidence shifted, by reason of the presumption, to the defendant, there would have been any difference in the verdict. There was ample evidence upon which the jury could, and probably did, find plaintiff guilty of contributory negligence. The jury could well have concluded (it is a jury question, Van Cise v. Lencioni, 106 Cal.App.2d 341, 235 P.2d 236) that in turning directly into the path of an oncoming car when it was only 75 to 100 feet away, plaintiff violated section 544(a) of the Vehicle Code, which prohibits such turn unless it can be made with reasonable safety and with the proper signal. His contradictory statements as to what he did and where he was at the time of the accident, including his statement that another car forced defendant into his car, and his statement that he had told a false story to the police to escape liability, were sufficient cause for a jury to disregard his entire testimony and to believe that of defendant even though it might have also believed that defendant was negligent. In view of the maze of contradictions in plaintiff's testimony and statements, it is difficult to understand just what plaintiff believes the true facts to be. We cannot say, as required by section 4½ of article VI of the Constitution, that the error in this instruction caused a miscarriage of justice.

2. Instructions (b) *Insurance.*

[9] The court, presumably at defendant's request, instructed that the legal position of a defendant who carries public li-

ability insurance in this type of case is no different from that of a defendant who carries no such insurance, and that the fact that a defendant carries such insurance does not relieve plaintiff of the burden of proving liability. Plaintiff assigns this as error. Under the circumstances of this case it was not error to give the instruction. Defendant in cross-examining plaintiff brought out that plaintiff had given a statement to a representative of defendant's insurance carrier and had also visited the office of that company. The representative was called and testified that he was the investigator of the carrier which was "interested in this case," all of this without objection. Plaintiff's counsel in examining plaintiff referred to a statement prepared by the insurance company man, and in cross-examining the investigator brought out that he worked for the carrier and that he went to Officer Weigle to get reports on accidents for his insurance company. Plaintiff does not contend that the instruction is not a correct statement of the law, but contends that it should only be given where *plaintiff* injects the subject of liability insurance into the case. He relies upon Huetter v. Andrews, 91 Cal.App.2d 142, 204 P.2d 655, which does not support his contention. In that case it is not clear just what the court held. It apparently adopted the following quotation from the appellant's brief: "* * * a voluntary statement by the defendant, with obvious reference to collision insurance and not liability insurance, does not warrant or justify the instruction given." (The exact instruction is not set forth. There, the only reference to insurance was an answer by defendant, when asked as to the damage to his car, to the effect that "the insurance company is the one that has the final analysis on that." 91 Cal.App.2d at page 144, 204 P.2d at page 657. The Huetter case was based on Bennett v. Chandler, 52 Cal.App.2d 255, 126 P.2d 173, where the refusal of the trial court to give an instruction that the jury could not bring in a verdict against any insurance company was upheld. The court stated that merely asking jurors on voir dire about their interest, if any, in insurance companies, did not indicate the existence of insurance in the case and hence did not require the giving of such an instruction. The court pointed out that in Dermer v. Pistoresi, 109 Cal.App. 310, 293 P. 78, and other cases listed, the giving of such instruction was proper because the questions propounded intimated the existence of insurance in the particular case. Differing from the Huetter case, in our case there was considerable evidence from which the jury could have inferred that defendant had liability insurance. Moreover, it appeared in evidence that an insurance company was interested in the case, obviously on defendant's side. While it was first brought out by defendant, it was properly so, because the interest of the investigator in the case was a proper matter for the jury to consider. Had defendant not brought it out in the first instance, plaintiff would have on cross-examination. Plaintiff did not overlook it when his turn came. Where the evidence is before the jury, we can see no reason why the jury should not be properly instructed on the subject, regardless of who brought the evidence out.

3. Comparative Negligence.

[10] Plaintiff contends rather ingeniously that in spite of the decisions to the contrary, the rule of comparative negligence has been the law of this state since the adoption of the Codes in 1874, and asks us to apply that rule in this case. Unfortunately for her, however, the case was tried on the theory of contributory negligence and no intimation was made in the trial court that the comparative negligence rule should be applied. In view of that fact we see no reason for considering plaintiff's contention in that regard.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

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SECOND SERIES

39 Cal.2d 566

In re LA MONT'S ESTATE.

LA MONT et al. v. GUNNESS.

L. A. 22061.

Supreme Court of California, in Bank.
Sept. 25, 1952.

Rehearing Denied Oct. 23, 1952.

Proceedings in the estate of Daniel Everett La Mont, wherein Bella La Mont, and another, propounded will which was contested by William L. Gunness. From an order of the Superior Court, Los Angeles County, J. F. Moroney, J., denying probate of the will, the proponents appealed. The Supreme Court, Gibson, C. J., held that where testator had told person named as executor that the instrument was a will and had requested such person to sign it, and such person had seen testator sign and had affixed his own signature in testator's presence and in presence of another witness, authentication was sufficient.

Order denying probate reversed.

Prior opinion, 241 P.2d 584.

1. Wills ⚷116

Fact that certain person is designated in will as executor does not disqualify such person from acting as subscribing witness. Probate Code, § 50.

2. Wills ⚷114

Purpose of formalities required by section of Probate Code providing that there must be at least two attesting witnesses, each of whom must sign instrument as a witness, at end of will, at testator's request and in his presence, is to provide against false and fraudulent wills and to afford means of determining their authenticity, with function of attesting witness being to take note that those things required by statute are done, and to subscribe his name to the instrument. Probate Code, § 50.

3. Wills ⚷114

Where testator told witness that instrument was will and requested witness to sign it, and witness saw testator sign and affixed his own signature in testator's presence, and in presence of another witness, witness could testify to authenticity of document and to circumstances surrounding its execution, and his signature served to identify it, and will was properly authenticated even though witness may have thought he was signing in capacity of executor. Probate Code, § 50.

4. Wills ⚷114

Statute prescribing mode of authenticating wills does not require proof of specific intent on part of witness to act as such, but it is sufficient if person relied on as witness observed all events to which he was required to attest and signed instrument. Probate Code, § 50.

5. Wills ⚷120

Fact that testator, when requesting one who witnessed execution of will to sign same, failed to use the word "witness" in requesting signature, or that testator may have been under mistaken belief that witness who is also named as executor, must sign will, did not preclude existence of sufficient authentication, since no proof of any specific intent on part of testator with regard to particular capacity in which witness signed is necessary if formalities have been observed by witness. Probate Code, § 50.

6. Wills ⚷120

A testator need not follow any particular form in asking a person to attest his will, and a request may, under proper circumstances, be implied from the facts and circumstances surrounding the execution. Probate Code, §§ 50, 51.

Willis Sargent and Sidney H. Wyse, Pasadena, for appellants.

Gunness & Graves and Joseph L. Graves, Monterey Park, for respondent.

GIBSON, Chief Justice.

This is an appeal from an order denying probate of a will, and the sole question to be determined is whether the will was properly attested by two witnesses in compliance with section 50 of the Probate Code.

The instrument, which was typewritten, reads as follows:

"June 19, 1950

To Whom it May Concern:

I, Daniel Everett LaMont, do hereby bequeath my estate and its entire residue to my sister, Bella LaMont, of the home address.

My sister, Bella LaMont, and my nephew, Fred C. Smith, 523 Cecil St., Monterey Park, Calif., whose signatures appear below are to jointly administer the estate without bond. My nephew, Fred C. Smith, is to act as Guardian for my brother, Albert LaMont.

s/ D. E. LaMont
D. E. LaMont

s/ Bella LaMont Witness: s/ Klari Moore
Bella LaMont Address: 1001 So. 1st St.
Alhambra, Calif.

s/ Fred C. Smith Witness: s/ Helen B. Smith
Fred C. Smith Address: 523 Cecil St.
Monterey Park, Calif."

Notary Public

It is conceded that Helen B. Smith is a qualified witness. Klari Moore did not sign as a witness until several days after the will was executed, and because of the circumstances under which her signature was affixed, proponents do not claim she qualifies as a witness. Nor do proponents rely upon Bella LaMont as a witness since, if her signature were necessary to due execution, she could not take the entire estate under the will. Prob. Code, § 51. Accordingly, the question to be determined is whether Fred C. Smith, whose signature appears on the face of the will, can be counted as a second attesting witness.

The will was prepared by Helen Smith, Fred C. Smith's wife, at the testator's request about a month before it was signed. Decedent was under the impression that the will had to be notarized, and Fred consulted a notary about preparing it. A blank space was provided for the notary's signature, but the instrument was never notarized. At the time of the signing, Bella, Fred and Helen were all seated around a table with the testator, and they affixed their signatures to the will in the presence of each other. They testified that they saw the testator sign and that he declared in the presence of all of them that the document was his will. Each of them testified that he or she was requested by the testator to sign it as a witness. Although the testimony was uncontradicted, the trial court did not believe that the testator specifically asked either Fred or Bella to sign the will "as a witness," and, in denying probate, made the following finding: "That Fred C. Smith and Bella LaMont were not requested by said decedent to affix their signatures to said will as witnesses, nor did they affix their signatures to said will as witnesses, but said parties were present at the time the testator executed said will and were requested by him to sign said will as executor and executrix respectively."

[1] There can be no question that the testator requested Fred to affix his signature to the will, and there is no testimony that he was asked by the testator to sign as executor. The only possible support in the record for the finding that he did not sign as a witness, but instead signed as executor, must be derived from the body of the will, which provides that Fred and Bella, "whose signatures appear below are to jointly administer the estate," and from the additional fact that, unlike Klari Moore and Helen Smith, Fred is not described in the instrument as a "witness." The fact that Fred was designated an executor does not, of course, disqualify him from acting as a subscribing witness, Estate of Haupt, 200 Cal. 147, 151, 252 P. 597, and even if it be assumed that the court was justified in disbelieving the testimony that Fred was asked to sign "as a witness," it does not follow that the will was improperly executed.

[2] The decisive question is whether there has been substantial compliance with the requirements of subsection (4) of sec-

tion 50 of the Probate Code, which provides that there must be at least two attesting witnesses, "each of whom must sign the instrument as a witness, at the end of the will, at the testator's request and in his presence." The purpose of the formalities prescribed by the statute is to provide against false and fraudulent wills and to afford means of determining their authenticity. The function of an attesting witness to a will is to take note that those things are done which are required by the statute and to subscribe his name to the instrument. See Estate of Montgomery, 89 Cal.App.2d 664, 672, 201 P.2d 569.

[3, 4] In the present case the events surrounding execution of the will include every formal protection intended to be provided by the statute and show that its purposes have been accomplished. The testator told Fred that the instrument was a will and requested him to sign it, and Fred saw the testator sign and affixed his own signature in the testator's presence. All of this took place in the presence of Helen Smith. Fred can testify to the authenticity of the document and to the circumstances surrounding its execution, and his signature serves to identify it. In view of these facts it is immaterial that Fred may have thought he was signing in the capacity of executor. There is nothing in the statute which requires proof of a specific intent to act solely as a witness, and, in our opinion, no such intent is necessary where the person who is relied on as a witness observed all of the events to which he is required to attest and signed the instrument. Cf. Estate of Montgomery, 89 Cal.App.2d 664, 668 et seq., 201 P.2d 569.

[5, 6] Likewise, it is immaterial that the testator may have failed to use the word "witness" in requesting Fred's signature or may have been under a mistaken belief that a person who is named as executor must sign the will. It is well settled that a testator need not follow any particular form in asking a person to attest his will. For example, the request need not be express but may be implied from the facts and circumstances surrounding the execution. Estate of Dow, 181 Cal. 106, 114, 183 P. 794; Estate of Silva, 169 Cal. 116, 120, 145 P. 1015. Fred was asked to sign the instrument as part of its formal execution, and it was not necessary for proponents to prove that the testator had any specific intent with regard to the particular capacity in which Fred signed. Any other interpretation of the statute might make it a trap rather than a safeguard.

The order denying probate is reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

39 Cal.2d 541

FEINSTEIN v. STATE BAR OF CALIFORNIA.

L. A. 22192.

Supreme Court of California, in Bank.

Sept. 16, 1952.

Rehearing Denied Oct. 9, 1952.

Petition to review action of Board of Governors of the State Bar of California on petition for reinstatement of a disbarred attorney. The Supreme Court, Per Curiam, held that the evidence was not sufficiently clear and convincing to justify overruling the action of Board of Governors.

Petition for reinstatement denied.

Carter, J., dissented.

1. Attorney and Client 🔑61

The sole object of court, upon application by disbarred attorney for reinstatement, is to determine whether the character of applicant is such that he should be admitted to an office of trust, and recommended to the public as a trustworthy person, fit to be consulted by others in matters of confidence. Rules on Original Proceedings in Reviewing Courts, rule 59(b).

2. Attorney and Client 🔑61

Disbarred attorney seeking reinstatement has the burden of proof and must satisfy and fully convince the court by positive evidence that his efforts toward rehabilitation have been successful. Rules on

Original Proceedings in Reviewing Courts, rule 59(b).

3. Attorney and Client ⚷61

Pardon of an attorney previously disbarred on account of his conviction of the offense of which he was subsequently pardoned does not of itself reinvest him with those essentials required of an attorney. Business and Professions Code, § 6102; Pen.Code, §§ 4852.01 to 4852.2.

4. Attorney and Client ⚷61

Finding of the certificate of rehabilitation that a previously convicted and disbarred and subsequently pardoned attorney is now of good moral character is not a finding that he presently possesses the highest moral qualities required of an attorney, nor is it binding upon the State Bar or the Supreme Court, being at most evidence to be considered together with other evidence of present qualifications to practice law. Business and Professions Code, § 6102; Pen.Code, §§ 4852.01 to 4852.2, 4852.13, 4852.15.

5. Attorney and Client ⚷61

Letters of recommendation and favorable testimony of witnesses, particularly employers and attorneys, are entitled to considerable weight in proceedings for reinstatement of a disbarred attorney, but such evidence, however laudatory or great in quantity, is not alone conclusive, and applicant must show a proper attitude of mind regarding his offense. Rules on Original Proceedings in Reviewing Courts, rule 59(b).

6. Attorney and Client ⚷61

While Supreme Court has plenary power to reinstate a previously disbarred attorney, the greatest deference is accorded to the recommendation of State Bar and its administrative committee and only where the record clearly and convincingly demonstrates that applicant possesses an acceptable appreciation of the duties and responsibilities of an attorney in relation to his clients and the courts should the unfavorable action of Board of Governors be overruled. Rules on Original Proceedings in Reviewing Courts, rule 59(b).

7. Attorney and Client ⚷61

Evidence was not sufficiently clear and convincing to justify reinstatement of an attorney. Rules on Original Proceedings in Reviewing Courts, rule 59(b); Business and Professions Code, § 6102; Pen.Code, §§ 4852.01 to 4852.2.

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J. H. Morris, Hollywood, for petitioner.

Robert H. Edwards, Jr., Los Angeles, and Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

In 1938, upon conviction of a felony, Louis Feinstein was disbarred. Bar Misc. No. 1527. The Board of Governors of the State Bar upheld the action of an administrative committee unanimously recommending the denial of his petition for reinstatement. The matter is before this court upon Feinstein's petition to review the board's action. Rules on Original Proceedings in Reviewing Courts, rule 59[b].

Feinstein was admitted to practice in California in 1927. He was convicted upon each of two counts of an indictment which charged him with soliciting a client to commit grand theft. Pen.Code, § 653f. The judgment of conviction was affirmed, People v. Humphrey, 27 Cal.App.2d 631, 81 P.2d 588, and he was automatically disbarred. Code Civ.Proc. § 299; now Business & Professions Code, § 6102.

Concurrently with the criminal action, disciplinary proceedings against Feinstein were pending before a local administrative committee of the State Bar upon charges of issuing and passing fictitious checks. The committee unanimously recommended his disbarment and the Board of Governors approved the recommendation. Bar Misc. No. 1541. Feinstein's petition to this court for a review of those proceedings was dismissed as having become moot because of the previous order of disbarment based upon his conviction in the criminal proceeding. Feinstein v. State Bar, 12 Cal.2d 461, 85 P.2d 869; Hall v. State Bar, 12 Cal.2d 462, 85 P.2d 870.

Following his conviction, Feinstein was imprisoned until his release on parole in 1940. Upon his release, he secured employment as a salesman and bookkeeper and later entered business for himself as a public accountant, which profession he has followed to the present time. In 1950, Feinstein was granted a full and unconditional pardon by the Governor in accordance with the provisions of sections 4852.01 through 4852.2 of the Penal Code.

At the hearings upon his petition for reinstatement before the local administrative committee, Feinstein, produced thirteen witnesses who testified to his good moral character, diligence, and faithful performance of his work. Nine of these witnesses had employed him for varying periods since his release from prison. Three of them did not know that he had been disbarred. The other six knew, or surmised, that he had been disbarred, but did not know the facts concerning his difficulties.

All of the witnesses who had employed him were satisfied with his work and had confidence in him, although only one of them had ever had occasion to entrust him with any money. Several who testified in his behalf indicated that they would not hesitate to employ him in a capacity of trust or confidence should the occasion ever arise. The record includes testimony by persons who know Feinstein and his family socially. They said that his family relationships were excellent. Upon the request of Feinstein's counsel, the examiner was prohibited from informing any of the witnesses who had employed him of the details of Feinstein's disbarment or questioning them as to whether such knowledge would alter their opinions of him.

The remaining four witnesses, three of whom are attorneys, knew the details of Feinstein's disbarment. An optometrist and two of the attorneys were personal friends of Feinstein, but their contact with him since his parole was social only. They rated Feinstein as having a high moral character before as well as after his conviction. Their opinions that he now is morally fit to practice law were based upon circumstances no different from those existing before he was disbarred.

J. H. Morris, Feinstein's brother-in-law and his counsel in this proceeding, testified that, in a discussion pertaining to his reinstatement, Feinstein denied ever having made the fraudulent suggestions attributed to him in the criminal prosecution which resulted in his disbarment. Feinstein's explanation of the bad check accusations, as related by Morris, was that he had given the checks "sort of foolishly, without realizing what he was doing". Morris believes Feinstein's statement that he was not guilty of the charge of which he was convicted and said he would have the same opinion of Feinstein's high moral qualifications to practice law irrespective of this belief. Other than the present proceeding, Morris has had no professional dealings with Feinstein. He knew of no instance when Feinstein had been placed in a confidential relationship which might have tempted him to depart from an ethical course of conduct.

Testifying on his own behalf, Feinstein admitted the issuance of fictitious checks without sufficient funds to cover them as charged in the disbarment proceeding. He also stated that he knew his associate, Hall, was issuing similar checks. He drew a line through the word "order" on the checks, he said, to destroy their negotiability and give notice to third parties that it was an "unusual transaction". According to Feinstein, "it seemed to be held against me instead of for me. I thought I was doing the right thing, and instead I was doing the wrong thing. I shouldn't have done anything like that at all."

According to Feinstein's testimony, he drew the checks to assist a client who was operating a night club. "I don't think I collected more than a few hundred dollars at the time this thing happened", he said. "It was contemplated the more successful the night club was, the more work I did, and the more money I would make, but he wasn't any large client. It was a few hundred dollars involved, I guess."

As stated by Feinstein to the committee, the bank's president informed him at the time of the disbarment proceeding that the bank had lost nothing and that he did not believe Feinstein knew anything about the conspiracy to defraud it. Feinstein has never made restitution to the bank for losses occurring as the result of the check transactions, nor undertaken any further inquiry as to whether there were losses.

At the hearing upon his application for reinstatement, Feinstein flatly denied any guilt in connection with the fraudulent suits which were the basis for the criminal charges which resulted in his conviction. He said: "These cases were cases of clients of mine where they admitted that they had participated in a fake accident case. They testified against me and the doctor. They were given complete immunity as a result of it * * * it was either their skin or the skin of the doctor and the lawyer." Later, he remarked: "I never knew that either Callie Elliott or anybody else had been in a fraudulent claim." Feinstein stated that he had never inquired as to whether any loss had resulted to the defendants from the filing of suits in the negligence actions, nor had he repaid any portion of the settlement received in one of those cases.

Feinstein's income tax returns, admitted into evidence, indicate that his income has steadily increased from approximately $4,500 in 1943 to about $13,000 in 1949. His 1950 income was $13,000.

Regarding his legal ability, Feinstein testified that he read advance sheets of an accountant's tax service from time to time, had subscribed to the Southern California Law Review and read a tax magazine containing comments on tax law. One of the attorneys who had discussed hypothetical legal problems with him found that he had a keen conception of the applicable principles. Another attorney stated that he and Feinstein had discussed questions of law common to tax matters from time to time. Upon the foregoing evidence and the exhibits introduced, including the documents in connection with the statutory rehabilitation proceeding, the administrative committee unanimously concluded that Feinstein has not fully rehabilitated himself, lacks the present moral qualifications to warrant his reinstatement, and does not have present ability and learning in the law sufficient to warrant his reinstatement. These conclusions were adopted by the Board of Governors.

Feinstein contends that the evidence does not support certain findings of the committee or the conclusions and recommendations of the committee and the board. The evidence, he says, conclusively establishes his rehabilitation and present good moral character. Concerning his present ability in the law, he offers to take a legal examination if so ordered by this court. The State Bar argues that Feinstein failed to meet his burden of proving, by clear and convincing evidence, that he is entitled to reinstatement.

Reduced to its basic essentials, Feinstein's argument is that the evidence which he produced of his present good moral character was undisputed. The State Bar, he says, offered nothing to overcome this showing and relied solely upon the offenses which led to his disbarment. It is his contention that undue weight has been given to his past misconduct in reaching the conclusion that he has not been rehabilitated. Throughout this proceeding, both in his testimony before the committee and in his argument to this court, Feinstein has contended that he never intentionally did any wrong and that the testimony against him in the criminal case is suspect.

[1, 2] "The sole object of the court, upon an application by an attorney previously disbarred for reinstatement to practice, is to determine whether or not the character of the applicant is such that he should be admitted to an office of trust, and recommended to the public as a trustworthy person, fit to be consulted by others in matters of confidence. (Citation.) In such proceeding the burden of proof is upon the one who seeks, after disbarment, to accomplish a restoration to the ranks of the legal profession, and, before the court may grant the petition for reinstatement it must be satisfied and fully convinced by positive evidence that the effort he has made toward rehabilitation of his character has been successful. (Citations.) It is only reasonable that the person seeking reinstatement, after disbarment, should be re-

quired to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. In other words, in an application for reinstatement, although treated by the court as a proceeding for admission, the proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character." Kepler v. State Bar, 216 Cal. 52, 55, 13 P.2d 509, 510; Beeks v. State Bar of California, 35 Cal.2d 268, 275, 217 P.2d 409; McArthur v. State Bar, 28 Cal.2d 779, 788, 172 P.2d 55.

"One who has been disbarred for acts involving a high degree of moral turpitude—and those committed by petitioner were of that character—'should not be reinstated in the ranks of the legal profession except upon the most clear and convincing, nay, we will say upon overwhelming, proof of reform,' proof which we could with confidence lay before the world in justification of a judgment again installing him in the profession. * * *" In re Morganstern, 85 Cal.App. 113, 117, 259 P. 90, 92; Wettlin v. State Bar, 24 Cal.2d 862, 869, 151 P.2d 255; In re Stevens, 59 Cal.App. 251, 254–255, 210 P. 442.

[3, 4] "It has been definitely determined by this court that a pardon of an attorney previously disbarred on account of his conviction of the offense of which he was subsequently pardoned does not of itself reinvest him with those essentials required of an attorney at law." Wettlin v. State Bar, supra [24 Cal.2d 862, 151 P.2d 259]; In re Lavine, 2 Cal.2d 324, 329, 41 P.2d 161, 42 P.2d 311. The finding of the certificate of rehabilitation, Pen.Code, § 4852.13, that Feinstein is now of good moral character is not a finding that he presently possesses the highest moral qualities required of an attorney, nor is it binding upon the State Bar or this court. Pen.Code, § 4852.15. At most, it is but evidence to be considered together with other evidence of his present qualifications to practice law. In re Lavine, supra.

[5, 6] Letters of recommendation and the favorable testimony of witnesses, especially that of employers and attorneys, are entitled to considerable weight. Preston v. State Bar, 28 Cal.2d 643, 650–651, 171 P.2d 435; In re Andreani, 14 Cal.2d 736, 749–750, 97 P.2d 456. But such evidence, however laudatory or great in quantity, is not alone conclusive. Wettlin v. State Bar, supra; Keppler v. State Bar, supra, 216 Cal. at page 56, 13 P.2d 509. Reformation is a "state of mind", In re Andreani, supra, 14 Cal.2d at page 749, 97 P.2d at page 462, and "the applicant must show a proper attitude of mind regarding his offense before he can hope for reinstatement". Wettlin v. State Bar, supra, 24 Cal.2d at page 870, 151 P.2d at page 260. The committee of the State Bar, which has an opportunity to view the witnesses and the petitioner, is in a better position than is the reviewing court, faced only with the cold printed record, to determine the applicant's state of mind. In re Andreani, supra, 14 Cal.2d at page 750, 97 P.2d 456; Vaughan v. State Bar, 208 Cal. 740, 745, 284 P. 909. Although this court has plenary power to reinstate an applicant previously disbarred, it has always accorded the greatest deference to the recommendation of the State Bar and its administrative committee. In re Lacey, 11 Cal.2d 699, 701, 81 P.2d 935. Only where the record clearly and convincingly demonstrates that the applicant possesses an acceptable appreciation of the duties and responsibilities of an attorney at law in relation to his clients and the courts may a decision overruling the unfavorable action of the Board of Governors be justified. Beeks v. State Bar of California, supra, 35 Cal.2d at page 277, 217 P.2d 409.

[7] The record here fails to meet the requirement of clear and convincing proof of reform. The pardon and the favorable testimony of witnesses show commendable progress by Feinstein in rehabilitating himself as a member of society, but such improvement does not compel the conclusion that he has regained the highest moral attributes required of an attorney. To the contrary, his repeated assertions that, despite his conviction and the other disciplinary proceedings against him, he committed no wrong, coupled with his failure to make any attempt since his parole either to determine whether his activities resulted in losses to others or to reimburse his victims, indicate a continuing failure to comprehend his professional responsibilities. Under some circumstances, "a spirit of willingness, earnestness and sincerity" is sufficient to permit reinstatement although it is not within the power of the applicant to undo the damage which his acts have caused to others. In re Andreani, supra, 14 Cal.2d at page 750, 97 P.2d 456, 463; Preston v. State Bar, supra, 28 Cal.2d at page 650, 171 P.2d 435. But Feinstein has shown no such spirit, although it has been within his power not only to determine what damage he had caused but to right at least some of his wrongs.

There is nothing in the record which would justify this court in ordering either immediate reinstatement or acceptance of Feinstein as an applicant for examination upon his technical qualifications.

The application of petitioner for reinstatement is denied.

CARTER, Justice.

I dissent.

Upon a record which conclusively establishes the right of petitioner to be reinstated, the majority holds that reinstatement is not permissible because petitioner still protests his innocence of the felony, the conviction upon which he was disbarred, and because he has not restored money said to have been improperly obtained by him. As will be shown, there was nothing obtained by petitioner and hence there is nothing for him to restore. If lack of penitence is shown by clinging to one's honest assertion of innocence, then innocence is a crime rather than a virtue. If petitioner has not now shown that he is rehabilitated, he never will be able to do so. In the face of a record which conclusively establishes rehabilitation, the majority arbitrarily says to him; "You must give up all hope of regaining your former position as a member of the bar." Let us look at the facts.

First it was found that prior to the time of petitioner's disbarment, disciplinary proceedings were pending against him before the Board of Governors and the board had recommended disbarment. Petitioner's petition to this court for a review of those proceedings was dismissed by this court because of the disbarment by reason of his conviction of a felony on a different charge. Feinstein v. State Bar, 12 Cal.2d 461, 85 P.2d 869. Thus no review of those proceedings has been had by this court and they have no bearing on the instant case. The charge in those proceedings arose out of the issuing and passing of two fictitious checks of $475 each, and eleven checks totalling $4,200. According to the findings in those proceedings, petitioner had as a client a Mr. Zimmer who controlled a corporation which owned a cafe. For his legal services to the corporation and past loans, petitioner was to receive 25% of the profits of the business; later changed to fixed weekly installments. Zimmer was short of capital and had an arrangement with tellers of a Hollywood bank permitting him to overdraw his and the corporation's accounts, which eventually led to a loss by the bank of $20,000. Zimmer told petitioner of the arrangement and asked him to loan him checks drawn on his account in the same bank and Zimmer would cover them with cash deposits to petitioner's account from cafe receipts; some checks were to be sold to a third person. The arrangement was carried out by petitioner who gave checks which he had rendered non-negotiable by drawing a line through the word "order." This would not ordinarily be observed. The Zimmer affair resulted in his being indicted by a federal grand jury *but the proceeding was dismissed. It also appears that the president of the bank told petitioner that he was not liable, as he did not know of the deal between Zimmer and the bank tellers.* Hence, even if we give consideration to the Zimmer transactions, petitioner was under no obligation to refund anything to to the bank. He received nothing and we have the bank president's word that nothing was owing.

In addition to the foregoing facts, the committee also found that since petitioner's release from prison in 1940 he has operated the business of public accountant, having obtained a certificate in 1945 from the state board to do so. In addition to his own testimony he produced thirteen witnesses, three of whom were attorneys, one an optometrist and the others persons who had employed him as a bookkeeper. Those for whom he kept books testified that he faithfully discharged his duties, and in one case that he had been entrusted with substantial sums of money and faithfully accounted for his trust. Some of those witnesses said he had not handled matters for them involving a trust or confidential relationship. One attorney testified that he was rehabilitated and knew the law, but his only relationship with him consisted of discussions of his own cases. Another, a relative, said he had been rehabilitated. As to his legal ability, he testified that he read advance sheets of accountant's tax service from time to time, received the Southern California Law Review and read a tax magazine containing comments on tax law. The committee concluded by finding that petitioner had failed to sustain the burden of proving that he had rehabilitated himself, or had the moral qualifications, or had sufficient learning or ability in the law.

The recommendation of the board is based *solely* upon the conduct of petitioner between 1935 and 1937, and the asserted failure of petitioner to prove his rehabilitation. *No other evidence was offered by it.* On the other hand, petitioner produced testimony by *nine* witnesses engaged in various businesses who have *employed him as tax consultant, accountant and bookkeeper for periods ranging from five to eleven years.* They *all* testified that his work was accurate and satisfactory. Various remarks were made to the effect that his character is "above reproach"; that "if he conducts himself as well as an attorney as he does as an accountant he would make a very good attorney"; that he is honest in all respects, trustworthy and highly honorable; that: "I would not be afraid to trust the man with the entire store and let him take care of it. I trust him fully, he is a trustworthy person." While only one witness testified that he had entrusted him with his funds, others said they would be willing to do so if there were any occasion for it. Some witnesses testified that they had not employed him in a confidential capacity, and apparently they had no occasion to do so, but if they had, they would not hesitate to engage him for such work. Some of the witnesses knew and some did not know he had been disbarred in 1938, but some of those without that knowledge said *it would have made no difference in their testimony.*

Three attorneys practicing in Los Angeles testified for petitioner. One who had known him for 26 years and was associated with him for a short time, knew of the disbarment and talked to him about it, testified that he now has a good sense of morality, has proven himself to be of good moral character and fit to practice law. Another testified to substantially the same effect. Counsel for petitioner in this proceeding, a brother-in-law of petitioner, testified that he has known petitioner since 1944; has had discussions on legal questions with him and found him understanding of them; that petitioner is morally rehabilitated. An optometrist, who had been a friend for 15 years, stated that petitioner had a good reputation for honesty.

Petitioner testified at length regarding his activities both before and after disbarment in which he denied any wrongdoing in the Zimmer matter; that he did not make restitution to the bank or anyone else because no money was received by him and he did not incur any liability or indebtedness. He made special studies in accounting in prison and thereafter, but none in law.

It is the position of respondent that the burden was on petitioner to show that he had become rehabilitated, is now of good moral character and learned in the law, see Beeks v. State Bar of California, 35 Cal.2d 268, 217 P.2d 409; Rules of Procedure of the State Bar, Rule 52; that the past conduct of petitioner discloses a mental attitude of a person who would commit a wrong when placed in a position of trust and confidence if he thought he could escape retribution.

In respect to the latter contention it would seem more accurate to describe petitioner's mental attitude to be that of an attorney who would use his office to obtain wrongfully something from third persons with whom he did not occupy a position of confidence, as the crime of which he was convicted, or which, like the Zimmer affair, did not involve the defrauding of his client but the gaining of something from someone else for his client and himself. And he has conclusively proven by the many witnesses above mentioned that he is not now the kind of a person who would attempt to obtain money from others by fraud. Indeed it has been held that the conduct leading to the prior disbarment is too remote to be considered on application for reinstatement. In re Stoller, 160 Fla. 769, 36 So.2d 443, and the essential question is whether he has reformed and his moral stability has been restored. It must be remembered that prior to the incidents above mentioned, which occurred between 1935 and 1937, he had not been involved in any difficulty and his good moral character was established when he was admitted to the bar.

Moral reformation or rehabilitation has long been a perplexing problem to such experts as penologists, psychologists, theologians and social workers. When laymen endeavor to ascertain the fact on the evidence of lay witnesses, the problem becomes even more complex. It is very difficult for an attorney seeking reinstatement to produce witnesses who have sufficient intimate knowledge of his conduct both before and after his disbarment to give an opinion as to whether the applicant has been fully rehabilitated. In most cases, witnesses available to the applicant are those who, because of their association with him after his disbarment, can testify that he *then,* at the time of the hearing, has a good moral character—a reputation for that character. This evidence is pertinent because a strong inference flows from his continuous good character since disbarment that he will not again resort to practices which might bring him into disrepute. To weigh against that evidence the nature of his misconduct and conclude that he has not been rehabilitated, is to reject such testimony and the inference which flows therefrom. It verges on reaching a conclusion that some misconduct may be considered so reprehensible that reformation is impossible. If it does not go that far, the decision of the arbiter becomes mere speculation, because he is required to weigh the seriousness of the wrong committed against positive evidence that the person now has a good character, the effect of the former factor on possibility of reformation being a mere matter of personal opinion which the applicant is helpless to supply evidence to rebut. The gravity of the offense should not, therefore, be of compelling consequence. The character or nature of the misconduct is of importance however, that is, what was done under what circumstances. It is then possible for the applicant to present evidence by acquaintances that under circumstances of a similar character generally he has properly conducted himself—has not fallen into a similar pattern of wrongdoing. Of course, the length of time that applicant has kept himself on the side of rectitude is important, for it may be inferred that the longer he has been honest, the more likely he will stay that way. In this connection, the majority opinion suggests that the testimony of petitioner's witnesses shows that it was not based on circumstances different from those existing before disbarment; they thought he was honest before and still think he is. That is not true of all of the witnesses and does not erase the positive, unrefuted evidence that petitioner is now of good moral character.

In the instant case petitioner has produced such evidence. He has shown generally, without dispute, that he now has a good moral character. While some of his witnesses said they had not employed petitioner in a confidential capacity, others had, and it should be clear that where one employs another to keep his books and prepare his tax returns, the employer is placing all the facts relating to his business in the employee's hands, a thing he would not do if he did not trust the employee. In tax return work, applicant had an opportunity to defraud the government to his employer's direct benefit and his own incidental benefit, but did not do so. If he had, it would be a pattern of misconduct similar to that in which he indulged between 1935 and 1937. Neither the committee nor the board found that they disbelieved petitioner's witnesses. Over twelve years have elapsed since the disbarment. If that cannot be considered sufficient time, then most of our parole proceedings and penalties for various offenses lack a sound foundation.

Furthermore, it will be recalled that petitioner was granted a full and unconditional pardon by the Governor. While it has been held that a pardon does not restore to a disbarred attorney the right to practice law, Wettlin v. State Bar, 24 Cal.2d 862, 151 P.2d 255; In re Lavine, 2 Cal.2d 324, 41 P.2d 161, 42 P.2d 311, it is clear that great weight must be given to pardons such as the one here involved. The pardon granted petitioner was pursuant to provisions added to the Penal Code in 1943. Pen.Code, §§ 4852.01–4852.2. Thereunder a released prisoner may file with the superior court of the county in which he resides a notice of intention to apply for a "certificate of *rehabilitation*". Pen.Code, § 4852.01. "During the period of rehabilitation the person shall live an *honest and upright life,* shall conduct himself with sobriety and industry, shall *exhibit a good moral character,* and shall conform to and obey the laws of the land." (Emphasis added.) Id., § 4852.05. After the period for rehabilitation has expired he may apply to the court for a "declaration of the *fact* of his rehabilitation"—for a "certificate of rehabilitation". Id., § 4852.06. Notice is given of the application to the district attorney, chief of police and Governor. Id., § 4852.07. A hearing is had in which is considered testimony and "all records and reports relating to the petitioner and the crime of which he was convicted, including the record of the trial, the report of the probation officer, if any, the records of the prison from which the petitioner has been released showing his conduct during the time he was there imprisoned, the records of the prison doctor and the prison psychiatrist, the records of the parole officer concerning him if he was released on parole, the records of the Youth Correction Authority concerning him if he has been committed to the authority, the records of the chief of police or sheriff upon whom the notice of intention was served, and written reports or records of any other law enforcement agency concerning the conduct of the petitioner since his release on parole or discharge from custody." Id., § 4852.1. Moreover, the court "shall require from the district attorney an investigation of the residence of the petitioner, the criminal record of the petitioner as shown by the records of the Bureau of Criminal Identification and Investigation, and the investigation of any representation made to the court by the applicant, and the district attorney shall file with the court a full and complete report of the results of said investigations, and shall require from the district attorney and the chief of police or sheriff having jurisdiction as provided in subdivision (a) of Section 4852.02 written reports setting forth all matters within their knowledge relating to the conduct of the petitioner during his period of rehabilitation, including all matters mentioned in Section 4852.11." Id., § 4852.12. (It should be noted that many more sources are used to determine rehabilitation than are customarily available in reinstatement proceedings before the State Bar.) If the court after the hearing "finds that the petitioner has demonstrated by his course of conduct *his rehabilitation and his fitness to exercise all of the civil and political rights* of citizenship, the court shall make an order declaring that the petitioner has been rehabilitated and recommending that the Governor grant a full pardon to the petitioner." (Emphasis added.) Id., § 4852.13. Thus, the precise fact, moral rehabilitation and whether petitioner has exhibited a good moral character, decided by the court, is presented to the State Bar on application for reinstatement. It was observed by this court, with respect to the use of a transcript of testimony at a criminal trial in a disbarment proceeding: "Petitioner was prosecuted in the name of the People of California, and the trial was conducted by attorneys representing the People. In the present proceeding the case against petitioner is presented by The State Bar, acting as the arm of this court and also representing the People of the State. In reality the parties are the same. Petitioner's contention that the subject matter is not the same is based on the fact that this proceeding is for disbarment, whereas the earlier case was a criminal prosecution. The Legislature, however, aware that a disbarment proceeding is different from any other type of action, could hardly have intended to preclude the use of the transcript of an earlier proceeding in a proceeding for disbarment. The State Bar seeks to prove the same facts that the public prosecutor sought to prove so that both proceedings actually do concern the same matter." Werner v. State Bar, 24 Cal.2d 611, 616, 150 P.2d 892, 894. It cannot be doubted, therefore, that petitioner's certificate of rehabilitation is a very cogent factor. It is not like an ordinary pardon where the motive or basis may be merely sympathy or forgiveness.

A point is made of the failure of petitioner to make restitution. This is not a case of misuse of a client's funds and here it does not appear that petitioner received anything or that anyone was entitled to or claimed a right to the restoration of anything.

Respondent claims a lack of showing of legal ability to practice. As above shown, there is evidence that petitioner has such ability. Moreover, he is a college graduate, a graduate of a law school of high standing, and practiced law for over ten years. It will not be presumed he has lost his knowledge. The presumption is the other way. See Friday v. State Bar, 23 Cal.2d 501, 144 P.2d 564. Moreover, petitioner offers to take a legal examination if this court deems it necessary.

From the foregoing it is apparent that the only just and reasonable result is reinstatement. The basis of the majority opinion seems to be that petitioner has not made a lachrymose display of penitence, or come to the Throne of Grace humbly begging forgiveness for sins he claims not to have committed. Not only that, but he must apparently produce witnesses who have heard him shout from the rooftops that he was a sinner but has forsaken his sins and is now redeemed. The majority seem to have forgotten that deeds speak louder than self-serving protestations. By the record petitioner has conclusively demonstrated that his conduct since disbarment has established rehabilitation. Nothing more should be required under any system which has for its objective the accomplishment of the American ideal of "Equal justice under law."

I would reinstate petitioner as a member of the bar.

Rehearing denied; CARTER, J., dissenting

39 Cal.2d 578

PEOPLE v. SOUTHACK.

Cr. 5321.

Supreme Court of California, in Bank.

Sept. 25, 1952.

Rehearing Denied Oct. 23, 1952.

Conviction of manslaughter in the Superior Court, Los Angeles County, Otto J. Emme, J., and from the judgment of conviction and an order denying his motion for new trial, defendant appealed. The Supreme Court, Schauer, J., held that the evidence presented a question of fact as to whether the manslaughter involved use of a deadly weapon upon victim and hence refusal to consider application for probation was error.

Order denying a new trial affirmed, and judgment reversed and cause remanded with directions.

For prior opinion, see 241 P.2d 558.

1. Homicide 🔑255(2)

Evidence was sufficient to support conviction of manslaughter, either voluntary in heat of passion, or involuntary. Pen. Code, § 192, subds. 1, 2.

2. Homicide 🔑255(2)

Evidence that at time of fatal shooting defendant unlawfully exhibited gun in an angry manner, constituting a misdemeanor, would support conviction of involuntary manslaughter committed in the commission of an unlawful act, not amounting to felony. Pen.Code, §§ 192, subd. 2, 417.

3. Homicide 🔑255(2)

Evidence that at time victim was fatally shot defendant was simply holding gun, but was negligent in so doing would support conviction of involuntary manslaughter committed in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. Pen.Code, § 192, subd. 2.

4. Criminal Law 🔑781(2)

Testimony in prosecution for murder that immediately after victim was shot by gun which defendant was pointing at him, defendant exclaimed, "I did it, I did it," warranted instruction to view with caution testimony as to oral admissions or confessions of defendant and refusal of such instruction would have been improper. Code Civ.Proc. § 2061, subd. 4.

5. Criminal Law 🔑1172(6)

Instructing jury not to consider involuntary confession and that a confession obtained by police by violence, threats or promise of immunity was not voluntary was not reversible error, though such instructions had no application to the evidence, in absence of showing that the giving of such abstractly correct instructions could have prejudiced defendant.

6. Witnesses 🔑379(1), 397

A prior statement of a party which is both an admission and an impeaching contradictory statement is admissible both to impeach testimony of such party and also to prove the fact admitted.

7. Criminal Law 🔑1171(1)
Witnesses 🔑277(4)

Where defendant testified on direct examination in prosecution for murder that he had previously been told that he had a right to protect his home from victim even if he had to shoot him and that he was afraid of victim, cross-examination of defendant as to whether he made any claim that shooting was in justifiable defense of self, home, or family was proper, and lengthy reiteration of such inquiry, even if it was intended to confuse and prejudice defendant, did not constitute prejudicial misconduct, where defendant consistently replied that he did not fire the gun.

8. Criminal Law 🔑1171(1)
Witnesses 🔑387

Cross-examination of defendant as to statements made by him at sheriff's substation shortly after homicide inconsistent with his testimony on direct examination concerning prior conduct and allegedly abusive statements of victim of homicide and whether door was on night chain or open at time of fatal shooting was relevant as having some tendency to impeach defendant and did not constitute prejudicial misconduct.

9. Criminal Law 🔑1170½(5)

Cross-examination of defendant as to statement made at sheriff's substation shortly after homicide concerning ownership of gun inconsistent with defendant's testimony on direct examination was not prejudicially erroneous, though defendant did not dispute fact that gun was in his possession and control.

10. Criminal Law 🔑1170½(1)

Cross-examination of defendant's daughter in prosecution for murder of her former husband concerning daughter's statement to sheriff allegedly inconsistent with her testimony on direct examination as to previous conversation with former husband was not prejudicial to defendant, where witness was neither confused nor impeached thereby.

11. Witnesses 🔑387

Control of cross-examination of a witness as to which of his conflicting statements is true rests in the sound discretion of trial judge.

12. Witnesses 🔑387

The purpose of cross-examination of a witness as to which of his conflicting statements is true is to ascertain the truth, and if such purpose can be furthered by direct questioning as to truth or falsity of prior statements, such questioning may be permitted, but trial court must be alert to protect witness against being badgered or tricked into unintended statements. Code Civ.Proc. § 2052.

13. Criminal Law 🔑1189

Where record discloses that trial court, without considering the merits of application for probation, erroneously determined that defendant was not eligible for probation, judgment should be reversed with directions to trial court to consider application for probation on its merits. Pen.Code, § 1203.

14. Criminal Law ⚿982

That fatal wound was inflicted by a deadly weapon did not compel conclusion, as a matter of law, that defendant was using the weapon and was therefore ineligible for probation. Pen.Code, § 1203.

15. Criminal Law ⚿982

Conflicting evidence as to whether defendant used or attempted to use loaded gun upon victim of homicide or merely held gun without due caution presented a question of fact as to whether manslaughter of which defendant was convicted involved the use of a deadly weapon upon victim, and hence refusal to consider application for probation on ground that defendant must have been convicted of voluntary manslaughter and hence was not eligible for probation, was error. Pen.Code, §§ 192, subds. 1, 2, 1203.

16. Criminal Law ⚿1177, 1189

Where, though the evidence presented a question of fact as to whether manslaughter of which defendant had been convicted involved the use of a deadly weapon upon victim, trial court erroneously refused to consider application for probation on ground that defendant must have been convicted of voluntary manslaughter and hence was not eligible for probation, judgment of conviction must be reversed, since application for probation must be considered before any judgment is pronounced, but where there was no error affecting verdict, new trial was unnecessary. Pen.Code, §§ 192, subds. 1, 2, 1203.

17. Criminal Law ⚿982

Where evidence presents a question of fact as to whether manslaughter of which defendant has been convicted involved use of a gun upon victim, trial court, in passing on application for probation, must first determine such question of fact, and if it is determined in the affirmative, probation must be denied, but if it is determined that defendant did not use gun upon victim, probation may be granted or denied as may appear proper under all the circumstances. Pen.Code, §§ 192, subds. 1, 2, 1203.

◆

Bertram H. Ross, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Defendant was charged with murder, a jury found him guilty of manslaughter, and he appeals from the resulting judgment of conviction and from an order denying his motion for new trial. Defendant contends (1) that the giving of instructions concerning confessions and admissions was prejudicial error because there was no evidence that defendant made any confession or admission; (2) that if an extrajudicial admission of a party defendant is used as a prior self-contradictory statement to impeach him, it cannot also be considered as an admission evidencing the truth of the fact admitted; (3) that defendant was prejudiced by misconduct of the prosecuting attorney on cross-examination of defendant and his daughter; (4) that the trial court erroneously determined that as a matter of law defendant was not eligible for probation. We have concluded that on the record only the fourth of these contentions has merit.

The Evidence

The victim of the homicide, Ellsworth O'Donnell, was a former son-in-law of defendant. Ellsworth's former wife, Billie O'Donnell, and the O'Donnells' infant daughter resided with Billie's parents, Mr. and Mrs. Southack, during the period which is relevant here. The killing occurred on Sunday, May 15, 1951.

In March of 1950 Ellsworth had come into the Southack home, argued with Billie, put his hands at her throat, and said, "I should kill you * * * I should kill the whole family." In April of 1950 Ellsworth, after having taken his child out for the afternoon, went to the Southack home with liquor on his breath. He argued with his former wife and with defendant; defendant ordered him to leave and started to telephone the police; Ellsworth ripped the telephone from the wall and broke a window and defendant's television set. As a result of this altercation Ellsworth was arrested on defendant's complaint. Defendant testified that the arresting officers told him at that time that "I would have a right to protect my home even if I had to shoot him."

On the afternoon of the killing Ellsworth made three visits to the Southack home. On the first two occasions he was alone. Billie went into the front yard and talked with him. Defendant heard him arguing with Billie about his right to see the child, cursing her, saw him kick over a garbage can on the first occasion and heard him say, on the second, "It's a good thing you came out or I'd have come in there and killed the whole damn bunch of you." On each of these two occasions Ellsworth left when Billie returned to the house and placed a call to the sheriff's office.

On his third visit of the afternoon Ellsworth was accompanied by his father. The father remained seated in his car in front of the Southack home. Ellsworth came to the front door and knocked. Billie said, "you had better go away from here because I am calling the police." Ellsworth called to his father, "They won't answer me. I will kick the God damned door in." He then kicked or struck the door violently. Defendant telephoned the sheriff's office and Ellsworth went to a neighbor's residence and also telephoned the sheriff's office. Ellsworth waited in the Southacks' front yard until two deputy sheriffs came. Billie again came out of the house and joined Ellsworth and his father in conversation with the deputies. Defendant came from the house and joined in the conversation. According to the deputies, defendant in a loud voice said that Ellsworth could not come into the house; that if he did defendant would shoot him; but that the elder Mr. O'Donnell was welcome. At the officers' request defendant then returned to the house.

After further conversation with Ellsworth one of the officers went into the house and talked with defendant. This officer testified that defendant again said that if Ellsworth came into the house he would shoot him, and the officer replied that if defendant did so he would be charged with murder. The officers prepared to leave. Billie was on the front porch and Ellsworth was standing by the steps talking with her. Defendant opened the front door; Ellsworth stated that he would return at 8 o'clock with a doctor to examine the child; defendant replied that the doctor could come into the house but that Ellsworth could not and if he attempted to do so defendant would shoot him. After further argument defendant cursed Ellsworth, said, "I could shoot you without batting an eye," and fatally shot Ellsworth. Defendant rushed from the house crying, "Oh my God, I did it, I did it." The deputy sheriffs immediately took defendant into custody.

The gun with which Ellsworth was shot was a twelve-gauge shotgun with a "hair trigger." Defendant testified that when Ellsworth came to the house earlier in the day he had loaded the gun and it had discharged accidentally; that when Ellsworth returned to the house for the third time he reloaded it in case he should need it to protect himself; that when he went to the doorway the daughter, Billie, was standing in it; and that he did not fire the gun at Ellsworth but that "Something hit me to the left side; I am blind on that side. I do not know what it was," and "the gun went off of its own free will." The daughter testified that she "bumped into" her father. Defendant and others testified that defendant did not threaten to shoot Ellsworth or curse him. Billie testified that the curse attributed to defendant by the prosecution was uttered by Ellsworth, who also said, "come on out and fight like a man."

The People introduced testimony of a ballistics expert who had experimented with the shotgun. Such evidence tends to show that it was most unlikely that the gun could be accidentally discharged as a result of a person "bumping into" defendant unless the gun were cocked and defendant's finger were on the trigger.

[1-3] The above summarized evidence is sufficient to support a finding of manslaughter, either voluntary in "heat of passion", (Pen.Code, § 192, subd. 1) or involuntary. The involuntary manslaughter might be "in the commission of an unlawful act, not amounting to felony" (Pen.Code, § 192, subd. 2), for it could be found that defendant unlawfully exhibited the gun in an angry manner, a misdemeanor (Pen.

Code, § 417), or it might be "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection" (Pen. Code, § 192, subd. 2), for it could be found that defendant was simply holding the gun but that he was negligent in so doing. (See People v. McGee (1947), 31 Cal.2d 229, 238, 187 P.2d 706; People v. Carmen (1951), 36 Cal.2d 768, 774, 228 P.2d 281.)

Instructions as to Confessions and Admissions

[4] Defendant does not urge that the instructions as to confessions and admissions are erroneous in substance, but rather he argues that no instructions whatsoever on the subject should have been given because, he says, there was no evidence of any confession or admission. In this defendant is mistaken. As previously stated, there is testimony tending to show that immediately after Ellsworth was shot by a gun which defendant was pointing at him, defendant said, "Oh my God, I did it, I did it." The statement may be construed to be an admission, and it was proper to instruct the jury to view with caution testimony of oral admissions or confessions of defendant (Code Civ.Proc., § 2061, subd. 4); indeed, it would have been improper to refuse an instruction to that effect.

[5] Other instructions to which defendant objects told the jury that they could not consider a confession if they found that it was involuntary and that a confession was not voluntary if it was obtained by violence, threats, or promise of immunity by the police. There is no evidence whatsoever that defendant's declaration, "I did it," was improperly induced by the police and no evidence of any other statement which could be construed to be a confession. Therefore, the instructions as to confessions had no application to the evidence. However, defendant has not shown that, upon the record here, the giving of the abstractly correct instruction could have prejudiced him.

Use of Prior Oral Admission to Impeach a Party Witness

[6] Immediately after the shooting defendant was taken to a sheriff's substation and a statement was taken from him. This statement was not put in evidence but portions of it were used in an attempt to impeach defendant on cross-examination. Defendant testified that in the course of the statement he had admitted that the gun from which the fatal shot was fired was his gun. He now asserts that, under the instructions concerning admissions, the jury might have mistakenly considered the statement as proof of the fact admitted. Defendant's argument in this connection is based upon his mistaken assumption that a prior statement of a party which is both an admission and an impeaching contradictory statement, if it is used to impeach the party-witness, cannot also be evidence which tends to prove the fact admitted. This is not the law. Such a statement can be used for either or both purposes. (Bonebrake v. McCormick (1950), 35 Cal.2d 16, 18–19, 215 P.2d 728.)

Misconduct of Prosecuting Attorney

Defendant first complains of a line of questions which were asked him on cross-examination and of which the following are illustrative:

> "Q. [by Mr. Finnerty, deputy district attorney]. Now, at the time the gun went off in the doorway * * * you did not fire that gun to defend yourself, did you? A. No, I did not fire the gun at all.
>
> "Q. Well, then, your answer is you didn't fire it to defend yourself? A. I didn't fire the gun.
>
> "Q. And at the time the gun went off you weren't trying to protect yourself, your daughter, your granddaughter, your house or your property, were you? A. The only thing I was doing with the gun was to scare the boy, that was all. That was the only thing the gun was taken there for."[1]

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[1] This line of questions continued as follows:

"Q. I appreeiate that. Would you answer my question, however: At the time the gun went off you were not trying to protect yourself, your daughter, your granddaughter, or your property, were you?

[7] The nature of the questions did not of itself make them improper. Defendant had testified on direct examination that he had been told that he had a right to protect his home from Ellsworth "even if I had to shoot him" and that "I was in fear of the man; I had absolute fear of the boy." Therefore, the prosecuting attorney was properly allowed to inquire whether defendant made any claim that the shooting was in justifiable defense of self, home, or family. Althought the lengthy reiteration of the questions may have been intended to confuse and prejudice defendant, it is apparent that it did not have that effect, for defendant consistently reiterated that he "did not fire the gun."

Defendant further argues that the prosecuting attorney was guilty of prejudicial misconduct by attempting to impeach defendant and his daughter on collateral matters. The prosecuting attorney based this attempted impeachment on transcripts of the statements made by the defendant and Billie at the sheriff's substation on the night of the homicide. Defendant was asked whether he had stated that on the occasion of Ellsworth's first visit to the Southacks' home on the day of the killing "I did not see him; all I did was hear him * * * I heard him say to my daughter that he wanted to see the child, that he had been to the house several times and she wasn't home. That is all I did hear." This appears to be somewhat inconsistent with defendant's testimony that "I heard loud talking and cursing out there, and I heard Ellsworth O'Donnell say, 'You are a God damn liar. You didn't call.' And I heard my daughter answer him back and she said, 'I did, Ellsworth, I called. You can ask mama * * *.' He said, 'I don't give a God damn what your mother says,'" and that he (defendant) saw Ellsworth kick a garbage can. Defendant testified that the variance between his statement and his testimony on direct examination was due to the fact that at the time he gave his statement he was upset and did not clearly remember all the details of the incident.

Defendant gave a similar explanation of a variance between his statement that on

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"Mr. Ross [defendant's counsel]: Just a moment before you answer that. It is objected to on the following grounds: it is incompetent, irrelevant and immaterial; it calls for a conclusion and opinion of the witness, and is improper cross examination; argumentative also.

"The Court: Objection overruled.

"The Witness: In the matter—I don't know how you put the question, or how you want me to answer it. Yes, if any man would have come at me, naturally, I would have protected myself, or if anybody would have come to break into my home.

"Q. By Mr. Finnerty: At the time the gun was fired, was it your intention that by the firing of the gun you were protecting yourself? A. I did not fire the gun. I had no intention of firing the gun.

"Q. Then you didn't fire it to protect yourself? A. I didn't fire the gun.

"Q. The gun wasn't fired to protect yourself? A. The gun wasn't fire by me; I did not fire the gun.

"Q. At the time the gun fired, it was not fired—it was not your intention that it should be fired to protect yourself, was it? A. The gun went off accidentally; I did not fire the gun at any time.

"Q. Well, that means, then, I take it, that you weren't protecting yourself? A. I wasn't.

"Mr. Ross: I submit the question has been asked and answered.

"The Court: Objection is overruled. He may answer.

"Q. By Mr. Finnerty: Were you trying to protect yourself at the time the gun went off? A. I wasn't trying to do anything at that particular time because I didn't—the gun went off of its own free will.

"Q. Were you trying to protect your daughter at the time the gun went off? A. I would have if anything would have happened.

"Q. Were you, at that particular time? A. I was not trying to protect anything.

"Q. Were you trying to protect your granddaughter? A. No, I wasn't.

"Q. Were your trying to protect your property? A. Only in so far as if there would have been any violence,—

"Q. Well, at that time? A. —which there had been on plenty of occasions, and that is why I had the gun, because of the fear I had of the boy.

"Q. At that particular time, though, you did not use the gun to protect yourself; is that right? A. I did not use the gun; I did not fire the gun."

Ellsworth's second visit "the only thing I know, my daughter went out to see him, I guess it was about the child, I don't know, but I didn't hear anything about that" and his testimony that on the second visit he heard specific threatening and cursing statements of Ellsworth. Defendant admitted that in his statement he had said that the night chain was on the door when the fatal shot was fired, whereas according to his testimony the door was open and he and his daughter were standing in it.

[8] Each of the above matters, although inherently of slight significance, was relevant as having some tendency to impeach defendant; from them the jury could infer a significant change in defendant's description of the occurrences. The picture suggested by the impeaching statements is that of a man who, after having observed no particularly violent conduct on the part of Ellsworth immediately preceding the event, shot Ellsworth through the crack of a securely chained door. The picture presented by defendant's testimony at the trial, if the testimony that the shooting was accidental is disbelieved, is that of a man who shot Ellsworth after being goaded beyond control by Ellsworth's violent and profane denunciations of and threats toward defendant and his family.

[9] Defendant complains that the prosecuting attorney should not have been allowed to ask defendant whether he had made the following statement at the sheriff's substation: "Q. This is your gun? A. It is, yes, now." Defendant testified on cross-examination that he had made such answer and that "That answer was true in so far as it goes" and, when the prosecuting attorney asked defendant if he would care to amplify or explain his answer, defendant testified, "It was mine in so far as the fact that it was in my home; it did not solely belong to me; it belonged to my son-in-law [not Ellsworth but another son-in-law], but it was there for me." On direct examination defendant had testified that the gun belonged to his son-in-law. Defendant does not dispute the fact that the gun was in his possession and control; questions as to who had legal title thereto seemingly were not important but it does not appear that they were prejudicially erroneous.

The first incident in the cross-examination of defendant's daughter to which he objects was the asking of the question whether, in her statement to the sheriff, she had said that Ellsworth on his first visit to her on the day of the killing "told me that he was over after his little girl this morning, and I told him he wasn't because I had been home all morning long, and I told him that I had tried to call his house this morning so he could take the little girl, and he said I hadn't because his mother was there all morning and he knew that I didn't, and he blew up over that." On direct examination the daughter had testified that "I said, 'What do you want?' and he said, 'I came over to get Suzy [the little girl],' and I told him, I said I had called him at 9:00 o'clock that morning to pick her up and nobody was home, and he told me I was a God damned liar, and I told him, I said I wasn't, that I had 'phoned him and until almost 11:00 o'clock and he just kept saying I was a damned liar."

[10] On cross-examination defendant's counsel objected to the question as to the statement on the ground that it was not impeaching. After some discussion Billie was allowed to testify that on the morning in question she had tried to telephone Ellsworth's home but that no one had answered. The trial court said, "The record has cleared itself up. Proceed." The matter was a trifling one; Billie was neither confused nor impeached; and defendant was not harmed by the asking of the question.

Defendant asserts that in two instances the trial judge erred to his prejudice in overruling objections to the cross-examiner's questions as to whether prior statements of Billie were true. Billie was asked whether she was "inside or outside" during a certain conversation with Ellsworth; she replied, "outside." She was then asked whether she had not said, in her statement to the sheriff, that on this occasion "I didn't go out." She testified, "I gave those answers, yes, but it is entirely wrong, of what happened. I was half out of my mind when all this happened." The prosecuting attorney then asked, "Q. And you are telling us, are you, that when * * * [the sheriff] asked these questions and you gave these answers, you were not telling the truth; is that right?" An objection that the question was argumentative and invaded the province of the jury was overruled and the witness reiterated her explanation that she had been distraught when she was questioned by the deputy sheriff.

On further cross-examination Billie was asked if she knew of her own knowledge whether or not defendant had invited a deputy sheriff and Ellsworth's father into the house shortly before the shooting; she testified that she did not know of her own knowledge. She was then asked whether in her statement at the sheriff's substation she had said that defendant "asked the sheriff to come into the house, but he didn't ask Mr. O'Donnell." She testified that she had made the statement, "but I didn't finish to what I had started to say"; the clear implication of her further testimony is that if she had been given the opportunity or questioned further she would have explained that her knowledge as to the invitation was based on hearsay and deduction. The prosecuting attorney again asked whether her prior statement was true; defendant's counsel again objected that the question invaded the province of the jury; the objection was overruled; and the witness again testified that she "didn't get a chance to finish" and that at the time the statement was taken "I wasn't in a condition of saying just exactly what had happened because I knew but I didn't remember until after this was taken."

As previously stated, defendant argues that the cross-examination as to whether the witnesses' prior statements were true was prejudicially erroneous. The cases in which this problem is presented are in conflict. (See 70 C.J., Witnesses, § 1274, p. 1081.) People v. Cordero (1925), 72 Cal. App. 526, 528, 237 P. 786, held that it was error (but not prejudicial) to ask whether prior conflicting statements were true, on the ground that it was for the jury, not the witness, to determine which of the conflicting statements were true. State v. Johnson (1936), 221 Wis. 444, 450, 267 N.W. 14, 17, held that the trial court in the exercise of its discretion properly sustained objections to the questions "You want to claim now you did not tell the truth at that time? Do you want to tell us that the testimony you gave down there is the same as you gave here? Did you try to tell the truth?"; these questions, said the appellate court, were argumentative and called for argumentative answers.

On the other hand in People v. Voiler (1934), 2 Cal.App.2d 724, 728, 38 P.2d 833, defendant was asked, "Are you telling the truth now, or were you telling the truth before the grand jury?"; it was held that the question was "in substance proper cross-examination." And in People v. Campos (1935), 10 Cal.App.2d 310, 316, 52 P.2d 251, it was held proper for the cross-examiner to ask whether prior statements inconsistent with the testimony of the witness were true. Neither the Voiler nor the Campos case discusses the objections to this sort of questions which are presented by defendant here.

In People v. Glover (1903), 141 Cal. 233, 244, 74 P. 745, a witness was permitted to testify that a previous statement which was contradictory of her testimony, and which she admittedly made, was untrue. It was urged that the untruth of the statement should have been shown "by competent and relevant testimony, and not by the sweeping statement of the witness." The appellate court held, "the testimony of the witness was both competent and relevant on this point. She best of all knew which of her statements was true. She had given the one and was confronted by the other; they were inconsistent, and she had a right to explain, under section 2052 of the Code of Civil Procedure, her former statements. If, in the explanation, she declared that her former statements were untrue, this certainly was an explanation, as far as it went, and no reasonable objection could be made to this method of explaining it."

[11, 12] Control of cross-examination of a witness as to which of his conflicting statements is true should be in the sound discretion of the trial judge. The purpose of such cross-examination is ascertainment of the truth, and if, as here, that purpose can be furthered by direct questioning as to the truth or falsity of prior statements, such questioning may be permitted; the trial court, however, must be ever alert to protect the witness against being badgered or tricked into statements unintended by the witness.

Right to be Considered as Eligible for Probation

[13] Defendant urges that the trial court erroneously concluded that defendant was not eligible for probation and that, if this court decides that defendant is not entitled to a complete reversal and new trial, then the judgment should be reversed with directions to the trial court to consider the application for probation on its merits. This is the proper procedure where the record discloses that the trial court without considering the merits of the application for probation, erroneously determines that defendant is not eligible for probation. (People v. Jones (1927), 87 Cal.App. 482, 494–495, 499, 262 P. 361; People v. Lovelace (1929), 97 Cal.App. 228, 234, 235, 275 P. 489; People v. Miller (1931), 112 Cal.App. 535, 539, 297 P. 40.)

Section 1203 of the Penal Code provides, as to eligibility for probation, that "probation shall not be granted to any defendant * * * who used or attempted to use a deadly weapon upon a human being in connection with the perpetration of the crime of which he was convicted. * * *"

[14] As previously indicated, ante, 248 P.2d at pages 15–16, there is evidence from which it could be inferred that defendant "used or attempted to use" the loaded gun upon Ellsworth, and there is also evidence from which it could be inferred that defendant, as he himself testified, "did not use the gun," but merely held it without due caution. The fact that the fatal wound was inflicted by a deadly weapon does not compel the conclusion, as a matter of law, that defendant was "using" the weapon and was therefore ineligible for probation. Any implications to the contrary in People v. Covey (1934), 137 Cal.App. 517, 523, 30 P.2d 1010, are disapproved.

[15] Remarks of the trial court at the time it was considering defendant's application for probation indicate that it was of the opinion that the jury must have convicted defendant of voluntary manslaughter and that it overlooked the possibility that, under the evidence and the instructions, defendant could have been convicted of involuntary manslaughter. If defendant's crime was voluntary manslaughter, then the trial court was correct in its stated conclusion that "there is nothing further the court can do but send this man to the penitentiary." But, since the court could have resolved in defendant's favor, the question of fact as to whether the manslaughter involved the use of the weapon upon Ellsworth and, hence, could have considered and, conceivably, granted his application for probation on the merits, it was error to refuse to consider the application at all.

[16] The judgment must be reversed because an application for probation must be considered "before any judgment is pronounced" (Pen.Code, § 1203), but since there is no error affecting the verdict of the jury no new trial is necessary (People v. Jones (1927), supra, 87 Cal.App. 482, 499, 262 P. 361).

[17] For the reasons above stated the order denying a new trial is affirmed; the judgment is reversed and the cause is remanded for further proceedings, in accordance with law and with specific directions to the trial court to entertain the application for probation and to determine, in accordance with the views expressed herein, whether defendant used the gun upon Ellsworth; if it determines that defendant did use the gun upon Ellsworth, the application must be denied; if it determines that defendant did not use the gun upon Ellsworth then it may grant or deny probation as may appear proper under all the circumstances.

GIBSON, C. J., and SHENK, CARTER and SPENCE, JJ., concur.

39 Cal.2d 570

In re BLOCH'S ESTATE.

GOLDBERG v. BLOCH.

L. A. 22069.

Supreme Court of California, in Bank.
Sept. 25, 1952.

Proceeding in the matter of the estate of Helene I. Bloch, deceased. Sally Goldberg, petitioner, presented two instruments for probate, and Julius J. Bloch filed objections thereto. The Superior Court, Los Angeles County, John Gee Clark, J., entered an order admitting will to probate and Julius J. Bloch, objector, appealed. The Supreme Court, Gibson, C. J., held that instrument entirely in decedent's handwriting constituted a complete testamentary document and was properly admitted to probate as decedent's holographic will, though her name appeared only in body of instrument.

Order affirmed.

Traynor and Edmonds, JJ., dissented.

For prior opinion, see 239 P.2d 147.

1. Wills 🔑130, 132

A "holographic will" must be written, dated and signed entirely by the hand of testator and it must be executed with testamentary intent. Probate Code, § 53.

See publication Words and Phrases, for other judicial constructions and definitions of "Holographic Will".

2. Wills 🔑133

The signature need not be located at the end of a holographic will but may appear in another part of instrument, provided testator wrote his name there with the intention of authenticating or executing the instrument as his will. Probate Code, § 53.

3. Wills 🔑133

Where signature appears elsewhere than at end of holographic will, testator's intention to thereby authenticate or execute instrument as his will must appear on the face of document itself, and parol evidence is inadmissible to show that a signature found elsewhere than at end is a signature of execution. Probate Code, § 53.

4. Wills 🔑133

Where decedent's signature is found only in the body of alleged will, court must determine from an inspection of the language and form of the instrument and the relative position of its parts whether there is a positive and affirmative inference that decedent's name was placed in such location with intention of executing instrument, and if such an inference appears, the execution is considered proven. Probate Code, § 53.

5. Wills 🔑133

A holographic testamentary instrument may be admitted to probate, though testator wrote his name only in the beginning, where it appears that the instrument is a complete declaration of testator's desires. Probate Code, § 53.

6. Wills 🔑133

An instrument entirely in decedent's handwriting naming sister as executrix, providing that bonds in stated sums which belonged solely to decedent should be distributed equally among named individuals, expressly excluding husband from sharing in bequest and giving reasons for doing so, constituted a complete testamentary document and was properly admitted to probate as decedent's "holographic will", though her name appeared only in body of instrument in clause alleging sole ownership of bonds bequeathed. Probate Code, § 53.

◆

Frye & Yudelson and Collman E. Yudelson, North Hollywood, for appellant.

Samuel D. Robbins, Los Angeles, for respondent.

GIBSON, Chief Justice.

This is an appeal from an order admitting to probate, as the will of Helene I. Bloch, a holographic instrument which was found after her death in a safety deposit box held by her and her sister as joint tenants. The document, which appeared on two sides of an envelope, was dated and was written entirely in decedent's own hand. The portions of the writing which were admitted to probate are as follows:[1]

---

[1] Language on the envelope by which decedent attempted to provide funds for care of her grave was denied probate, but the parties raise no question as to this part of the order.

> "My executor shall be Sally Goldberg (sister) who shall employ counsel & pay expenses from estate to fight any action which may be taken by said husband Julius J Bloch 8/24/48
>
> Bonds belonging solely to Helene I. Bloch .... 8000^{00}
> 5300^{00}
> 13300^{00}
>
> In case of my death these are to be distributed to the following children for their education (divided equally)
>
> Babette Freshman
> Carolyn Freshman
> Barbara Sue Freshman
> Gary Lee Goldberg
> Susan Linda Goldberg
> Judy Brown
> Stephen Brown
>
> Julius J Bloch shall not receive a dower right or be allowed to contest my wishes in any court in the United States. Julius J Bloch did not
> over [end of first side of envelope]
> give me any part of these monies
> prior
> Same was saved (before) my marriage and invested likewise. During my marriage Julius J Bloch did not contribute to my support—I paid my own expenses throughout our marriage Therefore he is not to receive one cent of my estate. During our marriage Julius J Bloch, husband, was such only in name. When he had funds or made profits he squandered all on his selfish desires gambling—also thruout this marriage I continually aided financially his many adventures—all ending with losses Therefore I feel he does not participate."

The writing stopped at the lower right-hand corner of the second side of the envelope, and there was insufficient room at that location for any further words of the same size and spacing as were employed elsewhere in the document. Some unused space was left above the writing on both sides of the envelope.

[1] A holographic will must be entirely written, dated, and signed by the hand of the testator, Prob.Code, § 53, and it must be executed with testamentary intent. Estate of Golder, 31 Cal.2d 848, 850, 193 P.2d 465. The language of the document involved here is plainly dispositive in character, and the document was dated and was admittedly written by the hand of the decedent. The sole question is whether the decedent's name, which appears only in the body of the instrument, constitutes a signature within the meaning of the statute.

[2, 3] It is settled in California that the signature need not be located at the end but may appear in another part of the document, provided the testator wrote his name there with the intention of authenticating or executing the instrument as his will. Estate of Kinney, 16 Cal.2d 50, 53, 104 P.2d 782; Estate of McMahon, 174 Cal. 423, 424, 163 P. 669, L.R.A.1917D, 778; see Estate of Manchester, 174 Cal. 417, 421, 163 P. 358, L.R.A.1917D, 629. The required intention must appear on the face of the document itself, and parol evidence is not admissible to show that a signature found elsewhere than at the end is a signature of execution. Estate of Hurley, 178 Cal. 713, 714–715, 174 P. 669; see Estate of Morgan, 200 Cal. 400, 401–402, 253 P. 702; Estate of McMahon, 174 Cal. 423, 424, 163 P. 669, L.R.A. 1917D, 778; Estate of Manchester, 174 Cal. 417, 421–422, 163 P. 358, L.R.A.1917D, 629; Estate of Kinney, 16 Cal.2d 50, 53, 104 P. 2d 782. The rule of evidence adopted in these cases has also been applied in determining whether a signature appearing in the body of a document is sufficient to satisfy the statute of frauds. Marks v. Walter G. McCarty Corp., 33 Cal.2d 814, 820–821, 205 P.2d 1025; McNear v. Petroleum Export Corp., 208 Cal. 162, 167–168, 280 P. 684, citing probate cases.

[4, 5] It has been said that where a decedent's signature is found only in the body of a document which is claimed to be a will, the court must determine from an inspection of the instrument's language, form and the relative position of its parts whether or not there is a positive and satisfactory inference that the decedent's name was placed in that location with the intention of executing the instrument, and if such an inference appears, the execution is considered proven.

See Estate of Kinney, 16 Cal.2d 50, 53, 104 P.2d 782; Estate of Manchester, 174 Cal. 417, 421, 163 P. 358, L.R.A.1917D, 629. Particularly important here are the principles set forth in the Kinney case where it was held that a holographic testamentary instrument may be admitted to probate, although the testator wrote his name only in the beginning, whenever it appears that the instrument is a completed declaration of the decedent's desires. 16 Cal.2d at pages 54–56, 104 P.2d 782. The court said, 16 Cal.2d at pages 55–56, 104 P.2d at page 784: "Completeness alone has been held sufficient evidence of the adoption of the name so placed as the authenticating signature of the testator and as a compliance with the statute which requires the will to be 'signed'. * * * From the earliest consideration of the question, completeness of the testamentary declaration has been deemed sufficient evidence of the 'signing' of the writing, even though the declarant's name was written by him at a place other than at the end." The court distinguished cases cited for the proposition that there must be some affirmative expression to the effect that the name was adopted as an executing signature, and it stated that those cases are not to be construed as holding that such an affirmative expression is required where the will appears to be a completed testamentary declaration. 16 Cal.2d at page 54, 104 P.2d 782. In this connection it was noted that the decedents involved in those cases did not appear to have "done everything they intended to do". 16 Cal. 2d at page 55, 104 P.2d at page 784. The court, applying these principles, upheld a will which provided simply: "I, Anna Leona Graves Kinney, do bequeath all my possessions to my four sisters who were living in 1923", giving the names and addresses of four persons.

Many other cases, some of which have cited and followed Estate of Kinney, indicate that the courts of this state have been very liberal in sustaining the validity of holographic wills which appear to be complete testamentary documents although signed elsewhere than at the end. See Estate of Brooks, 214 Cal. 138, 140–141, 4 P. 2d 148 ["This is my will—Elizabeth Ryan Brooks", after which are numerous specific bequests]; Estate of Morgan, 200 Cal. 400, 402, 253 P. 702; Estate of Wallace, 100 Cal. App.2d 237, 239, 223 P.2d 284, 285, ["I, James T. Wallace have the use of all Personal and Real Estate as long as I survive", after which were two short sentences disposing of the property]; Estate of Gardener, 84 Cal.App.2d 394, 396–397, 190 P.2d 629, 631, ["I Mrs. Estelle Gardener 433 West Laurel Street do give devise and bequeth Mrs. Dorothy Mathews and Mrs. Eleatra Hyatt" certain described property]; Estate of Kaminski, 45 Cal.App.2d 779, 781–782, 115 P.2d 21 ["Last will and testament of Belle Kaminski, Dec. 8–1937 * * * being of sound & disposing mind and memory * * * do make publish and declare this my last will & testament in the manner following, that is to say", followed by specific provisions disposing of property and concluding with a direction for cremation]; Estate of Bauman, 114 Cal.App. 551, 553 et seq., 300 P. 62 ["That I Lovina Bauman, on this date April 9th 1929, desire my wishes herein executed as stated * * *"]; Estate of Sullivan, 94 Cal.App. 674, 677, 271 P. 753 ["I, Mark Cornelius Sullivan * * revoking all wills by me heretofore made, do hereby publish and declare this my Last Will and Testament * * * in manner and form following: * * *"]; Estate of England, 85 Cal.App. 486, 488, 259 P. 956, 958 ["last will of Anna England", in caption, followed only by bequests].)

[6] The instrument involved in the present case, as we have seen, discloses a testamentary intent, and, in our opinion, constitutes a complete testamentary document under the foregoing decisions. The writing, on its face, indicates that the testatrix did everything that she intended to do: She specified that the bonds which belonged solely to her were to be distributed equally among seven named individuals; she excluded her husband from sharing in this bequest, giving reasons for doing so; and she appointed her sister executrix and directed her to resist any action which might be taken by the husband. The document, after giving the reasons of the testatrix for exclusion of her husband, ends, in a natural manner, by stating: "Therefore I

feel he does not participate."[2] The photostat of the instrument contained in the clerk's transcript shows that after the word "participate" there is a mark which, although not entirely clear, may well have been intended as a period. Even if no period was placed at the end, other portions of the writing disclose that the testatrix occasionally omitted punctation marks after sentences and initials. See Estate of Brooks, 214 Cal. 138, 140, 4 P.2d 148, sustaining will with neither period nor signature at end. The fact that the testatrix used her name in one part of the document for a dual purpose, that is, to describe the property covered by the bequest as well as to authenticate the will, is immaterial.

Unlike the writings involved in the cases relied upon by appellant, there is nothing in the document before us to suggest that it was incomplete in the sense that the testatrix may have intended to set forth any additional matter but failed to do so. For example, the instrument considered in Estate of Manchester, 174 Cal. 417, 163 P. 358, 359, L.R.A.1917D, 629, ended: "Whereunto I hereby set my hand this fourteenth day of January, 1914", and the court stated that these are apt words to precede a signature in attestation of a will and tend to show that the decedent intended to sign immediately below but did not carry out that intent. 174 Cal. at page 419, 163 P. 358. In Estate of Bernard, 197 Cal. 36, 40–41, 239 P. 404, the court held that the abrupt termination of the instrument near the middle of the last page manifested that the writer did not intend to stop at that point but, rather, that something additional was to be done, and that this compelled the conclusion that the decedent had no intention of adopting the name written in the opening clause as the executing signature of a will. See also Estate of Leonard, 1 Cal.2d 8, 9 et seq., 32 P.2d 603; Estate of Devlin, 198 Cal. 721, 726, 247 P. 577; Estate of Hurley, 178 Cal. 713, 715, 174 P. 669.

Since it appears that the holographic document written by Mrs. Bloch is a complete testamentary instrument, it follows, under the decision in Estate of Kinney, supra, 16 Cal.2d 50, 56, 104 P.2d 782, that her name is to be regarded as having been written in the body of the instrument with authenticating intent.

The order is affirmed.

SHENK, CARTER, SCHAUER and SPENCE, JJ., concur.

TRAYNOR, Justice.

I dissent.

In my opinion the decedent did not comply with the requirement of section 53 of the Probate Code that a holographic will must be "signed by the hand of the testator himself." Although this section does not require the signature to be affixed at the end of the instrument offered for probate, compare section 50(1), it does require the name of the decedent, wherever placed, to be written with the intention of executing the instrument as a will. Estate of Man- 1917D, 629; see cases collected in 19 A.L.R.2d 926.

Regardless of where the name may appear in the instrument, there is always the possibility, of course, that it was intended as a signature. The mere existence of that possibility, however, is not enough to permit a reasonable inference that it was so intended. When the name is used to identify the decedent as the author of the alleged will as in Estate of Kinney, 16 Cal.2d 50, 104 P.2d 782 ("I, Anna Leona Graves Kinney, do bequeath all my possessions to my four sisters"), or to identify the instrument as decedent's will as in Estate of Brooks, 214 Cal. 138, 4 P.2d 148 ("This is my will—Elizabeth Ryan Brooks"), and in addition the instrument appears to be a complete testamentary document, it may reasonably be inferred that the name was placed where it was with the intention of executing the instrument. In such cases the name is linked to the alleged testamentary act and the probabilities that it was intended as a signature are strong. In the present case, on the contrary, decedent's name appears only in the description of her property. It is not part of the description of the instrument itself or of the purpose for which it was written. The holding that under such circumstances the mere fact that the alleged will appears to be a complete testamentary instrument is evidence that it was signed, confuses the question whether it was intended as a will with the question whether the name appearing thereon was intended as a signature. As this court pointed out in Marks v. Walter C. McCarty Corp., 33 Cal. 2d 814, 820, 205 P.2d 1025, 1028, quoting Chief Judge Cardozo in Mesibov, Glinert & Levy v. Cohen Bros. Mfg. Co., 245 N.Y. 305, 311–312, 157 N.E. 148, "'We may, indeed, infer from the delivery of the writing that the defendant intended to assume the obligation of a contract, whether the document was signed or unsigned. It might have intended as much if there had been no writing whatever. It may even have supposed that a writing was unnecessary. Something more must be found before the statutory requirements can be held to be obeyed. The defendant must have intended, not merely to contract, but to sign. We see no mark of such purpose.'" No inference was drawn in the Marks case that defendant's name was intended as a signature from the fact that it appeared at the head of a complete instrument. Similarly, in this case the words "Bonds belonging solely to Helene B. Bloch" provide no evidence that decedent placed her name in the body of the instrument with the intent that it operate as an executing signature, and, accordingly, it is immaterial that the instrument may otherwise appear to be a complete testamentary act.

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[2] The parties, in their briefs, disagree as to whether the last word is "participate" or an abbreviation thereof or something else. The dispute is apparently due to the fact that the briefs contain photostats which are not as clear as the one in the clerk's transcript, which plainly shows each letter of the word. It is possible that the testatrix inserted the provision relating to her "executor" after she had written the above quoted sentence, but this does not seem to be material since each provision is complete by itself.

"[T]he right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes. In conferring that right the legislature has seen fit to prescribe certain exactions and requirements looking to the execution and authentication of the instrument, and a compliance with these requirements becomes necessary to its exercise." In re Walker, 110 Cal. 387, 390, 42 P. 815, 1082, 30 L.R.A. 460. It is the duty of a court to deny probate to any instrument that does not meet the requirements set by the Legislature, regardless of sympathy for the wishes of a decedent that may be thwarted by adherence to the statute of wills. Estate of Seaman, 146 Cal. 455, 463, 466, 80 P. 700; Estate of Moore, 92 Cal.App.2d 120, 122, 206 P.2d 413.

I would reverse the order admitting the instrument to probate.

EDMONDS, J., concurs.

113 Cal.App.2d 451

PILKINTON v. DAVIS.

Civ. 18874.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1952.

Rehearing Denied Oct. 21, 1952.

C. R. Pilkinton sued R. P. Davis to recover the contract price for transportation of defendant's cattle by plaintiff. Defendant filed a counterclaim for damages on the grounds of plaintiff's negligent transportation of the cattle and false representation that he would obtain full insurance coverage thereon. From a judgment of the Superior Court of Los Angeles County, Eugene P. Fay, J., for defendant, plaintiff appealed. The District Court of Appeal, McComb, J., held that the evidence sustained the trial court's findings that plaintiff negligently handled the cattle, resulting in injury to them, and that defendant's damage was $2,362.

Judgment affirmed.

1. Carriers ⇨228(5)

Evidence sustained trial court's finding that one transporting two truck loads of another's cattle negligently handled them, resulting in injury to them, so as to entitle owner to recover damages from carrier on counterclaim in carrier's action for contract price of transporting cattle.

2. Carriers ⚷229(5)

In action for contract price of transporting two truck loads of cattle owned by defendant, who filed counterclaim for damages for negligent transportation thereof, evidence sustained trial court's finding that defendant's damage was $2,362.

◆

Warren J. Ferguson, Fullerton, for appellant.

J. B. Tietz, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover the contract price for the transportation of defendant's cattle by plaintiff, plaintiff appeals.

Facts: Plaintiff instituted an action to recover $618 for work and services performed for defendant in transporting two truck loads of cattle from Strawberry, Nevada to Blythe, California.

Defendant answered and filed a counterclaim for $4,424, claiming that plaintiff negligently transported the cattle and falsely represented to defendant that he would obtain 100% insurance coverage on the shipment.*

The trial court gave judgment in favor of defendant and against plaintiff in the sum of $2,362.

[1] *Questions:* First: *Was there substantial evidence to sustain the trial court's finding that plaintiff negligently handled defendant's cattle resulting in injury to them?*

Yes. Bearing in mind the rule announced in Re Estate of Isenberg, 63 Cal. App.2d 214, 217, 146 P.2d 424, the evidence disclosed that plaintiff's driver, when the cattle were loaded, gave defendant a receipt reading as follows: "On November 26, 1949, I received in good shape 15 cows, 69 steers, Jack K. Luce. Witnessed by Bonnie Hooper."

A witness testified that when the cattle reached Ely, Nevada, they were drawn and gaunt; not in fit condition to be insured. The inference inevitably results that the cattle were not properly handled in transportation, from the Hooper ranch where plaintiff received them, to Ely, Nevada, and therefore supports the trial court's finding of negligence upon the part of plaintiff in view of the fact there was testimony that cattle ordinarily received were not in such condition, but were in good and insurable condition.

[2] Second: *Was there substantial evidence to sustain the trial court's finding that defendant's damage was $2,362?*

Yes. The evidence disclosed that the animals that died as a result of plaintiff's negligence were worth $800; that a steer which was lost weighed around 800 pounds, and was worth 22 cents per pound, or a total of approximately $176; that the normal shrinkage in shipments of this class is 8%, and that the actual shrinkage due to plaintiff's negligence was 18%, therefore there was a shrinkage of 10% over the normal in the present case.

The evidence disclosed, predicated upon the foregoing finding, that the difference in the value of the cattle when received by plaintiff and when they reached their destination was $2,980. Since plaintiff was entitled to a credit of $618, the contract price for the shipment, defendant's damage was $2,362, the sum for which the court gave judgment in favor of defendant.

It is obvious that the questioned finding is supported by the evidence.

Affirmed.

MOORE, P. J., and FOX, J., concur.

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* The action was duly transferred to the superior court for trial.

113 Cal.App.2d 459

PEOPLE v. WHITEHEAD et al.

Cr. 4810.

District Court of Appeal, Second District,
Division 2, California.
Oct. 2, 1952.

Defendant was convicted of robbery in the first degree. The Superior Court, County of Los Angeles, William B. Neeley, J., entered judgment of conviction and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, McComb, J., held that defendant's testimony on direct examination that his confession was not voluntary, after confession had been admitted into evidence without objection following statement of officer that it was voluntary, raised issue to be determined by trier of fact.

Affirmed.

Criminal Law 🔑260(11)

Where defendant testified on direct examination that his confession was involuntary, but previously had made no objection when confession was received in evidence after testimony of police officer that confession was voluntary, defendant's testimony raised issue to be determined by trier of fact whose determination was binding on appeal.

◆

William Herbert Hall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

After trial before the court without a jury defendant was found guilty of robbery in the first degree. Defendant appeals from the judgment and from the order denying his motion for a new trial.

Facts: On August 7, 1951, defendant and another man took $95 from a liquor store located at 9024 Long Beach Boulevard. The men tied the owner's hands behind his back and while he was in fear of a gun which was pointed at him the robbery was committed. Without objection a confession of defendant was received in evidence.

Question: Was defendant's confession inadmissible for the reason it had been coerced from him by a beating inflicted by police officers?

No. The record discloses that defendant's confession was received in evidence without objection after a police officer had testified that the conversation with defendant, which constituted the confession, was free and voluntary.

Upon direct examination in his own behalf defendant testified that he was beaten by unknown police officers and therefore forced to state that he had participated in the robbery. This testimony was merely contradictory of the testimony given by Officer Rafferty that the confession was free and voluntary and raised an issue to be determined by the trier of fact, whose determination, supported as it is by substantial evidence, is binding upon an appellate court.

The judgment and order are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

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113 Cal.App.2d 481

PEOPLE v. COSTELLO.

Cr. 4836.

District Court of Appeal, Second District,
Division 3, California.
Oct. 3, 1952.

Defendant was convicted of forgery of a fictitious name in checks with intent to defraud, and from judgment of conviction and an order of the Superior Court of Los Angeles County, Clement D. Nye, J., denying his motion for a writ of error coram nobis, defendant appealed. The District Court of Appeal, Shinn, P. J., held that the evidence sustained trial court's implied finding that when defendant withdrew plea of not guilty and plea of not guilty by reason of insanity and entered a plea of guilty, he acted voluntarily and understandingly.

Purported appeal from judgment dismissed and order affirmed.

1. Criminal Law 🔑997

Evidence sustained trial court's finding, implicit in order denying petition for writ of error coram nobis, that when defendant withdrew plea of not guilty and plea of not guilty by reason of insanity and entered a plea of guilty to one of three counts of information charging forgery of a fictitious name in checks with intent to defraud, the defendant acted voluntarily and understandingly with knowledge of the legal effect of such action.

2. Criminal Law 🔑1158(1)

Trial court's determination, having ample support in the evidence, that when defendant withdrew plea of not guilty and plea of not guilty by reason of insanity and entered plea of guilty to one of three counts of information charging forgery of a fictitious name in checks with intent to defraud, defendant acted voluntarily and understandingly was conclusive on appeal from order denying his petition for writ of error coram nobis.

3. Criminal Law 🔑1069(6)

Appeal from judgment of conviction which was not taken within ten days after rendition of judgment would be dismissed. Rules on Appeal, rule 31.

Richard G. Costello, in pro. per.

Edmund G. Brown, Atty. Gen., Frank Richards, Asst. Atty. Gen., for respondent.

SHINN, Presiding Justice.

In the respondent's brief, prepared by Mr. Frank Richards, assistant attorney general, we find the following statement of the case and discussion of the several grounds of appeal urged by appellant:

"This is an appeal by defendant from an order denying his petition for a writ of error coram nobis. It appears that on March 7, 1951 an information was filed in the Superior Court of Los Angeles County charging defendant with three counts of forgery of a fictitious name in certain checks which he passed with intent to cheat and defraud. The information also alleged two prior convictions of forgery, one in 1940 and the other in 1948, and that defendant served a term of imprisonment therefor in the State prison. He was arraigned on March 9, 1951 and was represented by counsel. His time to plead was continued to March 16, 1951, at which time defendant pleaded not guilty, denied the prior convictions, and his trial was set for April 11, 1951. On March 30, 1951 defendant came into court with his counsel and entered the additional plea of not guilty by reason of insanity. Doctors were appointed by the court to examine defendant as to his sanity and the case was reset for trial on May 2, 1951. On this latter date, defendant withdrew his plea of not guilty and the trial on the issue of insanity and prior convictions was set for June 25, 1951. Nothing appears in the record on this date, but on July 16, 1951 defendant withdrew his plea of not guilty by reason of insanity and pleaded guilty to count one of the information. He also admitted the alleged prior convictions. On August 15, 1951 defendant was sentenced on count one to the State prison and the other counts in the information were dismissed.

"On February 14, 1952 defendant in propria persona filed in the Superior Court a petition for a writ of error coram nobis contending that his plea of guilty to count one of the information was entered under conditions of fraud, duress or mistake in that at the time of withdrawing his plea of not guilty and entering a plea of guilty to count one, his intentions were merely to permit the court to pass upon the insanity issue without a jury. Attached to his petition are several affidavits from friends who state that he is an alcoholic and when drunk is not conscious of what he is doing. There are also letters to the effect that defendant has been in the Cook County Hospital, Chicago, Illinois, for chronic alcoholism and was classified as having a psychopathic personality. From the order denying his petition, defendant filed notice of appeal and also from the judgment rendered August 15, 1951. His appeal from the judgment should be dismissed for the reason that such appeal was not taken within ten days after the rendition of the judgment. (See: Rule 31, Rules on Appeal; In re Horowitz, 33 Cal.2d 534, 537 [203 P.2d 513]; People v. Behrmann, 34 Cal.2d 459, 461 [211 P.2d 575].)

"On behalf of his appeal, defendant contends that he was deprived of an adequate and proper presentation of his defense through negligence and incompetency of his counsel; that through no lack of diligence on his part the true facts of his case were never presented to the court; that the true facts of the case are that he was a chronic alcoholic and had a psychopathic personality and had suffered delirium tremens; that the trial court may have considered the medical reports of the court appointed physicians which precluded defendant from presenting the true facts of his defense; that he pleaded guilty by mistake because of his misapprehension of the legal effect of withdrawing the plea of not guilty by reason of insanity; that the legal proceedings resolved into extrinsic fraud, and that insanity was the paramount issue of his defense.

"In his brief on appeal defendant contends that he clearly stated to his counsel that he desired to be tried by a jury on the issue of insanity and instructed his counsel to present this defense under his plea of not guilty by reason of insanity.

"The record does not support defendant's contention. It shows the following:

> " 'The Court: You are withdrawing your plea of not guilty by reason of insanity after having talked with the doctors and you believe that you were sane at the time that the offense was committed, is that true?
>
> " 'The Defendant: Yes.
>
> " 'The Court: You are doing this freely and voluntarily, are you?
>
> " 'The Defendant: Yes.
>
> " 'The Court: Nobody has forced you or persuaded you to do this against your will or without your consent, have they?
>
> " 'The Defendant: No.
>
> " 'The Court: Has anybody given you any promise of reward or any hope of immunity or leniency?
>
> " 'The Defendant: No.
>
> " 'The Court: Permission will be granted to withdraw the plea.'

"Furthermore, lack of effective aid of counsel cannot be determined in coram nobis proceedings.

"People v. Smith, 109 Cal.App.2d 76 [239 P.2d 903].

"Defendant states that the true facts are that he was a chronic alcoholic and had a psychopathic personality and that these facts were not presented to the court through no lack of diligence on his part.

"As we have hereinabove pointed out, defendant withdrew his plea of not guilty by reason of insanity after he had talked with the doctors and believed that he was sane at the time of the commission of the offense to which he pleaded guilty. The mere fact that his attorney advised and persuaded him to withdraw his plea of not guilty by reason of insanity does not constitute a sufficient basis for issuing a writ of error coram nobis.

"See: People v. Ynostroza, 105 Cal.App.2d 332, 333 [232 P.2d 913].

"Defendant states that he pleaded guilty by mistake due to his misapprehension of the legal effect of withdrawing his plea of not guilty by reason of insanity and therefore the legal proceedings against him resolved into extrinsic fraud.

"During the entire proceedings in court defendant was represented by his own private counsel; and even so, the court was solicitous of defendant's understanding of the legal effect of withdrawing his several pleas to the charges set forth in the information. It was only after defendant stated to the court that it was his desire to withdraw his plea of not guilty by reason of insanity to each count and enter a plea of guilty to count one, that he believed that he was sane at the time he committed this offense, that nobody had persuaded or forced him against his will or had made any promise of reward or hope of immunity or leniency to change his plea, that the court granted permission to defendant to withdraw his plea. This is not a case which involves extrinsic fraud.

"In People v. Devora, 105 Cal.App.2d 457, 463 [233 P.2d 653, 656], it is stated:

> "'Appellant made no complaint at the time he was sentenced; he made no motion for a new trial and no appeal was taken. In addition, when he entered his pleas of guilty, he admitted that he had not been promised any reward or immunity. The record is free from error. The order denying the motion to set aside the judgment is supported by the evidence. The order is affirmed.'

"In view of the record herein which shows that defendant was fully informed by the court and therefore aware of the legal effects of withdrawing his plea of not guilty by reason of insanity and pleading guilty to count one of the information, his petition for a writ of error coram nobis was properly denied."

The foregoing is a fair and adequate presentation of the case on appeal. It fully answers the sole question whether there was substantial evidence in the hearing in the trial court to support the finding, implicit in the order appealed from, that appellant, at the time he withdrew his plea of not guilty and his plea of not guilty by reason of insanity, and entered a plea of guilty to one count, acted voluntarily and understandingly.

[1] We have reviewed the record and are satisfied that the trial court's finding has ample support in the evidence. In addition to the portions of the record quoted by the attorney general we find other passages in the reporter's transcript which further dispute appellant's contention that he did not understand the import of what he was doing when he withdrew his plea of not guilty by reason of insanity. Immediately prior to the withdrawal of the plea the court stated: "This is on the issue of insanity." Whereupon defendant's attorney, Gladys T. Root, stated: "If your Honor please, the defendant now, on advice of counsel, is willing to withdraw his plea of not guilty and withdraw the plea of not guilty by reason of insanity, the District Attorney being disposed now to allow us to enter a plea of guilty to the one count, if we withdraw the insanity plea." Thereupon the defendant pleaded guilty to the prior convictions. The court then asked: "Mr. Costello, you understand that heretofore you have withdrawn the plea of not guilty to each count of the information and that you are standing at the present moment on the plea of insanity. It is your desire, is it, to withdraw that plea of not guilty by reason of insanity to each count, and enter a plea of guilty to Count 1, is that right?" to which the defendant answered: "Yes." Then followed the further colloquy quoted in the respondent's brief. We do not see what more the court could have done to make it clear to the appellant that he was abandoning his claim of insanity.

[2] The determination of this factual question in the light of the record is conclusive upon the appeal. We may add, however, that while appellant is unskilled in the law it is evident from the briefs he has written on the appeal that he is possessed of a high degree of intelligence and understanding.

[3] The purported appeal from the judgment is dismissed.

The order is affirmed.

WOOD and VALLÉE, JJ., concur.

CONTI et al. v. STATE BOARD OF EQUALIZATION.

Civ. 15145.

District Court of Appeal, First District, Division 2, California.

Oct. 3, 1952.

Rehearing Denied Nov. 1, 1952.

Hearing Denied Nov. 25, 1952.

Proceedings by Mary Conti and another against State Board of Equalization for peremptory writ of mandate ordering the Board to set aside its order suspending petitioners' liquor license. The Superior Court, Alameda County, A. J. Woolsey, J., held evidence insufficient to support the order and the Board appealed. The District Court of Appeal, Nourse, P. J., held that evidence did not justify decision of Board suspending a liquor license for selling a bottle of beer to a minor who exhibited to the licensee an out of state motor vehicle operator's license, identifying a party over 21.

Judgment affirmed.

1. Intoxicating Liquor ⚿108(1)

Statute providing that where licensee proves that he or his employee demanded and was shown, before selling alcoholic beverage to a minor, a motor vehicle operator's license as evidence of majority and identity of person served, such proof shall be a defense to proceeding for suspension or revocation of liquor license does not impose upon the licensee the duty of determining at his peril whether the driver's license is a bona fide license of party presenting it, but possession of the license is presumptive evidence that license belonged to the holder. Gen.Laws, Act 3796, § 61.2(b).

2. Intoxicating Liquor ⚿108(1)

Under statute providing that where licensee proves, that he or his employee demanded and was shown, before furnishing alcoholic beverage to minor, a motor vehicle operator's license as evidence of majority and identity of person served, such proof shall be a defense to proceeding for suspension or revocation of liquor license, bartender is justified in assuming validity of driver's license and in accepting holder as legal owner, unless personal appearance of holder of driver's license demonstrates above suspicion that he is not the legal owner. Gen.Laws, Act 3796, § 61.2(b).

3. Intoxicating Liquor ⚿108(5)

Evidence did not justify decision of State Board of Equalization suspending a liquor license for selling a bottle of beer to a minor who exhibited an out of state driver's license identifying a person over age of 21. Gen.Laws, Act 3796, § 61.2(b).

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Edmund G. Brown, Atty. Gen., William M. Bennett, Deputy Atty. Gen., for appellant.

J. Elwood Andresen, Oakland, for respondent.

NOURSE, Presiding Justice.

In proceedings before the State Board of Equalization on an accusation charging the sale of liquor to a minor the board ordered a fifteen day suspension of the liquor license. This proceeding in mandamus was brought by the licensees to review the proceedings before the board. The attack on the suspension order was based on the claim that the evidence was insufficient to support it. The trial court so held.

The licensees sold a bottle of beer to a nineteen year old member of the Coast Guard on his presentation of an out of state motor vehicle driver's license identifying a party over the age of 21. Soon thereafter two members of the Navy Shore Patrol entered the premises and questioned the purchaser. He admitted that the driver's license belonged to a friend and that he was a minor. The licensees defend their sale on the provisions of section 61.2(b) of the Alcoholic Beverage Control Act, Gen.Laws, Act 3796, which reads: "In any criminal prosecution, or any proceeding for the suspension or revocation of any license issued under this act and based upon violation of said Section 61, proof that the defendant licensee or his agent or employee demanded and was shown, before furnishing any alcoholic beverage to a minor, a motor vehicle operator's license or a registration certificate issued under the Federal Selective Service Act or other bona fide documentary evidence of majority and identity of such person, shall be a defense to such prosecution or proceeding for the suspension or revocation of any license."

At the hearing before the State Board the hearing officer found that the accused "did not establish a defense to the above proceeding under Section 61.2(b) of the act." The trial court held that this finding was not supported "by any substantial evidence" and annuled the order of the State Board.

[1] We are inclined to agree with the ruling of the superior court because the statute does not impose upon the licensee the duty of determining at his peril whether the driver's license is a bona fide license of the party presenting it. Possession of the license is presumptive evidence that the license belonged to the holder. Code Civil Procedure, sec. 1963, subd. 11. To hold otherwise would require the attendant to determine at his peril whether the driver's license had been legally issued, whether it had not been revoked or suspended, and whether the party presenting it was in truth and fact the legitimate holder of the paper.

[2, 3] There is really no conflict in the evidence—just a shade of difference in the suspicions the witnesses might have drawn from the personal appearance of the boy. It is conceivable that a member of the Shore Patrol would have more experience in guessing the age of a member of the uniformed service than would one whose daily duties were confined to attending bar. Unless the personal appearance of the holder of the driver's license demonstrates above mere suspicion that he is not the legal owner of the license the bartender is justified in assuming the validity of the driver's license and in accepting the holder as the legal owner.

The hearing officer of the State Board made no finding of fact relating to the presentation and inspection of the driver's license. He drew the conclusion that a defense was not established under section 61.2(b) of the Control Act. The trial court found that there was no substantial evidence to support that determination.

In a somewhat similar case, Young v. State Board of Equalization, 90 Cal.App.2d 256, 258, 202 P.2d 587, 588, the court said:

> "As we read the section 61.2(b) of the act, a defense was established when the clerk Seahorn demanded identification of Taylor and was shown the registration certificate. The wording of the section indicates that such a registration certificate is bona fide documentary evidence of majority and identity. The clerk, if he acted in good faith and without actual knowledge, gained from the appearance of the purchaser, or otherwise, that the car did not or could not belong to the minor, and if the alteration was with reasonable diligence not discernible or ascertainable, had a right to assume that anyone presenting such a card would not unlawfully possess or use it."

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

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113 Cal.App.2d 447

KATZ v. WAHRHAFTIG et al.

Civ. 15114.

District Court of Appeal, First District,
Division 2, California.
Oct. 2, 1952.

Proceeding by Phil C. Katz, as public administrator of the City of San Francisco and as administrator of the estate of Jessie S. Gregory, deceased, against Marjorie Atsatt and Matt Wahrhaftig and others. Matt Wahrhaftig and others filed a cross-complaint. The Superior Court, Thomas J. Ledwich, J., entered judgment and Wahrhaftig and others appealed from the portion of judgment that decreed that the deed was given to Wahrhaftig and others in trust. The District Court of Appeal, Jones, J., held that the evidence as to the trust found by the court was sufficient to sustain the finding of the court.

Affirmed.

1. Trusts ⚷44(2)

Evidence sustained finding that deceased's undivided interest in realty was conveyed to grantees in trust to be held by them during lifetime of grantor, subject to her order, and with trust revocable at her pleasure, and on appeal finding must be sustained.

2. Appeal and Error ⚿1010(2)

Where defendants urge the insufficiency of the evidence to sustain the court's finding, as grounds for reversal of the judgment, the defendants must demonstrate that there is no substantial evidence to support the challenged finding.

3. Appeal and Error ⚿989

Where verdict is attacked as unsupported by the evidence, appellate court's power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding.

4. Appeal and Error ⚿996

Where two or more inferences can be reasonably deduced from the facts, appellate court is without power to substitute its deductions for those of the trial court.

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Matt Wahrhaftig, J. D. Cooper, Oakland, for appellants.

Henry F. Boyen, San Francisco, Fitzgerald, Abbott & Beardsley, Oakland, of counsel, for respondents.

JONES, Justice pro tem.

This appeal is taken from a particular part of a judgment determining adverse claims to the Guadalupe Mine and Ranch in Santa Clara County. The property is comprised of a quicksilver mine and several hundred acres of land, and was owned by Mrs. Jessie S. Gregory who is now deceased. During her lifetime Mrs. Gregory gave deeds to an undivided one-half of the property to her attorneys as their fees for representing her in litigation involving the property. She gave another deed to appellants on February 23, 1937, of the other undivided one-half, and it is from the part of the judgment decreeing that this deed was given upon the trusts found by the court that the appeal is taken.

The court found that by virtue of the execution of the deed appellants acquired no beneficial interest or ownership in the property, but that the title to the undivided half thereof was transferred in trust to be held by them during the lifetime of Mrs. Gregory, subject to her order, and with the trust revocable at her pleasure.

Mrs. Gregory died on December 27, 1939, and it was some four years later, November 10, 1943, that the deed dated February 23, 1937, was recorded by appellant, Wahrhaftig.

Appellants contend that the property was deeded upon a trust different from that found by the court. No mention of a trust is made in the deed. In form it is a straight grant, bargain and sale deed of an undivided one-half interest in the property from Mrs. Gregory to appellants. Their claim of a trust is based on an alleged oral and secret agreement made with Mrs. Gregory by which they contend they became empowered "to hold, manage, control, sell, invest and reinvest said property and make leases and exchanges therefor and were to hold the net income of the trust property for the use and benefit of said trustor during her lifetime and upon her death were to pay the net income thereof to Winifred Stover Donnan, niece of said decedent, until her death, and thereafter were to pay the net income or so much of the principal of said trust property as they in their judgment might decide to be necessary for his maintenance and support, to one Dr. Stover, father of Winifred Stover Donnan, until his death, the net income and principal to be payable directly to the beneficiaries and to be free from all claims of creditors to the fullest extent permitted by law and upon the death of the survivor of said Winifred Stover Donnan and Dr. Stover to hold all said property and the proceeds and avails thereof in trust for and to devote the income thereof and so much of the corpus thereof as they in their judgment might elect for the use of Jewish refugees from persecution and to apply the income and so much of the principal as they might desire even to the full amount thereof, for the relief of such Jewish refugees."

[1] The appeal presents the clear cut issue as to which trust was established by the evidence. We are of the opinion that

the finding of the trial court in this respect has abundant and substantial evidentiary support and must be sustained.

It is argued by the appellants that the evidence in support of the revocable trust is so lacking in substance as to offer no support for the finding of the trial court as to its existence, but, on the other hand, conclusively establishes a trust upon the terms contended for by them.

The record discloses that on February 24, 1937, the day after the deed was executed Wahrhaftig wrote to Mrs. Gregory stating: "I hereby acknowledge and declare that whatever interest I have acquired under the deed dated February 23, 1937, whereby you conveyed an undivided one-half interest in the Guadalupe property to me and Margaret Hodgen, is being held by me subject to your order; that I claim no interest in said one-half interest; that I am merely holding it as a matter of convenience for you and in trust for you." On the same subject he stated in a letter to Margaret Hodgen written on March 1, 1937, that: "I wish to acknowledge receipt of your letter of February 26, 1937, in which you seem to express some doubt as to the wisdom of taking a conveyance to you and to me as trustees for Mrs. Gregory. She has already executed this conveyance but I am not going to record it for a while at least. I have written her a letter stating that whatever interest I have received is held as trustee for her and subject to her order and that whatever you have received is also subject to her order. I doubt very much whether we will ever have to record the deed."

Upon the trial of the case he testified: "Q. Did she say that the changes in that alleged inter vivos trust might be affected by any subsequent will she might make, any will she might make after that date? A. I do not think she used the word 'will'. I think what she said was she had the right to change it right up to the time of her death."

Miss Hodgen testified: "Q. Did she say anything about any reservation of the right to change the purposes for which you and Mr. Wahrhaftig were to hold the property? A. She did reserve that right, yes.

"Q. Expressly? A. Yes, she did.

"Q. And did you and Mr. Wahrhaftig at that time make any statement to Mrs. Gregory that you would observe her wishes? A. We did."

On December 20, 1939, Mrs. Gregory executed a will wherein she named Miss Marjorie Atsatt with Miss Hodgen as executrices and Mr. Wahrhaftig as executor and devised all of her property to them upon almost the identical trusts claimed by appellants to have been created by the oral agreement. After Mrs. Gregory's death on December 27, 1939, this will was duly admitted to probate. The persons named were appointed as the executor and executrices respectively of the will, and continued to act as such until their resignation on November 8, 1946. At no time during the probate proceedings did the appellants announce to the court the trust which they now claim was created on February 23, 1937. To the contrary they at all times represented that the property belonged to Mrs. Gregory and was subject to her testamentary disposition. The fact that Mrs. Gregory made a will in which she specifically created a trust which by operation of law would become effective upon her death creates a strong presumption that she did not intend the arrangement made on February 23, 1937, to continue beyond her lifetime. The conduct of appellants with respect to the probate of the will and its testamentary effect lends strong support to this presumption.

[2-4] As is said in Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552, where the defendants urged as grounds for the reversal of the judgment the insufficiency of the evidence to sustain the findings: "Such contention requires defendants to demonstrate that there is no substantial evidence to support the challenged findings. As was stated in the oft-cited case of Crawford v. Southern Pacific Co., 3 Cal.2d 427, at page 429, 45 P.2d 183, at page 184: '* * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' which will support the findings, and when 'two or more

inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' See, also, Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660; Fischer v. Keen, 43 Cal.App.2d 244, 248, 110 P.2d 693; Laherty v. Connell, 64 Cal. App.2d 355, 357, 148 P.2d 895; Wuest v. Wuest, 72 Cal.App.2d 101, 104, 164 P.2d 32. Careful review of the record here, in the light of these fundamental principles of law, does not sustain defendants' attack upon the propriety of the trial court's determination, and the judgment must be affirmed."

The same may be said of the record in this case.

The portion of the judgment appealed from is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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113 Cal.App.2d 421

SHRIVER v. KUCHEL, Controller of State.

Civ. 19051.

District Court of Appeal, Second District, Division 3, California.

Oct. 1, 1952.

Action by William Henry Clay Shriver against Thomas H. Kuchel, as Controller of the State of California, for a declaratory judgment as to nonliability for interest on inheritance taxes. From an adverse judgment of the Superior Court of Los Angeles County, Joseph M. Maltby, J., plaintiff appealed. The District Court of Appeal, Vallée, J., held that compromise agreement for settlement of controversy as to inheritance tax liability did not include interest on the tax.

Judgment affirmed.

1. Compromise and Settlement 🔑11

Compromise agreements are governed by the legal principles applicable to contracts generally.

2. Compromise and Settlement 🔑11

The primary object in construing a compromise agreement is to ascertain the intention of the parties from the writing itself, construed in the light of the circumstances surrounding its execution, including the object, nature, and subject matter of agreement and the preliminary negotiations between the parties.

3. Compromise and Settlement 🔑16(1)

A valid compromise agreement has many of the attributes of a judgment and, in absence of a showing of fraud or undue influence, is decisive of the rights of the parties thereto and operates as a bar to the reopening of original controversy.

4. Compromise and Settlement 🔑17(1)

A compromise agreement is conclusive between the parties as to the matters compromised, but it settles only such matters as appear clearly to be comprehended in agreement by intention of the parties and the necessary consequences thereof and does not extend to matters which the parties never intended to include therein, though existing at the time.

5. Taxation 🔑887

The right of state to an inheritance tax vests immediately upon death of transferor, though state at that time may not know the amount of tax. Revenue and Taxation Code, § 14102.

6. Taxation 🔑901

Inheritance taxes become delinquent if not paid within two years after death of transferor and bear interest only if not paid within such two-year period, but if not paid within such period, inheritance taxes bear interest from date of death of transferor until paid. Revenue and Taxation Code, §§ 14102, 14103, 14211.

7. Taxation 🔑895(3)

Inheritance tax appraiser fixes only the amount of the tax. Revenue and Taxation Code, §§ 14102, 14506, 14509.

8. Taxation 🔑901

Interest is not such an integral part of inheritance tax as to be an indispensable part thereof, but it is an item which is determinable separate and distinct from determination of the tax and it is determined only in the event tax is not paid before delinquent date. Revenue and Taxation Code, §§ 14102, 14103, 14211, 14506, 14509.

9. Taxation ⚷899

Interest on inheritance tax is not an item which would normally be included in a compromise of tax itself, unless it can be said that interest was an item within the contemplation of the parties at time of the compromise. Revenue and Taxation Code, §§ 14102, 14103, 14211, 14506, 14509.

10. Taxation ⚷899

Compromise agreement for settlement of controversy as to inheritance tax liability, which was entered into after tax had become delinquent and evidenced by stipulation reciting that tax should be reduced from stated sum as shown in report of inheritance tax appraiser by allowing as a credit against such sum stated amount, constituting amount of inheritance tax due another state, did not include interest on the tax, in absence of reference to interest either in stipulation or order approving it, particularly in view of fact that stipulation was entitled "stipulation for sustaining of objections in part", thereby indicating intention to limit compromise. Revenue and Taxation Code, §§ 14102, 14103, 14211, 14506, 14509.

11. Appeal and Error ⚷843(2)

Where judgment approving compromise settlement of controversy as to inheritance tax liability and fixing the amount of such tax had become final, the question of State Controller's authority to make such compromise agreement was immaterial and moot. Revenue and Taxation Code, § 14102.

◆

Elizabeth Cochran, James E. Pawson, Long Beach, for appellant.

James W. Hickey, Sacramento, Walter H. Miller, Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiff, William Henry Clay Shriver, brought this action for declaratory relief against the State Controller. He seeks a declaration as to whether he, as a transferee of property made to him during the lifetime of S. C. Clay Shriver, is liable to the State of California for interest on inheritance taxes.

S. C. Clay Shriver died on June 14, 1947. On December 1, 1947, the State Controller filed a petition (LBC 14374) for determination of inheritance tax. The petition alleged: Shriver was a resident of Los Angeles at the date of his death; he was, prior to his death, the owner of stocks and bonds situate in Los Angeles County; the stocks and bonds were transferred by him prior to his death in contemplation of death; an inheritance tax is due and payable. On December 1, 1947, an order was made designating an inheritance tax appraiser and referee. On January 9, 1948, the report of the inheritance tax appraiser was filed. On February 2 appellant filed an answer to the petition and objections to the report of the inheritance tax appraiser. This document denies the allegations of the petition and alleges: Shriver was a resident of Kansas at all times mentioned and at the date of death; he left a will which was admitted to probate, and a finding made of his residence in the probate court of Butler County, Kansas; the stocks and bonds described in the petition and all property of Shriver was located and is held under the jurisdiction of the probate court of Butler County, Kansas, and is in the possession of the executor of Shriver's will; the transfers alleged in the petition were made and consummated while the transferor and the transferee were nonresidents of California and none of the property is or was ever within the jurisdiction of the Superior Court of this State. On February 16, 1949, the report of the inheritance tax appraiser, as referee, was filed. It reported that decedent was a resident of the County of Los Angeles at the date of death; and that there was a tax due from appellant in the amount of $85,262.26.

On May 22, 1950, a stipulation, entitled "Stipulation For Sustaining Of Objections In Part," was entered into between the State Controller and appellant which reads:

> "Whereas, the Inheritance Tax Appraiser has heretofore filed in these proceedings a report of the amount of inheritance tax due; and

> "Whereas, objections thereto have been filed by William Henry Clay Shriver, and
>
> "Whereas, an agreement of compromise has been reached by and between the parties,
>
> "Now, Therefore, It Is Agreed that the amount of inheritance tax due the State of California from the said William Henry Clay Shriver shall be reduced from the sum of $85,262.26 as shown in said report by allowing as a credit against said sum the amount of $37,897.46;
>
> "It Is Further Stipulated that an order be made by the Court pursuant to this stipulation, directing the inheritance tax appraiser to file an amended report herein fixing the tax at the reduced amount;
>
> "It Is Further Stipulated that the said order may include that there should be paid to the inheritance tax appraiser as fees for services in the sum of $660.71."

On August 22, 1950, the stipulation was filed and an order made by the court which reads:

> "Upon reading and filing the stipulation for sustaining of objections in part entered into by and between attorneys for petitioner and respondents, and good cause appearing therefor,
>
> "It Is Hereby Ordered, Adjudged and Decreed that the inheritance tax be and the same is hereby set in the amount of $47,364.80, allowing a credit against the original tax in the sum of $37,897.46;
>
> "It Is Further Ordered that the State Inheritance Tax Appraiser, Harland V. Boyer, be directed to file an amended report fixing the tax accordingly.
>
> "It Is Further Ordered that the Inheritance Tax Appraiser's fee be paid in the sum of $660.71."

Prior to the making of the foregoing order and on July 10, 1950, appellant paid $47,364.80 to the County Treasurer of the County of Los Angeles. On December 8, 1950, he filed the present action for declaratory relief. The complaint alleges the facts we have narrated and that the document dated May 22, 1950, was a compromise; that the Controller "is now insisting upon the payment of penalty as, of and from the date of death of S. C. Clay Shriver, although willing to consent to a remission for the two year period from and after the death, and is threatening to bring an action against this plaintiff under the provisions of sections 14211 and 14212 of the Revenue and Taxation Code of the State of California"; that a bona fide controversy exists between the parties; and that "plaintiff paid the amount of the tax within a reasonable time after the determination, as a full settlement of the controversy existing over the question of the residence of the deceased had been entered into."

The Controller answered alleging that the written stipulation for compromise was executed pursuant to and as a result of an oral compromise entered into by and between plaintiff and defendant on August 8, 1949; that the compromise included the amount of tax only and was not understood by either party to include either interest or penalties; that the $47,364.80 paid by plaintiff was applied first to interest in the sum of $1,454.68 owing on the tax as of the date of payment, and the balance to the tax itself. The sum of $1,454.68 remains unpaid on the tax, with interest.

The only evidence introduced at the trial was the file in the proceeding for the determination of inheritance tax (LBC 14374) and an oral stipulation between the attorneys for the parties, as hereinafter appears. The court found and concluded that the compromise related to the amount of inheritance tax only and it was not understood by either party thereto that the amount agreed upon as a compromise was intended to cover the full amount of the tax and interest, but, on the contrary, was intended to cover the amount of tax only. Judgment was that interest is owing on the unpaid portion of the tax from the date of death until payment is made in full.

Plaintiff contends that upon the payment of the sum of $47,364.80, pursuant to the stipulation of compromise and the order approving the same, he has fully discharged his obligation to the State of California with respect to inheritance taxes and interest, and that no further sum is due thereon. This contention must necessarily find support in the agreement of compromise.

[1–4] Compromise agreements are governed by the legal principles applicable to contracts generally, the primary object being to ascertain the intention of the parties, which is to be determined from the writing itself, construed in the light of the circumstances surrounding its execution, including the object, nature, and subject matter of the agreement, and the preliminary negotiations between the parties. Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 479, et seq., 19 P.2d 785; Hammond Lumber Co. v. Cravens, 82 Cal.App. 685, 691, 256 P. 428; 5 Cal.Jur. 384, § 1; 15 C.J.S., Compromise and Settlement § 21, p. 735. In California a valid compromise agreement has many of the attributes of a judgment, and in the absence of a showing of fraud or undue influence is decisive of the rights of the parties thereto and operates as a bar to the reopening of the original controversy. Armstrong v. Sacramento Valley R. Co., 179 Cal. 648, 650, 178 P. 516; Frankfield v. Freiberger, 216 Cal. 266, 13 P.2d 905; Fouratt v. Goodman, 203 Cal. 252, 254, 263 P. 533; Lamb v. Herndon, 97 Cal. App. 193, 203, 275 P. 503; Silver v. Shemanski, 89 Cal.App.2d 520, 531, 201 P.2d 418. A compromise agreement is conclusive between the parties as to the matters compromised. Compromise agreements, however, "'regulate and settle only such matters and differences as appear clearly to be comprehended in them by the intention of the parties and the necessary consequences thereof, and do not extend to matters which the parties never intended to include therein, although existing at the time.' 8 Cyc. 520, 521." Lemm v. Stillwater Land & Cattle Co., supra, 217 Cal. 474, 482, 19 P.2d 785, 789.

[5–9] The right of the state to an inheritance tax vests immediately upon the transferor's death, Rev. & Tax.Code, § 14102, although at that time the state may not know its amount. Inheritance taxes do not bear interest if paid before they become delinquent, which is two years after the death of the transferor. Rev. & Tax.Code, § 14103. It is only when they are not paid within the two-year period that they bear interest and then, under the 1943 statute, from the date of death until paid. Rev. & Tax.Code, 1943, § 14211. The inheritance tax appraiser fixes only the amount of the tax. Rev. & Tax.Code, §§ 14506, 14509. Thus it appears that interest is not such an integral part of the tax as to be an indispensable part thereof, but is an item which is determinable separate and distinct from the determination of the tax and is determined only in the event the tax is not paid before the delinquent date. This being so, it seems reasonable to conclude that it is not an item which would normally be included in a compromise of a tax itself unless it can be said that it was an item within the contemplation of the parties at the time of the compromise.

[10] With the foregoing principles in mind, it is apparent that the parties did not intend to include the item of interest in their compromise agreement. The stipulation and the order approving it are silent as to any reference to "interest" and refer only to the "tax". It is to be noted that the stipulation is stated to be a "Stipulation For Sustaining Of Objections *In Part.*" The italicized words, "In Part", we think are significant as denoting an intention to limit the compromise and distinguishes it from those various forms of compromise which are intended by the parties to be all-inclusive. That this was their intent is manifest from the recital in the stipulation that an agreement for compromise "has been reached", and that the inheritance tax due California "be reduced from the sum of $85,262.26 as shown in said report by allowing as a credit against said sum the amount of $37,897.46." It appears from the oral stipulation entered into by the attorneys at the trial of this action,[1] that 1) the sum of $37,897.46, allowed as a credit against the reported tax, was the entire amount of the inheritance tax due the State of Kansas, 2)

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[1] "Mr. Barker [Attorney for the State Controller]: I don't like to take the stand and testify. Will you stipulate that on or about August the 5th, 1949, there was an oral agreement between you and myself that we should compromise the

the agreement of August 5, 1949, was grounded "on the basis that the California inheritance tax would be determined on the basis that the decedent was a California resident and would be deducted therefrom the amount of the Kansas inheritance tax," and 3) the essence of the agreement of August 5, 1949, was subsequently incorporated in the written stipulation. It is, we think, significant that on August 5, 1949, no mention of interest was made or considered by either of the parties, although the period within which the tax could have been paid without interest had passed and interest on the unpaid inheritance tax was due and payable although not then computable because of the controversy as to residence. Since interest was not considered it cannot be maintained that it was within the contemplation of the parties when the compromised figure of the tax was finally agreed to.

[11] Since the judgment in the proceeding to determine the tax (LBC 14374) has become final, the question of the Controller's authority to make the compromise is immaterial and moot.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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113 Cal.App.2d 363

RAY v. BARTHORPE et al.

Civ. 15047.

District Court of Appeal, First District,
Division 2, California.
Sept. 29, 1952.

Action by Orlena Barthorpe Ray against Elaine Tichner Barthorpe and others to obtain interest in stock allegedly held by plaintiff's divorced husband, now deceased, as community property. The Superior Court, City and County of San Francisco, Sylvain J. Lazarus, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained finding that plaintiff's claim was barred by statute of limitations.

Affirmed.

1. Divorce 🔑253

There was implied finding by court in divorce action that allegation in complaint that there was no community property was true, where findings in divorce action were waived and judgment was for plaintiff therein.

2. Limitation of Actions 🔑95(1)

Proceeding by divorced wife of now deceased former husband to obtain interest in stock allegedly constituting community

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Kuchel suit, LBC 14374, on the basis that the California inheritance tax would be determined on the basis that the decedent was a California resident and would be deducted therefrom the amount of the Kansas inheritance tax, which at that time you understood to be $17,000? Will you stipulate that that is a fact?

"Mr. Pawson [Attorney for plaintiff]: Yes, with one qualification. I will stipulate that we discussed it and had a tentative agreement. It wasn't an oral agreement. In fact, in the first place an oral agreement wouldn't be enforceable against either. We were discussing it at that time, and we put it over until we could determine, and we were going to discuss it later. I will go along to that extent.

"Mr. Barker: There was a tentative compromise?

"Mr. Pawson: Yes. We discussed it from the first time we got together on the matter. In other words, we were always negotiating and talking about what could be done.

"Mr. Barker: There was a tentative compromise on the basis I have enumerated prior to the effective date of Section 14195, and will it be stipulated that later you ascertained that the Kansas inheritance tax instead of being $17,000 was $37,897.46, and you asked us whether we were then willing to carry out the original compromise on the basis of allowing as a deduction against the California inheritance tax the larger amount of the Kansas inheritance tax as determined?

"Mr. Pawson: Yes, we discussed that.

"Mr. Barker: Is it stipulated that I made a counter proposition to you that instead of allowing $37,897.46 we should allow $27,897.46, and you refused to accept that counter compromise, and then later the State of California finally acquiesced in your proposition that the entire amount of the Kansas inheritance tax should be deducted from the California inheritance tax?

"Mr. Pawson: Resulting in the ultimate written agreement, yes."

property, brought more than three years after wife had acquired full knowledge and notice of former husband's interest in stock was barred by statute of limitations. Code Civ.Proc. § 338, subd. 4.

3. Limitation of Actions ⚷197(2)

In action by divorced wife of now deceased former husband to obtain interest in stock allegedly constituting community property, evidence supported finding that former wife had notice and knowledge of interest of deceased in stock more than three years prior to institution of action. Code Civ.Proc. § 338, subd. 4.

◆

Coffey & Margolis, John R. Swendsen, San Francisco, for appellant.

Hoffman, Davis & Martin, San Francisco, for respondent Elaine Tickner Barthorpe.

NOURSE, Presiding Justice.

Plaintiff is the divorced wife of John S. Barthorpe, deceased. The defendant Elaine T. Barthorpe is his widow. In the year 1935, while plaintiff and her husband were living together, the husband joined with two others to form the Jamison Steel Corporation. These three, with the wives of each, executed a written agreement by which each agreed to purchase one-third of the corporate stock to be paid for within five years. All dividends were to be applied to the purchase of the stock which was placed in escrow subject to a voting trust. The terms of this contract were fully explained to plaintiff and she executed it with full knowledge of its terms.

[1] The date of this contract was February 5, 1935. On September 15, 1935, the parties separated and on February 3, 1937, the deceased filed a complaint for divorce in which he alleged that there was no community property. The defendant answered and, at the ensuing trial, judgment went to the plaintiff therein. Findings were waived, hence we must assume an implied finding that the allegation in the complaint that there was "no community property" was true.

In December, 1937, the deceased acquired a sufficient bonus from his employment with the steel company to enable him to purchase his one-third of the stock and this was left as an asset of his estate when he died on September 21, 1943. The plaintiff remarried in June, 1938. She made no claim to a community interest in the stock until sometime in 1943 or 1944. She commenced this action on October 15, 1948.

[2] On the evidence the trial court found that in the year 1936 appellant had full knowledge and notice of the interest in the steel stock held by her former husband, and that her action was therefore barred by section 338, subd. 4, of the Code of Civil Procedure.

The only debatable question raised on the appeal is whether the evidence supports this finding. Appellant confidently asserts that it does not.

Appellant testified freely that she was fully aware of the terms of the stock purchase in 1935. She had this knowledge in 1937 when the divorce action was tried, in which she did not contest the allegation that there was no community property. She had such knowledge in August, 1936, when she wrote to counsel of her former husband as follows:

> "I do not feel he is being fair. I believe I am entitled to some income from the business. If I am entitled to one-half of the community property, I am entitled to one-half of his interest and income from said business. You say he is (as I know) paying for his share out of the *profits* of the business. One-half of that is mine. Therefore I can see it only one way—I too, am paying for his third interest."

[3] Similar statements appear in appellant's evidence, all of which support the finding that she had such knowledge long prior to the three year period of the statute.

Judgment affirmed.

DOOLING, J., and JONES, Justice pro tem., concur.

113 Cal.App.2d 383

ABBOTT v. HAUSCHILD.

ABBOTT v. HIGGINS et al.

Civ. 18812, 18813.

District Court of Appeal, Second District, Division 1, California.

Sept. 30, 1952.

Related actions by which an attorney sought relief against his client, based upon a contract between the parties, and against a third person, for inducing a breach of such contract. The Superior Court, Los Angeles County, Philbrick McCoy, J., rendered a judgment unsatisfactory to plaintiff, and he appealed. The District Court of Appeal, White, P. J., held, inter alia, that the trial court had properly construed the instrument as promising the attorney merely a reasonable fee for getting the client's property back from his wife.

Affirmed.

1. Appeal and Error 🔑1008(3)

When extrinsic evidence has been properly received by trial court in aid of construction of contract or other instrument and such evidence is substantial in support of trial court's interpretation, court on appeal will adhere to interpretation placed by trial court on writings and conduct of parties, even though opposing inferences might reasonably be drawn from conflicting evidence.

2. Appeal and Error 🔑1008(3)
Contracts 🔑176(1)
Trial 🔑136(3)

Interpretation of contract or other written instrument is question of law if there is no extrinsic evidence thereon or if evidence is without conflict and not susceptible of conflicting inferences, and finding of trial court thereon is not conclusive on appeal.

3. Attorney and Client 🔑148(3)

Where contract drawn by attorney, engaged to get certain property back for client, provided that his compensation should be 50% of any money realized from the sale of property but such contract ambiguously provided that attorney should receive a reasonable fee for getting the client's property back for him, contract provided for the payment of a reasonable fee only.

4. Attorney and Client 🔑166(4)

Evidence would not sustain attorney's contention that he had performed duties required of him under contract with client.

5. Attorney and Client 🔑141

$150 was reasonable fee for services rendered by attorney in endeavoring to get client's property back from his wife.

6. Appeal and Error 🔑1011(2)

Where evidence was in conflict and, while susceptible of conflicting inferences, was interpreted by trial court in manner reasonably justifying conclusion that construction given instrument involved was consistent with true intent of parties, as shown by evidence, appellate court was without power to retry case and substitute another interpretation which might be equally tenable without consideration of evidence upon which trier of facts relied and which he chose to believe.

◆

Marshall Abbott, Alfred D. Freis, Los Angeles, for appellant.

George D. Higgins, Los Angeles, for respondents.

WHITE, Presiding Justice.

The appeals in the two above entitled causes have been presented on a single set of briefs, the causes having been tried together in the superior court. In case No. 18812 (Superior Court No. 578115) plaintiff sought to quiet title to an asserted one-half interest in a parcel of real property and by a second cause of action sought to enforce an "attorney's lien" upon one-half the proceeds of the sale of the property if the property had been sold. Plaintiff appeals from the judgment that he take nothing by this action.

In case No. 18813 (Superior Court No, 581830) plaintiff sought damages for breach of contract and by his third cause of action sought to recover against defendant George D. Higgins for inducing such breach. In this case a demurrer to the third cause of action was sustained without leave to amend, and after trial, judgment was entered that plaintiff recover the sum of $150 as reasonable attorney's fees for services actually rendered by him. Plaintiff appeals from that portion of the judgment providing that he take nothing by his first cause of action, as well as from that portion of the judgment to the effect that he recover only the sum of $150 as attorney's fees.

In June, 1947, defendant Hauschild consulted the plaintiff, an attorney, with reference to property standing in the joint names of Hauschild and his wife, which property will be referred to as the Ninth Avenue property. Plaintiff dictated, and there was reduced to typewriting and signed by Hauschild, a document entitled "Statement of Facts," containing recitals as to the manner in which Hauschild acquired his Ninth Avenue property and other real estate. The statement then continued with recitals to the effect that Hauschild married his wife Rosalie in January, 1929; that he was a janitor and maintenance man of no business experience and trusted his wife; that she persuaded him that under California law his property should be put in joint tenancy with her, and relying upon her, he permitted this to be done; that through his wife he met a Mr. Knouse, who made him a loan of $1800 which he repaid; that relying upon his wife and Mr. Knouse he signed a series of mortgages and promissory notes; that in June, 1947, he received a demand from the executors of the estate of Knouse for payment of a mortgage upon the Ninth Avenue property. The balance of the "Statement of Facts" is quoted in full as follows:

> "I know nothing about this mortgage and if the mortgage bears my signature, it was secured from me based upon my full faith and reliance upon the truthfulness and honesty of my wife and the said Q. A. Knouse. I did not receive any of the proceeds of this mortgage and I do not know whether any monies were actually received in return for the signing of the promissory notes and mortgage. It is my belief that Knouse secured my signature on a number of blank forms at the time that I made my only loan, to which I have herein already referred.
>
> "The letter I received from Mr. Pyle, Attorney for the estate, says that this matter now has to be taken care of and unless it is taken care of promptly, foreclosure proceedings will be instituted and the property sold at public auction to the highest bidder and a deficiency judgment taken against me for the difference between the amount due and payable and the amount for which the property sells. The letter also suggests that I give them a deed to the 9th Avenue property if they will accept it in full settlement.
>
> "I desire that you bring a proper action, do everything necessary to get this property back for me. For your compensation I will pay you 50% of any money realized from the sale of the property at 3512 9th Avenue, and I hereby assign to you a ½ interest in said property at 3512 9th Avenue. However, I do not want my 3rd Street property to be touched under any circumstances. I will pay you a reasonable fee for getting my property back from my wife."

In superior court action No. 578115 (the quiet title and attorney's lien case) the trial court found that the agreement was prepared by the plaintiff, an attorney-at-law, who had some prior relations with his client, the defendant, Hauschild. Plaintiff was employed to get this property, that is the 9th Avenue property, "back from my wife." The court further found that the language in the last paragraph of the "Statement of Facts," that "I desire you to bring a proper action to do everything necessary to get this property back for me. For your compensation, I will pay you 50% of any money realized from the sale of the property," and "I will pay you a reasonable fee for getting my property back from my wife," was "ambiguous, uncertain and conflicting and requires construction." The court then found that "the defendant Hauschild intended to and did contract to pay a reasonable fee for getting 'my property back from my wife'"; that the purported assignment was no more than an assignment as security for such reasonable fee; that to accomplish the purpose of "getting my property back from my wife" plaintiff filed an action to quiet title against the mortgagees of the property and the wife, but that the complaint was never served on the wife, "whose claim against the property was the reason for the litigation." The demurrer of the mortgagee, the Estate of Knouse, was sustained without leave to amend. The court found that plaintiff neglected his duties as an attorney in respect to the litigation and failed to render any service of value to plaintiff under the agreement except as above stated; that the purported assignment of a one-half interest was not valid and that plaintiff was "not entitled to have his title quieted as against the one-half interest in said property." In action No. 581830 (Civ. No. 18813) the court found that plaintiff entered into negotiations with the attorney for the Knouse estate and agreed that $3450 was a reasonable settlement, but that "there was no agreement to pay this, or any other sum." Further the court found that the plaintiff did not, as alleged, secure a person ready, willing and able to purchase the property or furnish the money to complete the settlement; and further, that the "defendant Hauschild never refused to proceed with the action to be taken by plaintiff as provided in their contract."

Appellant asserts (1) that the evidence establishes that the primary reason for appellant's employment was to save as much as possible from the threatened foreclosure of the Ninth Avenue property; (2) that the finding that the only employment of appellant was to recover the joint tenancy interests previously given by respondent to his wife is not supported by the evidence—in other words, that the court erroneously construed the contract of employment; (3) that the court should have found that appellant was engaged to defend and compromise the mortgage foreclosure proceedings for 50% of the net recovery, and in addition to recover the joint tenancy interest from respondent's wife for a reasonable fee; and (4) that appellant substantially performed the services he contracted to perform until respondent discharged him without cause.

[1, 2] When extrinsic evidence has been properly received by the trial court in aid of the construction of a contract or other instrument, if such evidence is substantial in support of the trial court's interpretation, even though opposing inferences might reasonably be drawn from conflicting evidence, the court on appeal "will adhere to the interpretation placed by the trial court on the writings and the conduct of the parties." Edwards v. Billow, 31 Cal.2d 350, 358, 359, 188 P.2d 748, 753; Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319; Palmtag v. Danielson, 30 Cal.2d 517, 522, 183 P.2d 265; Quader-Kino A. G. v. Nebenzal, 35 Cal.2d 287, 294, 217 P.2d 650, 659. Conversely, as stated by Mr. Justice Traynor in his dissenting opinion in the case last-cited, "The interpretation of a contract or other written instrument, however, if there is no extrinsic evidence thereon or if the evidence is without conflict and not susceptible of conflicting inferences, is a question of law, and the finding of the trial court thereon is not conclusive on appeal." Another aspect of the applicable rule is set forth in Johnston v. Landucci, 21 Cal.2d 63, 69, 130 P.2d 405, 408, 148 A.L.R. 1355, as follows: "Where the construction given an instrument by the trial court appears to be consistent with the true intent of the parties as shown by the evidence, another interpretation will not be substituted on appeal although such other interpretation might, without consideration of the evidence, seem equally tenable."

There can be no question but that the compensation agreement contained in the last paragraph of the "Statement of Facts" is uncertain. It is not clear therefrom, for example, what is meant by bringing "a proper action" "to get this property back for me"—whether this means "back from my wife" for which under the last sentence in the agreement plaintiff was to receive a reasonable fee, or whether "back for me" means "back" from the claim of the mortgage. As stated by the trial court in its oral opinion, the agreement "depends apparently upon various recitations found in the Statement of Facts, as it is called, a document prepared by an attorney-at-law who had had some relations with his client. The essence of the matter was at that time that Mr. Abbott was employed to get this property * * * 'back for me.'

"He made two statements, however, as to his compensation. First, 'I desire you to bring a proper action to get the property back for me,' and, 'For your compensation I will pay you 50% of any money realized from the sale of the property.' Then he turns around and in the next breath says, 'I will pay you a reasonable fee for getting my property back for me (from my wife).' * * *

"That being the case, the court must of necessity construe the contract most favorably to the client, assuming the client knew anything about it—and I doubt it. But assuming he did, it amounts to a contract to pay a reasonable fee for getting 'my property back from my wife.' * *"

[3] It cannot be held that the trial court's construction of the agreement was erroneous. The agreement was drawn by an attorney who had had previous relations with his client, an elderly man, hard of hearing, and inexperienced in business matters, who was beset with worries about his wife's mental condition and the imminent foreclosure of a mortgage of which he claimed to have no knowledge. The agreement itself constitutes but one paragraph in a document entitled "Statement of Facts." Further, giving it the construction contended for by appellant, the client was agreeing to pay not only one-half of the moneys salvaged from a settlement of the foreclosure litigation, but an additional "reasonable" fee for securing a judicial determination that property which had been in joint tenancy with his wife for eighteen years was his separate property. Assuming the property to be of the value of $11,000 (appellant alleged, but failed to prove, that he secured a purchaser at this amount), there would be virtually nothing left for the client after settlement of the mortgage claim, payment to appellant of 50% of the balance received, and in addition payment to appellant of a "reasonable" fee for "getting the property back from my wife." In the circumstances presented, we find the trial court's construction of the contract to be reasonable.

[4, 5] Further, in any event, it appears that the appellant failed to show by a preponderance of the evidence that he performed the duties required of him under the purported agreement. He commenced an action on behalf of respondent against respondent's wife and the mortgagees of the property, Knouse, Fugl and others. So far as the evidence before the trial court indicated, the complaint was never served upon the wife. Knouse and Fugl filed a demurrer which was sustained. The trial court properly found that plaintiff failed to appear on the hearing of the demurrer and thereafter, being notified that he had 20 days to amend his complaint, failed to amend. The fee allowed for services actually rendered cannot be said to be unreasonable or inadequate.

[6] Where, as here, the evidence was in conflict and while susceptible of conflicting inferences, was interpreted by the trial court in a manner reasonably justifying the conclusion that the construction given the instrument appears to be consistent with the true intent of the parties, as shown by the evidence, we are without power to retry the case and substitute another interpretation which might seem equally tenable without consideration of the evidence upon which the trier of fact relied and which he chose to believe.

For the foregoing reasons, the judgments appealed from are, and each of them is, affirmed.

DORAN and DRAPEAU, JJ., concur.

113 Cal.App.2d 146

CROFOOT v. SPIVAK.

Civ. 8038.

District Court of Appeal, Third District, California.

Sept. 19, 1952.

Rehearing Denied Oct. 6, 1952.

Hearing Denied Nov. 17, 1952.

Action by H. C. Crofoot against Peter Spivak for services rendered. The Superior Court, Mendocino County, Lilburn Gibson, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeals, Van Dyke, J., held that plaintiff who agreed to introduce prospective buyers of realty to defendant in return for contingent fee was not a real estate broker within statute licensing real estate brokers and prohibiting operations of those not properly licensed.

Affirmed.

1. Brokers 🔑3, 42

Plaintiff who agreed to introduce prospective buyers of sawmills and timber properties to defendant in return for $2500 in event of sale to prospects was not a "real estate broker" within statute licensing real estate brokers and prohibiting operations of those not properly licensed and was entitled to fee though unlicensed. Business and Professions Code, §§ 10131, 10252.

See publication Words and Phrases, for other judicial constructions and definitions of "Real Estate Brokers".

2. Statutes 🔑220

Where Supreme Court had held 29 years earlier that person who introduced prospective buyers of realty to seller for contingent fee was not within statute licensing real estate brokers and was entitled to fee, and in intervening time Legislature had not amended pertinent statutory language, Legislature had acquiesced in the interpretation and District Court of Appeal would not be justified in changing it. Business and Professions Code, §§ 10131, 10252.

Ira W. Barr, San Francisco, for appellant.

Kasch & Cook, Ukiah, for respondent.

VAN DYKE, Justice.

This appeal is taken by defendant after judgment rendered against him in an action brought to recover money alleged to be due for services rendered. The complaint alleged the following: That in July, 1948 defendant orally promised plaintiff that if plaintiff was approached by persons interested in buying plaintiff's own sawmills and timber lands or timber rights and would forego selling his property to such persons and would introduce such prospective purchasers to defendant so that defendant would have an opportunity to sell to such persons the defendant's mill and lumber properties, and if defendant did thereafter consummate such sale with the persons so introduced to him by plaintiff, then he (defendant) would pay plaintiff the sum of $2,500; that plaintiff was approached by persons desiring to purchase such properties; that he introduced said prospective purchasers to defendant; that defendant thereafter sold his properties to them and that thereby defendant became indebted to plaintiff in the agreed sum of $2,500. Plaintiff affirmatively alleged that at no time had he been a licensed real estate broker or a licensed business opportunity broker. Defendant answered, generally denying plaintiff's allegations and after a trial the court found the facts to be as follows: That all of the allegations of plaintiff's complaint were true save and except those having to do with the condition that plaintiff should forego selling his own property to any prospective purchaser whom he might introduce to defendant and having to do with the allegations as to plaintiff's performance of such conditions, the court finding in effect that no such condition was stated in defendant's offer and no performance of such condition by plaintiff occurred. The trial court gave judgment for the sum of $2,500 as prayed for.

[1, 2] Reduced to its simplest proportions, this appeal has to do with the question of whether or not a license is required before one can collect on a promise to pay compensation for introducing a prospective purchaser to a property owner desiring to sell his properties, nothing more being done than the bare act of introduction. We think it unnecessary in the decision of this case to follow appellant through his discussions of the proper interpretation of the

pertinent licensing acts because we think the case is controlled by the decision in Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960, decided in 1923. Therein defendant, a licensed real estate broker, entered into an agreement with plaintiffs promising that if the latter would find anyone interested in the purchase of the property which the broker had for sale, to whom the broker would be able to negotiate a sale, or would introduce to him anyone to whom he would be able to make a sale, he would pay plaintiffs a certain percentage of his broker's commission. Plaintiffs did introduce such a prospective purchaser to whom the defendant broker negotiated a sale. It was held the complaint stated a cause of action and did not show that the plaintiffs were acting as real estate brokers within the meaning of the Real Estate Brokers Law. We think it is immaterial whether this act of introducing to defendant the prospective purchasers who bought defendant's property be considered as coming under the provisions of section 10131 of the Business and Professions Code defining a real estate broker, or under the provisions of section 10252 of the Business and Professions Code defining a business opportunity broker, for the construction placed upon the statutory definition of a real estate broker by the Supreme Court in the foregoing decision would apply equally to the statutory definition of a business opportunity broker. The trial court, upon substantial evidence, found particularly that the promise upon which plaintiff sued was a promise to pay for an introduction and required no further act on the part of respondent to raise the liability sued upon. The trial court also found that respondent did no more than was called for, that is, did nothing but introduce the prospective purchasers to the appellant who himself thereafter conducted the negotiations resulting in the sale of his property without any act or aid by respondent. The cited case was decided, as noted, some twenty-nine years ago and in the intervening time successive legislatures have met and have made no amendments to the pertinent language of the enactment which would change the scope of the legislature's definition of who was a real estate broker as that definition was contained in the act current at the time the Supreme Court made its decision. Under such circumstances we think it clear that the legislature has acquiesced in the interpretation of the statute as given and that no justification could be found for any different interpretation now. As pointedly observed by the trial judge in his memorandum opinion, no license is required for the simple act of introducing one person to another—yet.

We are satisfied the trial court correctly decided the case, and its judgment, therefore, is affirmed.

ADAMS, P. J., and PEEK, J., concur.

FRENCH v. RISHELL et al.*

Civ. 14914.

District Court of Appeal, First District,
Division 2, California.

Aug. 25, 1952.

Hearing Granted Oct. 23, 1952.

Proceeding by Beatrice Helen French against Clifford E. Rishell and others, as and constituting the board of trustees of the Fireman's Relief and Pension Fund of the City of Oakland, and the city of Oakland, a municipal corporation, for writ of mandamus directing allowance of a pension. The Superior Court, Alameda County, Ralph E. Hoyt, J., granted peremptory writ, and respondents appealed. The District Court of Appeal, Goodell, J., held that previous finding of Industrial Accident Commission that death of petitioner's husband arose out of his employment was res judicata of that point.

Judgment affirmed.

1. Mandamus 🔑151(2)

Members of board of trustees of city's pension fund were merely agents of municipality and creatures of its charter to perform for the city certain of its functions, and in mandamus proceeding to obtain pension, in which the board and the city were joined, city was real party in interest.

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* Subsequent opinion 254 P.2d 26.

2. Workmen's Compensation ⟹1789

The Industrial Accident Commission proceeds judicially and its determinations, subject to same limitations applicable to judgments of courts generally, are "res judicata" in all subsequent proceedings between same parties or those privy to them.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Judicata".

3. Workmen's Compensation ⟹1791

Finding of Industrial Accident Commission that decedent's death occurred in scope of his employment was res judicata of that point in subsequent mandamus proceeding between same parties, although rules of evidence were decidedly less stringent and exacting before Commission. Labor Code, §§ 3212, 5708, 5709.

4. Workmen's Compensation ⟹1792

Previous finding of Industrial Accident Commission, upon widow's application for benefits for death of husband, which application was resisted by city as husband's employer, that husband's death arose out of his employment, was res judicata of that point in subsequent mandamus proceeding to obtain pension brought by widow against city's pension board upon same issues, the board being merely the agent of city, which was real party in interest.

John W. Collier, City Atty., Oakland, for appellants.

Carroll, Davis & Freidenrich, Roland C. Davis, J. D. Burdick, San Francisco, for respondent.

GOODELL, Justice.

Herbert Wright French, a Captain in the Oakland fire department, died on March 26, 1949 after about 23 years service. His widow applied for a pension on the ground that his death had resulted from injury or disability incurred while in the performance of duty. On its denial she filed in the Superior Court a petition in mandate. A peremptory writ directed the allowance of the pension and the City and its pension board appealed.

The petition in mandate embodied a copy of the findings and award of the Industrial Accident Commission wherein that tribunal had determined that the decedent while employed as Captain in the fire department on and prior to March 26, 1949, "sustained injury occurring in the course of and arising out of his employment proximately causing death on March 26, 1949" and that his widow was totally dependent. It awarded her the death benefit of $6,000 and statutory burial expenses of $300.

The mandate case was presented on a motion for judgment on the pleadings. The court granted a peremptory writ on the ground that the Commission's award was res judicata of the death of decedent arising out of and in the course and scope of his employment. The only problem on this appeal is whether such holding was correct.

The widow's application to the Commission was based on the claim that decedent had "sustained injury arising out of and in the course of the employment, as follows: heart attack resulting in death."

Her application to the pension board (and likewise in mandate) was based on the claim that decedent's death was the result of an injury and disability incurred while in the performance of his duties as a fireman, and was due to an occlusion of the coronary artery, induced, brought on, and caused by exertions, emotional and physical strains, exposures to smoke, heat, water and fumes, suffered by decedent in the performance of his duties as fireman.

Thus the issues before the Commission, the pension board, and the court were identical, and there is no contention to the contrary.

[1] Appellants contend, however, that there is no identity of parties, one of the arguments being that the pension fund trustees were not parties to the proceeding before the Commission. The City as employer was, of course, respondent's adversary before the Commission. The Oakland charter provides (§ 101) that "The Mayor, Health Officer, and the President of the Civil Service Board shall hereafter constitute the Board of Trustees of such [pen-

sion] fund, and the City Treasurer shall be the custodian of said fund." In the petition for mandate the three trustees were joined with the City as respondents. The reason for this is apparent since they were the persons, as trustees created by the charter, to whom any writ would be directed. See Dierkes v. City of Los Angeles, 25 Cal.2d 938, 946, 156 P.2d 741 and Barber v. Mulford, 117 Cal. 356, 358, 49 P. 206. The writ of mandate is "issued * * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station * * *". § 1085, Code Civ.Proc. Their duties and functions in pension matters as representatives of the City were not as Mayor, Health Officer, or President of the Civil Service Board, but as trustees of the City's pension fund. Their trusteeships were created by the charter of the City of Oakland and they are merely agents of the municipality and creatures of its charter to perform *for the City* certain of its functions. Servente v. Murray, 10 Cal.App.2d 355, 361, 52 P.2d 270, followed in Johnson v. Fontana County Fire Protection Dist., 15 Cal..2d 380, 390–91, 101 P.2d 1092. They are, in fact, the only persons by and through whom the City can act in pension matters. Dierkes v. City of Los Angeles, supra. The petition in mandate alleged "that the City of Oakland is the real party in respondents' interest herein." That this is so is beyond question. Barber v. Mulford, supra; Johnson v. Fontana, supra; Dierkes v. Los Angeles, supra.; Servente v. Murray, supra. Appellants moved in the trial court to strike this allegation from the petition, which motion was denied. If the City is not such party, then it is difficult to see who *is* the real party in interest. This argument is wholly devoid of merit and the motion was properly denied.

The answer of the City to the petition in mandate admitted that it had contested the application before the Commission, the making of its findings and award, and "that the time for appeal therefrom has passed and the City of Oakland has not appealed therefrom and is complying with the provisions of said award."

[2] Williams v. Southern Pacific Co., 54 Cal.App. 571, 202 P. 356 is one of the leading cases in this state on the present subject and it reviews many authorities, Californian and otherwise. There Harry Williams, a brakeman, was killed in the discharge of his duties. His widow, acting on behalf of herself and a daughter, sued in the Superior Court under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., alleging that her husband had been killed while engaged in interstate commerce. She later applied to the Industrial Accident Commission for an adjustment of the death claim under the Workmen's Compensation Act.

The Commission after a hearing made findings and an award determining that at the time of his death Williams was engaged in *intra,* and not *inter*state commerce. (A more extended summary of the Williams case will be found in Goodman v. Superior Court, infra, 51 Cal.App.2d 297, at 301–303, 124 P.2d 644.

In the court action the jury impliedly found that decedent had been engaged in interstate commerce and Mrs. Williams was awarded a verdict and judgment for $25,000 for herself and her daughter. This judgment was reversed, the appellate court holding that the Commission's findings and award, which became final before the civil action was tried, were res judicata in the court action, of the question whether decedent was engaged in *intra* or *inter*state commerce, and that that question could not be relitigated as far as the widow was concerned. The net result of that holding was to close the door of the state courts to the widow (she having been the claimant before the Commission) since her exclusive remedy, where the employee was engaged in intrastate commerce, was under the Workmen's Compensation Act. The Superior Court was without jurisdiction, and the widow had no case therein. A hearing was denied by the Supreme Court.

The court, at 54 Cal.App. 576–577, 202 P. at page 358 said: "A material issue in both proceedings was the character of Williams' employment; if intrastate, the Commission had exclusive jurisdiction to award compensation; if interstate, then the jurisdiction was in the superior court. The Commission determined that the employment was in intrastate commerce, and the fact—'so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. * *' Southern Pac. R. Co. v. United States, 168 U.S. 1, 18 S.Ct. 18, 42 L.Ed. 355, [see, also, Rose's U. S. Notes]; 2 Black on Judgments (2d Ed.) § 506."

At pages 574–575 of 54 Cal., at page 357 of 202 P., the court said: "In Western Metal Supply Co. v. Pillsbury, 172 Cal. [407] 411, 156 P. 491, Ann.Cas.1917E, 390, it is said: 'Where compensation is sought the proceedings are in substance those of a court in an action at law. * * * We shall not take the time to review in detail the cases just cited, but content ourselves with saying that we think there is nothing in them which would support the claim that the powers exercised by the Industrial Accident Commission of this state in making awards of compensation are not strictly judicial.' See, also, Carstens v. Pillsbury, 172 Cal. [572], 576, 158 P. 218; Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24; Gouanillou v. Industrial Acc. Comm. [184 Cal. 418], 193 P. 937; Massachusetts, etc., Co. v. Industrial Acc. Comm., 176 Cal. [488], 491, 168 P. 1050. The findings of the Industrial Accident Commission are res adjudicata. In re Hunnewell, 220 Mass. 351, 107 N.E. 934; Centralia Coal Co. v. Industrial Acc. Comm., 297 Ill. 513, 130 N.E. [725], 727."

The Williams case has been cited approvingly by the Supreme Court in the following cases dealing with various phases of the doctrine of res judicata: In re Estate of Finch, 202 Cal. 612, 620–621, 262 P. 34; Domestic & Foreign Petroleum Co. v. Long, 4 Cal.2d 547, 562, 51 P.2d 73 (where a municipal court judgment was held to be res judicata in the superior court), and Bernhard v. Bank of America, 19 Cal.2d 807, 814, 122 P.2d 892.

It was followed in Merino v. Pacific Coast Borax Co., 124 Cal.App. 336, 340–341, 12 P.2d 458, 460, where the court said: "Appellant contends that it is not bound by the award * * *. In other words, the contention is that the findings and award of the Industrial Accident Commission do not constitute a judgment, and the matters in them contained are not res adjudicata as to appellant. Appellant was a party to the proceeding instituted before the commission and directly responsible for the joining of respondent here as a party defendant in the proceeding. * * * That the award duly made by the Industrial Accident Commission, under the circumstances here present, has the force and effect of a judgment, is a well-established rule of law in this jurisdiction. [Citations.]" A hearing therein was denied.

In Gerini v. Pacific Employers Ins. Co., 27 Cal.App.2d 52, 54, 80 P.2d 499, 501, a proceeding before the Industrial Accident Commission brought by the parents of a decedent resulted in an award in their favor based on a finding that the decedent had been an employee of one Ramazzotti. Thereafter, the parents brought an action in the superior court against the employer and his insurance carrier, claiming that their son was not in fact an employee and that the employer and his insurance carrier, defendants in the action, had conspired to prevent the plaintiffs from bringing a superior court action for the death of their son, and had falsely represented before the commission that the son was an employee of Ramazzotti. The court held that "The commission's finding was a final and conclusive determination of the fact of the son's employment", citing the Williams case, supra. A petition for hearing was denied.

In Goodman v. Superior Court, 51 Cal.App.2d 297, 301, 124 P.2d 644, 646, the question before the Commission was whether the employer was insured. The court said: "The law is settled that the Industrial Accident Commission proceeds judicially, and that its determinations, subject to the same limitations applicable to judgments of courts generally, are res judicata in all subsequent proceedings between the same parties or those privy to them." After discussing the Williams and Gerini cases, the court concluded: "It follows, therefore, that the prior decision of the commission in this proceeding, if such decision is final and not subject to attack on the ground of extrinsic fraud or mistake or other grounds permitted by law, is res judicata in the superior court action between the same parties on the question as to whether Goodman Bros., Inc., was in fact insured at the time the accident occurred."

In Goodspeed v. Great Western Power Co., 33 Cal.App.2d 245, 265, 91 P.2d 623, 633, 92 P.2d 410, a case involving a decision of the Railroad Commission, a board with judicial powers, it is said that "If the judgment of the commission, acting within its jurisdiction, is final, it is final for all purposes and in any character of action or proceeding where the precise matter is again presented for adjudication before any other tribunal, board or commission. So when the parties here went into court they should have proceeded upon the assumption that this issue—the real corporate character of defendant canal company—was no longer open to litigation." A hearing was denied by the Supreme Court.

Appellants place their chief reliance on the case of Schmidt v. Pension Board, 63 Cal.App.2d 439, 147 P.2d 90, 91, where the facts were substantially the same as in this case. There the proceeding was before a pension board on the application of a fireman's widow based on the claim that he had died as a result of an "injury arising out of or sustained by him while in the discharge of his duties as a member of the Fire Department of the City of Bakersfield". He, too, died of a coronary occlusion. There, too, the Commission had held that his death had been caused by injury or disability occurring in the course of and arising out of his employment. The Commission's award was considered by the pension board, but it denied the pension. In the mandate proceeding which followed, the Superior Court refused to admit the award in evidence and denied a peremptory writ. In affirming, the appellate court held that "The determination of the Industrial Accident Commission was not res judicata, was not binding on the Pension Board, and did not prevent a contrary determination by it. Drummond v. Drummond, 39 Cal.App.2d 418, 103 P.2d 217." The court added: "We see no connection between the two proceedings."

While it is true the Supreme Court denied a hearing therein, the Schmidt case cannot be reconciled with the early pronouncements of the Supreme Court in the group of cases already cited herein (found in Williams v. Southern Pacific Co. at 54 Cal.App. at page 575, 202 P. 356, supra) nor with the Williams, Merino, Gerini, Goodman and Goodspeed cases already discussed. The court does not cite any of those authorities, and it is to be assumed that they were not called to its attention. On the res judicata point it cites only Drummond v. Drummond, where the decisive factor was the absence of privity. There was no privity problem in the Schmidt case, and there is none here. The Schmidt case is the only California case cited by appellants which is contra to the California authorities cited earlier herein.

Appellants rely also on McGrath v. Young, 98 Cal.App.2d 415, 220 P.2d 609, 610, but a cursory reading thereof shows that it is not in point since therein there was no adjudication by the first tribunal. That case, like this, went first before the Industrial Accident Commission, then before the Oakland pension board, and then before the Superior Court in a mandate proceeding. Our opinion points out that while there was a hearing before the Commission, "no determination was made" and the insurance carrier then "entered into a compromise settlement with the widow under which she was paid $3,150 and the proceedings terminated." We said: "That such settlement was not res judicata and was not binding on the pension board would seem obvious." Our quotation from Schmidt v. Pension Board was not necessary to the decision.

One of appellants' contentions is that the Commission's award was not res judicata in the mandate proceeding because respondent's burden of proof before the Commission was measurably lighter than her burden before the pension board. The basis for this argument is the language of § 3212 of the Labor Code as it read at the time of the death*. It provided that in the case of a fireman "the term 'injury' includes * * heart trouble which develops or manifests itself during a period while such member is in actual service* in such department or unit. * * * Such * * * heart trouble * * * so developing or manifesting itself in such cases shall be presumed to arise out of and in the course of the employment unless there is evidence to the contrary."

Respondent's burden before the pension board and in the mandate proceeding may fairly be said to be defined by § 104(1) of the Oakland charter, which provides that the pension trustees "shall * * * provide for the family of a member of the Department who may die as a result of an injury or disability incurred while in the performance of his duty * * *." No presumption such as that found in § 3212 could aid the claimant before the pension board. Before the Commission respondent had to prove by competent, expert evidence, William Simpson Construction Co. v. Industrial Acc. Comm., 74 Cal.App. 239, 243, 240 P. 58, that her husband's heart trouble had developed or manifested itself while he was a member of the fire department, whereupon it would be presumed that the disability arose "out of and in the course of the employment." It would then be incumbent on the City, respondent's adversary before the Commission, to produce evidence to the contrary.

[3] It may be conceded that § 3212 made it less difficult for respondent to make out a prima facie case before the Commission than before the pension board or in mandate, but it is also true that all the rules of evidence are, and ever since the early days of the Commission have been, decidedly less stringent and exacting before the Commission than in a civil court. See §§ 5708, 5709, Labor Code; 27 Cal.Jur. pp. 478–481, §§ 148, 149. Despite that fact, in none of the cases cited earlier (Williams, Merino, Gerini, Goodman, Goodspeed) have these procedural differences been held to change the res judicata rule, and appellants have cited no authority holding that such differences modify it in any respect.

We agree with respondent's argument that "If, as appellants suggest, a difference in rules of evidence, presumptions, etc., were sufficient to suspend the operation of the doctrine, every plea of res judicata based on a foreign judgment would require proof of identity of law between the jurisdiction rendering the first verdict and that of the jurisdiction in which it is offered as conclusive evidence of the facts adjudged."

[4] In Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, at pages 410–413, 156 P. 491, supra, the court summarizes the powers of the Commission and shows how they roughly parallel those of a court of justice. Following that case the court in Gouanillou v. Industrial Acc. Comm., 184 Cal. 418, 420–421, 193 P. 937, 938, supra, said: "Since the Industrial Accident Commission is a judicial body exercising judicial functions, its decisions and awards are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals [citations]". Until the Supreme Court modifies that rule all other courts in this state are bound to follow it. Accordingly we must hold that in the mandate proceeding the Commission's award was as truly an adjudication of rights as any final judgment of a court of record, and that the court was correct in following the majority rule as announced in the Williams, Merino, Gerini, Goodman and Goodspeed cases, supra.

The Oakland charter was amended in 1941 to provide, inter alia, that if the widow of any deceased member of the fire department should receive any death award under the Labor Code "arising out of the performance of duty of such member", such payment should be "applied as a credit and set-off against any payment on account of * * * pension or other benefit payable under this article". The peremptory writ contains a direction that this should be done in this case.

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* On October 1, 1949 § 3212 was amended. This was between the date of death (March 26, 1949) and the award (January 31, 1950). The section was changed inter alia to read: "Such * * * heart trouble * * * so developing or manifesting itself in such cases shall be presumed to arise out of and in the course of the employment. *This presumption is disputable and may be controverted by other evidence, but unless so controverted, the commission is bound to find in accordance with it.*"

The amendment also changed "*actual* service" to "*the service*". (Emphasis added.)

The judgment is affirmed.

NOURSE, P. J., and JONES, J. pro tem., concur.

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113 Cal.App.2d 149

GARFINKLE v. MONTGOMERY.

Civ. 8055.

District Court of Appeal, Third District, California.

Sept. 19, 1952.

Unlawful detainer action by Harry A. Garfinkle against Verdis M. Montgomery, individually and as administratrix of the estate of Samuel C. Montgomery, deceased. From judgment of the Superior Court, Sacramento County, John Quincy Brown, J., both parties appealed. The District Court of Appeal, Van Dyke, J., held, inter alia, that defendants' liability for rental payments terminated upon plaintiff's entry into possession under writ of possession.

Affirmed in part, reversed in part, and remanded with directions.

1. Landlord and Tenant 🔑194(1)

Operation of writ of attachment and levy thereon by lessor was not such surrender of premises as to terminate lessees' liability for rent.

2. Landlord and Tenant 🔑288, 291(14)

The summary remedy of unlawful detainer is primarily designed to recover possession from the defaulting lessee, and as incidental to the main object, the court assesses damages and determines rent due. Code Civ.Proc. § 1174.

3. Landlord and Tenant 🔑291(14)

In an unlawful detainer action where lessee remains in possession or deprives lessor of possession until rendition of judgment, allowance of rental to date of judgment is proper, but where lessor enters into and assumes full control of the premises during the pendency of the action, and it cannot be said that such assumption of control is for account of lessee under appropriate provision of lease or circumstances justifying such declaration, such entry constitutes an eviction and liability for rent is thus terminated. Code Civ. Proc. § 1174.

4. Landlord and Tenant 🔑198

Where writ of possession was issued in unlawful detainer action on lessor's motion for summary judgment without showing of existence of any of the statutory conditions precedent to issuance of such writ, and writ was not based upon consent or stipulation of lessees, and lessor accepted benefits of writ and was placed in possession under it and maintained possession over all of the demised premises thereafter until judgment was rendered, possession of lessor was not for and on account of the lessees, and therefore liability of lessees for rental payments terminated upon lessor's entry into possession. Code Civ.Proc. §§ 437c, 1166a, 1174.

5. Landlord and Tenant 🔑198

The possession given by statute authorizing writ of possession in unlawful detainer action vests full and complete control of premises in lessor and therefore lessee is thereby evicted and his liability for rent under the lease is terminated from that date forward where the action thereafter results in a termination of the lease without any resumption of possession by the lessee. Code Civ.Proc. § 1166a.

6. Landlord and Tenant 🔑290(5)

Ordinarily, a cross-complaint and counterclaim is not permissible in an unlawful detainer action.

7. Landlord and Tenant 🔑291(18)

Where trial of cross-complaint in unlawful detainer action went to a nonsuit without any objection, Supreme Court would consider lessees' contention in regard thereto as properly before it.

8. Landlord and Tenant 🔑229(11)

Deposit by lessees of $2700 with lessor as security for performance of covenants of lease was not such security as would prevent issuance of attachment upon nonpayment of rent and therefore attachment of lessees' property did not constitute "conversion". Code Civ.Proc. § 537, subd. 4.

See publication Words and Phrases, for other judicial constructions and definitions of "Conversion".

9. Landlord and Tenant 🔑184(2)

Where lease provided for payment by lessees of $2700 to lessor as partial security for lease agreement, and lease stated that such sum should be applied to final six months rental provided that all terms and conditions of agreement had been complied with, upon termination of lease for nonpayment of rent, lessor was not entitled to retain such fund.

10. Evidence 🔑317(6)

Testimony of lessor seeking damages in unlawful detainer action for damage to demised premises that contractor had estimated cost of repairs at between $400 and $500 was hearsay.

11. Landlord and Tenant 🔑291(18)

In unlawful detainer action wherein damages were sought for damage to demised premises, weight and credibility to be given lessor's testimony, admitted without proper objection, that contractor had estimated cost of repairs to be between $400 and $500 was for trier of fact, and finding which disallowed such damages would not be disturbed, in view of fact that there was no showing as to the qualifications of the contractor or that the contractor had done anything reasonably necessary before an opinion as to cost of repairs could be given.

12. Appeal and Error 🔑994(2)

A finding of fact contrary to direct evidence of only witness testifying directly to question of fact found will not be disturbed on appeal where testimony and circumstances surrounding transaction are such as to deprive that testimony of all credibility.

13. Landlord and Tenant 🔑291(14)

Award of treble damages for unlawful detainer rests within sound discretion of trial court. Code Civ.Proc. § 1174.

14. Landlord and Tenant 🔑291(14)

Trial court did not abuse discretion in denying treble damages during period of unlawful detainer. Code Civ.Proc. § 1174.

15. Landlord and Tenant 🔑291(18)

Where matter of interests on amount of unpaid rental was not raised by pleading or otherwise called to attention of trial court in unlawful detainer action, it could not be contended on appeal that error was committed in failing to allow it. Code Civ. Proc. § 1174.

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Norman R. Samuelsen and Darold D. De Coe, Sacramento, for appellant.

Stanley J. Gale, Sacramento, for respondent.

VAN DYKE, Justice.

Plaintiff and defendants alike have appealed from a judgment in an action for unlawful detainer brought by plaintiff, lessor, against defendants, lessees. Plaintiff leased a commercial building in Sacramento to the defendants for a term of ten years beginning March 7, 1947. Pursuant to the terms of the lease the defendants paid to the lessor the sum of $2,700 which the lease provided should be turned over to the lessor as security for the performance of the covenants of the lease. The leased premises consisted of a store, a restaurant and a hotel.

The lessees defaulted in the payment of rent for the months of May, June and July, 1950, and on June 30th of that year the lessor served a three-day notice upon the lessees to pay the rental then delinquent or vacate the premises. On July 12th the rent was not paid and the lessor filed his complaint in unlawful detainer and at the same time procured a writ of attachment which was levied on furniture and fixtures located in the restaurant. The attaching officer in levying the writ padlocked the restaurant doors. On August 22, 1950 a writ of possession was issued and on August 30, 1950 the lessor was put into possession of the whole of the leased premises, which possession he has enjoyed ever since.

The lessees had sublet various portions of the leased premises. They received the rent of the store for the month of July and the subtenant thereafter moved out. The restaurant was vacant when the writ of attachment was levied, but the lessees had received rent from a subtenant thereof for the month of May. The lessees collected rent from a subtenant of the hotel for the month of July. Thereafter the lessor collected the rent.

The lessor's complaint in unlawful detainer alleged the existence of the lease and defendants' possession thereunder; set forth the defaults of the lessees in the payments of rental; alleged the service of the statutory three-day notice and the lessees' continued default and refusal to surrender possession. The prayer of the complaint was for the amount of delinquent rentals, various accrued charges, and damages for injury to the premises by subtenants. Termination of the lease was asked.

The answer admitted accrued and unpaid rental in the sum of $900; denied that the same was due or owing and apparently both admitted and denied possession of the premises.

The lessees filed a cross-complaint alleging that they had paid over to the lessor $2,700 as security for the performance of the lease; that the writ of attachment had been wrongfully and maliciously procured in that the lessor had by affidavit affirmed that he had no security for the performance of the lease when, in fact, he had; that by the wrongful attachment defendants had been damaged.

After a trial findings of fact and conclusions of law and judgment were made, drawn and entered as of December 6, 1950. The lessor was allowed judgment for rentals accruing from the date of the first default on May 10, 1950 to December 9th of that year, totaling $3,125. In addition he was allowed the sum of $315.15 for repairs, insurance, increase in taxes and water bills. The trial court found as a fact that the lessor's entry pursuant to the writ of possession was for the benefit and account of the lessees; that while so in possession the lessor had collected $750 as rental for the benefit and account of the lessees, and this sum, plus the deposited sum of $2,700, was credited against the judgment in plaintiff's favor. The lease was terminated. The lessees were nonsuited as to their cross-complaint.

We will first treat the contentions advanced by the lessees as appellants. They contend that as a matter of law there was a surrender of the premises to the lessor at about the time he obtained the writ of attachment and caused its levy, and possession having been surrendered they say the trial court erred in allowing rental to the lessor after the surrender. Consistent with this contention the lessees do not contend that the court erred in awarding rental for the months of May, June and July, 1950. They further make no complaint of that part of the judgment awarding the lessor repair charges, utility charges and the like which accrued prior to the surrender. Of first importance, therefore, is the ascertainment of the date beyond which the lessees were no longer liable to pay rent and other incidental charges.

Lessees, as appellants, contend that the writ of attachment effectively deprived them of the possession and use of the restaurant.

[1-3] We cannot sustain the lessees' contentions that the operation of the writ of attachment and the lessor's actions near or at that time constituted such a surrender of the premises as a matter of law as to terminate the liability for rent and hold that the trial court's implied finding to the contrary must be sustained. However, it is our further conclusion that liability for rental payments under the lease terminated upon the lessor's entry into possession under the writ of possession. The summary remedy of unlawful detainer is primarily designed to recover possession from the defaulting lessee. As incidental to the

main object the court under Section 1174 of the Code of Civil Procedure assesses damages and determines the rent due. Markham v. Fralick, 2 Cal.2d 221, 39 P.2d 804; D'Amico v. Riedel, 95 Cal.App.2d 6, 212 P.2d 52. In an unlawful detainer action where the lessee remains in possession or deprives the lessor of possession until the rendition of judgment the allowance of rental to the date of judgment is proper. Keyes v. Moy Jin Mun, 136 Cal. 129, 68 P. 476; Flournoy v. Everett, 51 Cal. App. 406, 196 P. 916. However, if the lessor enters into and assumes full control of the premises during the pendency of the action and it cannot be said that such assumption of control is for the account of the lessees under appropriate provisions of the lease or circumstances justifying such a declaration, then such entry constitutes an eviction and liability for rent is thus terminated. In Telegraph Avenue Corp. v. Raentsch, 205 Cal. 93, 269 P. 1109, 61 A.L.R. 366, an unlawful detainer action, a receiver was appointed at the instance of the lessor and took possession of the property involved. The judgment allowing the lessor the full amount of rental during the occupancy of the receiver was reversed, the court stating 205 Cal. at pages 100–101, 269 P. at page 1112:

> "The rule follows the general principle that any act of the landlord which results in dispossessing the tenant and which deprives him of the use, occupancy, and enjoyment of the premises amounts to an eviction. The reason for the rule is that rent is the landlord's right to receive from the tenant compensation for the benefits that are accruing to the tenant from his possession and enjoyment of the land, and that when the tenant is deprived of this right of possession and enjoyment by the action of the landlord, the right of the landlord to receive compensation automatically ceases. * * *
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> "It is, of course, true that the appointment of a receiver is not in every instance an ousting of possession of the property over which the receiver exercises control, but where, as here, a receiver is appointed at the instance of the plaintiff in an action in unlawful detainer, the very nature of which is to terminate the tenancy and to place the plaintiff in possession of the property, the receiver in such a case must be treated as the receiver of the party entitled to the possession * *, and where, as here, this receiver takes exclusive control and possession of the premises, all of which were occupied by subtenants under separate tenancies, and either collects the rents from such subtenants or removes them from possession, he must be treated as a receiver for the landlord, whose entry into possession is an eviction of the lessee."

[4, 5] We think the foregoing is applicable to and determinative of the question presented in this appeal as to the date when the liability of the lessees to pay rent ceased. And we think that under the situation presented here we have a much stronger case for the application of the principles laid down in the cited case than was presented in that case. For in this case, although the court found that the lessor had gone into possession of the premises under the writ of possession for the benefit and account of the lessees, we think that such a holding is without support and against law. It appears from the record that answer was made by the lessees on August 4, 1950 and on August 7th there was served and filed in the action a notice of motion for summary judgment and an affidavit in support thereof pursuant to the provisions of section 437c of the Code of Civil Procedure. On August 11th a counter-affidavit was served and filed and on August 22d the motion was presented to the court. After a hearing it appears that the court neither granted nor denied the motion. The order made, after reciting the making of the motion for summary judgment, the consideration by the court of the pleadings, the respective affidavits offered in support of and in opposition to the motion, and the arguments of counsel, was for the issuance of a writ of possession, upon the giving of a $2,000 bond. The writ was issued and possession was taken from the lessees and given to the lessor thereunder,

as hereinbefore recited. Section 1166a of the Code of Civil Procedure provides for the issuance of a writ of possession in an unlawful detainer action where it appears that "the defendant is insolvent, or has no property that is subject to execution sufficient to satisfy the amount of damages sought to be recovered by the plaintiff, or resides out of the State, or has departed from the State, or cannot, after due diligence be found within the State, or conceals himself to avoid the service of summons." A search of the record does not reveal that any of the foregoing conditions precedent to the issuance of a writ of possession under section 1166a of the Code of Civil Procedure were made to appear. It does not appear that the issuance of the writ was based upon consent or stipulation of the lessees, but of course it does appear that the lessor accepted the benefits of the writ, was placed in possession under it, and maintained that possession over all of the demised premises thereafter and until judgment was rendered. Under such circumstances a finding of the court that the possession of the lessor was for and on account of the lessees is without support. The purpose of the section authorizing the writ of possession in an unlawful detainer action is clear. It affords the lessor immediate possession of the premises unlawfully detained. The possession so given vests full and complete control of the premises in the lessor and therefore in line with the case of Telegraph Avenue Corp. v. Raentsch, supra, the lessee is thereby evicted and his liability for rent under the lease is terminated from that date forward where the action thereafter results in a termination of the lease without any resumption of possession by the lessee.

[6–8] Lessees, as appellants, further contend that the trial court erred in granting a nonsuit against them on their cross-complaint. While normally a cross-complaint and counterclaim is not permissible in an unlawful detainer action, Woods-Drury, Inc., v. Superior Court, 18 Cal.App.2d 340, 344, 63 P.2d 1184; D'Amico v. Riedel, supra, yet, since the trial of the cross-complaint went to a nonsuit without any objection, we shall consider the appellants' contention in regard thereto properly before us on this appeal. It is argued that the attachment was illegally procured in that the lessor was secured by deposit of $2,700 and for that reason was not entitled to the attachment. Upon this reasoning it is further argued that the use of the attachment constituted a conversion of the personal property seized by the officer. We do not agree. Section 537(4) of the Code of Civil Procedure provides for the issuance of an attachment in an unlawful detainer action for the payment of rent provided the payment is not secured "by any mortgage or lien upon real or personal property, or pledge of personal property". The deposit as security for the performance of the terms of the lease did not prevent the issuance of the attachment. In Lori, Ltd., Inc., v. Wolfe, 80 Cal.App.2d 557, at page 560, 180 P.2d 21, at page 23, an appeal from an order refusing to discharge an attachment in an unlawful detainer action, the court stated:

> "The principal point stressed by appellants as requiring a reversal of the order complained of is that the affidavit of plaintiffs for attachment is fatally defective in that, while it negatives the existence of all the kinds of security mentioned in section 537, Code of Civil Procedure, it fails to set forth the fact that the lease, including the obligation to pay rent, is secured by the sum of $4,800, in advance rentals in possession of plaintiffs; further, there is no allegation in the amended complaint or affidavit for attachment that this security has become valueless.
>
> "The language employed by plaintiffs in the affidavit for attachment conforms to the wording of the statute which is all that is required for the issuance of the writ. * * * The most that can be said in support of appellant's apparent contention that the deposit with plaintiffs of the sum of $4,800 created some kind of lien or security preventing issuance of attachment is that it was posted as security for the faithful performance of the terms of the lease. The question as to whether the terms and provisions of

> the lease have been breached by defendants constitutes the fundamental issue of this unlawful detainer action and necessarily cannot be determined on a motion to discharge an attachment but only by being put in issue and tried on the merits of the case itself."

In Hougham v. Rowland, 33 Cal.App.2d 11 at pages 14, 17, 90 P.2d 860 at pages 860, 862, upon the question of what security might be held without barring the right of attachment, it was said:

> "In determining this question, it is important to notice carefully the precise terms used in the statute. The law does not provide that no attachment shall issue where the plaintiff has other security for the claim, but it designates the specific kinds of security that will bar the remedy, namely, a mortgage, deed of trust, a lien, or a pledge of the property.
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> * * * * * *
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> "If we are, therefore, to be guided by the plain meaning of the statute, it would follow that appellant was entitled to the writ of attachment. The only ground upon which this conclusion could be avoided would be that the statute contemplates other security as well as those which are specifically mentioned. We think the statute having specified the four particular kinds of securities, to-wit, mortgage, trust deed, lien and pledge, by implication there would be excluded any other species."

We hold that the writ of attachment was lawfully issued. It may be noted in addition that there was no showing made by the lessees in support of their cross-complaint that they did not owe rental unpaid at the time of the issuance of the writ. It follows, therefore, that the conversion complained of in the cross-complaint did not take place and that the non-suit was properly granted.

[9] The lessor has also appealed from the judgment. He first contends that the lessees, having breached the terms of the lease, were not entitled to a refund of the security deposited, nor were they entitled to have the security credited against the money judgment rendered in his favor, as was done. Paragraph 3 of the lease, referring to the matter of the deposit for security, provided as follows:

> "Upon the execution of this agreement, in addition to the payment of the first month's rental in advance, lessee will pay to lessor the further sum of $1350 as partial security for this agreement as hereinafter set forth. Further, and in addition, on the 10th day of January 1948, lessee agrees to pay to lessor, in addition to the regular rental, the sum of $1350, which said sum, together with the previous sum paid as security, shall be applied to the final six months rental due under the agreement, provided however that all the terms and conditions of this agreement have been complied with and there has been no default or breach of any of the conditions or covenants herein."

To support the argument that he was entitled to retain the security and that it was error for the trial court to credit it against the judgment rendered in his favor, the lessor cites A–1 Garage v. Lange Inv. Co., 6 Cal.App.2d 593, 44 P.2d 681, and Gallagher v. McMann, 119 Cal.App. 688, 7 P.2d 204. But these cases and many others sustain the trial court. In the Gallagher case it was held that an agreement for deposit of money as security for the performance of the covenants of the lease is valid and enforceable and the lessor is entitled to retain the deposit until the complete discharge of the obligations which the same is intended to secure. A similar holding was made in the A–1 Garage case. In Ace Realty Co. v. Friedman, 106 Cal.App.2d 805, at page 812, 236 P.2d 174, at page 178, the court, quoting from 7 Cal.Jur. 10-Year Supp. (1945 Rev.) 529, sec. 141, stated:

> " 'The lessor is entitled to retain the deposited fund until complete discharge by the lessee of the obligations the performance of which the deposit is shown to have been intended to secure. * * *
>
> " 'The lease contract being terminated, the lessee has a right to the fund, less any amount that may be due and

> unpaid on account of rental. A right to have the deposited sum returned to him, accrues in the event of a surrender of the premises and acceptance by the lessor.' "

In the present case the lease has been terminated; there were no obligations remaining thereunder. Under such circumstances we know of no legal theory and counsel has suggested none which would allow the lessor to retain the fund. Such retention, if allowed, would be an outright forfeiture. The trial court properly treated the deposited funds as property of the lessees, applicable in so far as necessary in the discharge of the judgment rendered in favor of the lessor. Wickstrom v. McGrath, 86 Cal.App. 651, 656, 261 P. 326.

[10–12] It is next contended by the lessor that the trial court should have allowed $400 damages upon his testimony that a subtenant had damaged a floor and that the estimated repair cost was between $400 and $500. We find no error in disallowing this item. The record shows that the lessor did testify that a subtenant had moved out, leaving the floor "in a very bad condition, that it sagged" because the tenant "had too heavy stuff on there" and that he, the lessor, believed that the damage would cost somewhere between $400 and $500 to repair. At that point it was objected by counsel for the lessees that there was nothing in the complaint about such an item of damage. The court said to the lessor, "You haven't any actual figure on it?" The lessor answered that he had an estimate but that the contractor giving it to him "didn't give any decided or positive figure—he just said between $400 and $500." Obviously the testimony as to the cost of repairs was not that of the witness and constituted pure hearsay. What weight and what if any credibility were to be given thereto was a matter committed to the trier of fact. As was held in California Calaveras Min. Co. v. Walls, 170 Cal. 285, 149 P. 595, a finding of fact contrary to the direct evidence of the only witness testifying directly to the question of the fact found will not be disturbed on appeal where the testimony and the circumstances surrounding the transaction are such as to deprive that testimony of all credibility. It was also held in Blanc v. Connor, 167 Cal. 719, 141 P. 217, that it is within the province of the trial court to determine what credit and weight should be given to the testimony of any witness, and that the appellate court cannot control the trial court's finding or conclusion denying the testimony credence unless it appears that there are no matters or circumstances which at all impair its accuracy. Impliedly the trial court here refused to credit the testimony we have recited upon the issue of the cost of repair involved and we cannot here question the accuracy of that determination in view of the fact that the witness in reality gave no testimony other than that someone had told him that the cost of the repairs would be from $400 to $500. There was complete absence of any showing as to the qualification of the person making this statement and as to whether that person had inspected the premises or done anything reasonably necessary before an opinion upon so uncertain a matter as the cost of repairs to a damaged floor could be given. There are here ample circumstances justifying the refusal of the court to base a finding of fact upon the testimony put before it.

[13, 14] The lessor further claims that he was entitled to treble damages during the period of unlawful detainer, but the award of treble damages rests within the sound discretion of the trial court and we can find upon this record no reason for holding that such discretion was abused. Sec. 1174, Code Civ.Proc.; Gwinn v. Goldman, 57 Cal.App.2d 393, 134 P.2d 915.

[15] Finally, it is contended by the lessor that he was entitled to an award of interest on the amount of the unpaid rental. The matter of interest was not raised by pleading, or otherwise called to the attention of the trial court, and it cannot now first be contended on appeal that error was committed in the failure to allow it.

The record is not in such condition that we can correct the judgment as to those matters concerning which we have held it to be erroneous. Except as hereinbefore declared to be in error, the judgment is affirmed and it is reversed so far as it awards to the lessor rental beyond the time when he was placed in possession of the demised premises under the writ of possession and in so far as it allows incidental charges accruing after that date. The cause is remanded with directions to the trial court to take such further proceedings as may be necessary in accordance herewith. Appellant lessees are entitled to costs on appeal.

ADAMS, P. J., and PEEK, J., concur.

113 Cal.App.2d 280

HANDLEY v. HANDLEY.

Civ. 19018.

District Court of Appeal, Second District, Division 2, California.

Sept. 26, 1952.

Action by wife against husband for divorce. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., entered interlocutory judgment of divorce, and plaintiff appealed from that part of it adjudicating that a certain parcel of real property was community property rather than separate property of plaintiff. The District Court of Appeal, Fox, J., held that evidence sustained finding that, by their acts and conduct, the parties had confirmed their oral prenuptial agreement that the wife should take the property in her name and hold it as community property for the marriage.

Judgment affirmed.

1. Husband and Wife 🔑248

There can be no community interest in property in absence of a marriage.

2. Husband and Wife 🔑248½

Where woman took title to realty in her name prior to marriage and continued to hold it in her name after marriage, such realty could acquire status of community property only from a valid agreement, either prenuptial or postnuptial, between her and her husband.

3. Husband and Wife 🔑266

Agreement that property shall be community property of a marriage may be oral if it is confirmed by the subsequent act and conduct of the parties.

4. Husband and Wife 🔑264

In suit for divorce by wife who contended that realty held in her name was not community property, evidence sustained finding that, by their acts and conduct, the parties had confirmed an oral prenuptial agreement that realty would be taken in name of wife but held by her during marriage as community property.

5. Husband and Wife 🔑266

Provision of Civil Code declaring that confidential relationship is presumed to exist between husband and wife had no application to the making of an oral prenuptial agreement for woman to take title to realty and to hold it as community property after marriage, since confidential relationship could not, as matter of law, exist when parties were not married, and parties could deal with each other at arms length. Civ.Code, § 158.

6. Husband and Wife 🔑266

Even though acts and conduct confirming oral prenuptial agreement for woman to take title to realty in her name and to hold it as community property for marriage took place after marriage, when it was presumed that confidential relationship between the woman and her husband existed, examination of entire transaction justified inference that it was completely fair and just to the woman. Civ.Code, § 158.

◆

Edward A. Norstrand, Santa Monica, for appellant.

James L. Grubbs, Santa Monica, for respondent.

FOX, Justice.

This is an appeal by the plaintiff from that part of an interlocutory judgment of divorce adjudicating a certain parcel of real property to be community property rather than the separate property of plaintiff, and awarding the same to the parties in equal proportions, subject to a lien in favor of plaintiff for $2,348.

The parties met in Salem, Oregon, in 1940. Defendant was a sign painter by trade with a ninth-grade education. Plaintiff, who was divorced, lived with her fourteen-year old daughter. She was unemployed and on State relief. After a courtship of a year they left Salem for Seattle in the fall of 1941 pursuant to an agreement to pool their money for the purchase of a piece of income property since neither alone had sufficient means with which to accomplish their purpose. Plaintiff had $600 which she had obtained as alimony from her former husband. Defendant had a less amount of cash upon their arrival in Seattle after having paid the expenses of the trip. In Seattle they leased a rooming house and purchased furniture for it, each putting up an equal amount of money. They improved the property, increased its income substantially and after operating it for 16 months sold their interest for $1,700. A dispute arose over the division of the proceeds of the sale. A settlement was reached by which defendant received $340.

As a result of this dispute, the parties "broke off their engagement." Upon learning about a week later that defendant intended to come to California, plaintiff expressed a desire to accompany him and the parties "renewed their engagement." They planned to get a piece of income property in California and develop it as they had done in Seattle. Defendant insisted, however, that the aftermath of the Seattle venture would not be repeated as "he did not want any more one-sided dealings." He demanded "a fifty-fifty proposition." Plaintiff agreed to this arrangement. They discussed the community property law of California as a means of insuring such a division.

Before leaving Seattle, however, plaintiff had made a trip to see her former husband and collected $1,000 alimony. She then had $1,500 cash; defendant had $650 in cash, an automobile and trailer.

At plaintiff's suggestion it was agreed plaintiff should keep her funds intact, and defendant would use his money to pay their expenses, including those of plaintiff's daughter, to California. They made the journey in defendant's car and trailer. Upon arrival in Santa Monica they searched for income properties for some weeks. Finally defendant learned of the opportunity to buy the real property involved in this action and made a deposit thereon. At the time of entering into the escrow agreement plaintiff and defendant, in the presence of the escrow clerk and real estate saleslady, had a discussion between themselves as to how the title to the property should be taken. Plaintiff stated she would like the title in her name and that it made no difference as it was community property. Defendant said it made no difference to him as they were going to be married and had agreed on a fifty-fifty proposition. Accordingly, title was taken in plaintiff's name.

The parties moved into the premises on April 23, 1943, and were married on May 1, 1943. After their marriage they from time to time discussed the fact that the property was community property.

Prior to taking possession the parties agreed defendant would remodel and improve the housing facilities on the property so as to increase the income, and plaintiff would collect the rentals and use them to pay for the furniture they would have to buy with which to equip the apartments. After moving into the property defendant devoted his entire time for three months to remodeling, modernizing, painting and otherwise improving the premises. He also borrowed on his car and used these separate funds with which to purchase materials for the improvements.

The property was subject to two trust deeds. Payments were made on these by each of the parties. Those made by defendant came from the residue of the funds he brought from Seattle and from his earnings. Payments made by plaintiff apparently came from the rentals except two which totaled $2,348. This amount came from the proceeds of an insurance policy on the death of plaintiff's son and a lien was established by the judgment herein on the property in plaintiff's favor for that amount.

In working out the details of their earlier agreement and the operations of this business venture the parties, after their marriage, decided the utilities, groceries and other living expenses would be paid from defendant's earnings and the income from the apartments would be used to pay for the furniture and to make the payments on the trust deed obligations against the property. This arrangement, generally, seems to have been carried out. However, defendant appears to have made a number of payments on the encumbrances.

The parties filed joint Federal income tax returns from 1943 to and including 1950. These returns were executed by both parties. During this entire eight-year period they split their total income which included the income from this property as well as the earnings of defendant. In the 1945 Federal return on the line which showed their total income there was typed in the words "community property."

In the fall of 1947 plaintiff arranged another loan on the property for the purpose of building an additional house thereon. Defendant was at the time visiting his former home in Nebraska. It seems his return was delayed in order that he might take part in a big pheasant hunt. In a letter to him protesting the priority he was giving his hunting trip plaintiff said, "It makes me mad to think that comes before the building of *your* home." (Italics added.)

[1-3] Plaintiff's first contention is that the evidence is insufficient to support the finding that the property is community property. It is pointed out there can be no community interest in the absence of a marriage. Mooney v. Mooney, 91 Cal.App.2d 118, 204 P.2d 630. Therefore, since the parties were not married at the time the property was acquired, it was not then community. Consequently, if the property acquired the status of community property this must have resulted from a valid agreement, either prenuptial or postnuptial, since title was initially taken in plaintiff's name and there was no conveyance by either of any interest in the property. Such an agreement may be oral if it is confirmed by the subsequent acts and conduct of the parties. Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398; In re Estate of Sehabiague, 47 Cal.App.2d 793, 119 P.2d 30; In re Estate of Piatt, 81 Cal.App.2d 348, 183 P.2d 919. Plaintiff concedes the evidence is sufficient to warrant an implied finding that prior to their marriage the parties entered into an oral agreement to treat their subsequently acquired property as community after their marriage. The issue then is whether the evidence is sufficient to justify an implied finding that the oral prenuptial agreement was sufficiently confirmed by the acts and conduct of the parties after their marriage. Clearly, the evidence supports such a finding.

[4] There are a series of acts and a complete course of conduct on the part of defendant which indicates he confirmed their prenuptial oral agreement. He remodeled the property and otherwise improved it, using both separate and community funds for that purpose. He also made payments on the trust deeds. Plaintiff argues, however, these acts are without significance since the improvement of the property by him and the expenditure of his separate and their community funds thereon and in meeting payments on the trust deeds are presumed to be a gift to her since his labor was a community asset and he had control and management of the funds. She further contends defendant's act and course of conduct are not sufficient to confirm the oral prenuptial agreement; that to produce such a legal consequence there must be acts and conduct on the part of both the parties indicating such a confirmation. She insists there are no such acts or conduct on her part so indicating. She is, however, in error. For eight consecutive years she signed a joint Federal income tax return splitting their total income including the income from this property along with the earnings of defendant. Such a course of conduct is highly significant. In re Estate of Raphael, 91 Cal.App.2d 931, 936-937, 206 P.2d 391; Frymire

v. Brown, 94 Cal.App.2d 334, 339, 210 P.2d 707; Heck v. Heck, 63 Cal.App.2d 470, 475, 147 P.2d 110. Added significance is afforded by reason of the notation on one of the early returns of "community property." Plaintiff's reference to "your home" in her letter to defendant in 1947 is also revealing. Finally, the conversations of the parties from time to time after their marriage, at least up to the time plaintiff began to talk about kicking defendant out, based on the premise that the property was community, are important. Stice v. Stice, 81 Cal.App.2d 792, 798, 185 P.2d 402; Durrell v. Bacon, 138 Cal.App. 396, 403, 32 P.2d 644. These facts and circumstances are sufficient to support an inference of plaintiff's confirmation of their oral prenuptial agreement to treat the property as community.

"That such agreement not only existed between the parties but was in fact consummated during their marriage is established and affirmed by their acts and conduct in purchasing, improving and dealing with the property during their marriage." Mooney v. Mooney, 91 Cal.App.2d 118, 121, 204 P.2d 630, 631. Hence the court properly concluded the property was community, subject, however, to a lien in favor of plaintiff for $2,348.

[5] Plaintiff further contends that if there was an agreement between the parties it is fraudulent and void. She bases this contention on section 158, Civil Code, which declares a confidential relationship is presumed to exist between a husband and wife, and argues that the burden is on the husband to show any agreement with his wife is fair, just and fully understood by her. The simple answer to this argument is that section 158 has no application to the making of this oral agreement because the parties were not married when it was made, hence the confidential relationship did not, as a matter of law, exist and the parties could deal with each other at arm's length.

[6] If perchance it be argued that section 158, Civil Code, has some application because the acts and conduct which confirm the prenuptial oral agreement took place after their marriage the answer is that an examination of this entire transaction justifies an inference that it was completely fair and just to the plaintiff. As to plaintiff's fully understanding their deal, it will be recalled that when in Seattle they first discussed coming to California they agreed upon a "fifty-fifty proposition" and understood the community property law here so provided. When they were at the escrow office it was plaintiff who first suggested title be put in her name; that it didn't make any difference as it was community property. Defendant acquiesced because they were going to be married and had agreed on "a fifty-fifty proposition" and he thought it didn't make any difference how title stood. Plaintiff appears to have understood the significance of community property insofar as income taxes are concerned. She certainly was not making any claim to the property as her own when she wrote defendant in 1947. It is a reasonable inference from all the dealings between the parties and the way this transaction was handled in its entirety that the defendant did not mislead or misinform the plaintiff in any degree as to her rights under their agreement.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

113 Cal.App.2d 234

ELLIS et al. v. DALLAS et al.

Civ. 4288.

District Court of Appeal, Fourth District,
California.

Sept. 24, 1952.

Hearing Denied Nov. 20, 1952.

Action by Allen Ellis and another, doing business as Freeway Ranch Market, against Chris W. Dallas and others, doing business as Dee Gee Market, to restrain violation of the unfair practices act and for damages. The Superior Court, San Diego County, C. M. Monroe, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that since defendants' loss leader sales had not been made with intent to injure competitors or to destroy competition, denial of injunctive relief was not an abuse of discretion.

Affirmed.

1. Trade-Marks and Trade-Names and Unfair Competition 🔑99

In action by groceryman against competitor for injunction to restrain competitor from violating the unfair practices act and for damages, whether competitor when selling certain items below costs did so with intent of injuring groceryman or destroying competition, and whether such sales had a tendency or capacity to mislead or deceive purchasers or prospective purchasers or to divert trade from or otherwise injure other grocerymen were questions of fact for trial court. Business and Professions Code, § 17000 et seq.

2. Appeal and Error 🔑931(1), 1010(1), 1012(1)

An appellate court will view the evidence in the light most favorable to respondent, will not weigh the evidence, will indulge all intendments and reasonable inferences which favor sustaining finding of trier of facts and will not disturb finding of trier of facts if there is substantial evidence in the record in support thereof.

3. Trade-Marks and Trade-Names and Unfair Competition 🔑68(2.17)

In order for loss leader sales to be unlawful, such sales must be made for purpose of injuring competitors or destroying competition. Business and Professions' Code, §§ 17030, 17043, 17044, 17071.

4. Trade-Marks and Trade-Names and Unfair Competition 🔑97

Where groceryman's loss leader sales were not made with intent to injure competitors or to destroy competition, trial court did not abuse discretion in denying competitor injunctive relief. Business and Professions Code, §§ 17030, 17043, 17044, 17071.

5. Trade-Marks and Trade-Names and Unfair Competition 🔑100

Where trial court found that groceryman had not been injured by any act or practice of competitor and entered judgment that groceryman take nothing, findings of fact and judgment were not inconsistent, though it was also found that groceryman had been damaged in the nominal sum of $1.

◆

Hillyer & Hillyer by William Hillyer, San Diego, for appellants.

Miller, Higgs, Fletcher & Mack, San Diego, for respondents.

Edmund G. Brown, Atty. Gen., Frank J. Mackin, Asst. Atty. Gen., and Donald D. Stoker, Deputy Atty. Gen., amici curiae for appellants.

MUSSELL, Justice.

Plaintiffs brought this action under the provisions of the Unfair Practices Act, Section 17000 et seq., Bus. & Prof. Code, to restrain defendants from violating certain provisions of the Act, and for damages. A preliminary injunction was issued and the case was tried on its merits. Plaintiffs appeal from the judgment which was entered for the defendants.

On or about May 1, 1951, plaintiffs leased premises described as 200 National Avenue in Chula Vista and began remodeling a building thereon in which they commenced business as the "Freeway Ranch Market" on June 15, 1951. Defendants have owned and operated premises nearby known as the "Dee Gee Market", at 225 National Avenue, since February, 1947.

It is alleged in plaintiffs' amended complaint that on or about May 18, 1951, defendants commenced selling various articles or products at less than cost for the purpose of injuring plaintiffs as competitors and destroying the prospective competition of plaintiffs; that defendants have continued said practice and have advertised and sold certain "loss leader" articles or products, consisting of groceries, at less than cost, with the purpose of inducing, promoting or encouraging the purchase of other merchandise; that the effect of such sales was the tendency or capacity to mislead or deceive purchasers or prospective purchasers, and that certain sales had the effect of diverting trade from or otherwise injuring competitors and particularly the plaintiffs.

The trial court found that the defendants have from time to time advertised and sold a few items of stock merchandise at prices less than cost with the purpose of inducing, promoting and encouraging the purchase of other merchandise and for the purpose of increasing the volume of business and profits of the defendants, but not for the purpose of injuring the plaintiffs or any other persons as competitors or destroying the prospective competition of plaintiffs or any other persons; that the sale of a few items of stock merchandise at prices less than cost did not have the tendency and/or capacity to mislead or deceive purchasers or prospective purchasers; that said sales below cost did not have the effect of diverting trade from and/or otherwise injuring plaintiffs or any other competitors; that the plaintiffs have not been injured by any act and/or practice of the defendants; and that plaintiffs have not been injured or damaged in the sum of $5,000, or any other sum, except the nominal sum of $1.

Plaintiffs contend (1) that the evidence does not support the findings of fact; (2) that the findings of fact and conclusions of law are contrary to law; (3) that the findings of fact and conclusions of law are inconsistent; and (4) that the temporary injunction was erroneous.

The evidence establishes without question that the defendants advertised and sold certain grocery articles, to wit: Crisco, Tide and Bisquick, below cost. However, as admitted by appellants, the evidence showing the intent with which these acts were performed is in conflict. Defendants at the time of trial admitted advertising and selling articles below cost, but testified that their purpose in doing these acts was not to injure the plaintiffs or others but to induce the purchase of other merchandise and to increase their volume and profit. The advertisements of which plaintiffs complain commenced May 18, 1951, and continued until July 5th following. These items appeared in the San Diego Union and Evening Tribune.

Plaintiffs started to remodel their building about May 17, 1951, and it is contended that defendants knew at that time that plaintiffs were about to open their market. However, there was evidence that the defendants did not know that plaintiffs were opening their market until the middle of June, 1951.

There was evidence that shortly after January 1st defendants undertook a remodeling of their store, installing self-service and consolidating departments, their purpose being to take care of more customers and to increase their volume of business; that arrangements were made to advertise in the Union and Tribune commencing the first of May and the first advertisement was finished and delivered to the papers on May 15, 1951.

Testimony was introduced showing that at a meeting of grocers at which low cost staples was being discussed one of the defendants, Chris W. Dallas, made the following statement: "I will beat you all and you haven't seen anything yet." Mr. Dallas testified that he made the statement because he didn't like being told what to do; that "they wanted me to raise my prices and I wouldn't"; that it had been the practice in the San Diego area, including Chula Vista, prior to and subsequent to May 17, 1951, for stores to advertise and sell limited items of grocery merchandise below the invoice price, for the purpose of attracting trade and thereby increasing their volume of business; that prior and subsequent to May 17, 1951, defendants, in their weekly advertisements in the Chula Vista Star, the Bay Advertiser, the San Diego Union and Evening

Tribune, advertised and sold an estimated six to eight items below the invoice cost. The evidence shows that at the time defendants were selling the listed items below cost they sold some items of merchandise at prices higher than the O.P.S. or selling prices. Defendant Chris Dallas admitted this fact but stated that the matter was corrected after it had been called to his attention and that the particular items in question were among 150 items which for some reason or other had been fluctuating in price on the wholesale level.

[1, 2] The issue of the intent of defendants when selling Crisco, Tide and Bisquick below cost was one of fact for the trial court, as was the issue of whether such sales had a tendency or capacity to mislead or deceive purchasers or prospective purchasers or to divert trade from or otherwise injure competitors. The trial court found that plaintiffs had been damaged in the nominal sum of $1 but that they were not injured by any act or practice of the defendants. There was a conflict in the evidence as to the issue of damages. Where, as here, there is substantial evidence to support the trial court's findings on these issues, the findings thereon will not be disturbed on appeal. It is a well settled rule that on appeal an appellate court (1) will view the evidence in the light most favorable to the respondent; (2) will not weigh the evidence; (3) will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact; and (4) will not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557.

The principal question for our determination is whether the sale of the three listed items of merchandise below cost for the purpose of encouraging the purchase of other merchandise and increasing the volume of business without the intent to injure competitors or to destroy competition presents a factual situation entitling plaintiffs to injunctive relief and damages. We conclude that this question must be answered in the negative.

Section 17030 of the Business and Professions Code defines a "loss leader" as any article or product sold at less than cost: (a) Where the purpose is to induce, promote or encourage the purchase of other merchandise; or (b) Where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or (c) Where the effect is to divert trade from or otherwise injure competitors. This section, as worded, does not require an intent to injure competitors or destroy competition. However, section 17043 of the same chapter of the code provides as follows:

> "Sales at less than cost. It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."

[3] The stated purpose of the Unfair Practices Act is to safeguard the public interest against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practice by which fair and honest competition is destroyed or prevented. Section 17001, Bus. & Prof. Code. In Article 3, entitled "Offenses Against the Chapter", section 17040 provides:

> "Locality discriminations: Meeting competitive price. [*Creation of locality discriminations unlawful.*] It is unlawful for any person engaged in the production, manufacture, distribution or sale of any article or product of general use or consumption, with intent to destroy the competition to any regular established dealer in such article or product, or to prevent the competition of any person who in good faith, intends and attempts to become such dealer, to create locality discriminations.
>
> "[*Meeting competitive price.*] Nothing in this section prohibits the meeting in good faith of a competitive price."

In sections 17040, 17043 and in section 17045, relating to secret rebates, refunds, commissions or unearned discounts, an intent to injure competitors or destroy competition is required to establish a violation of the statute. While section 17044 of the Act provides that the practice of using any article or product as a "loss leader" is included among the prohibitions of the chapter, we conclude it was the intent of the legislature to make it unlawful to sell articles below cost for the purpose of injuring competitors or destroying competition and that to be unlawful, "loss leader" sales must be made for that purpose.

A further indication of legislative intent that in all violations of the Act there must be a purpose or intent to injure competitors or destroy competition is to be found in section 17071 of the code, which is as follows:

> "Proof of intent. In all actions brought under this chapter proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition."

In Wholesale Tobacco Dealers Bureau v. National etc., Co., 11 Cal.2d 634, 82 P.2d 3, 8, 118 A.L.R. 486, the question presented had to do with the constitutionality of certain sections of the Unfair Practices Act, and amendments of 1935, St.1935, p. 1546. The Act then prohibited sales below cost only when such sales were made "for the purpose of injuring competitors and destroying competition". The Act was held to be a constitutional exercise of the State's police power. Section 3 of the Act then under discussion provided as follows:

> "§ 3. *Sales at less than cost.* It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition, and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this act for any such act."

The court there said, 11 Cal.2d at page 658, 82 P.2d at page 17:

> "It is next urged by appellant that every sale below cost, except as provided in section 6, is made unlawful by section 3 regardless of intent, and that so construed the act is unconstitutional. It would certainly add to the weight of appellant's argument on the main issue if the statute omitted intent as an integral part of the act prohibited. It is one thing, from a legal standpoint, to prohibit sales below cost engaged in for the purpose of injuring competitors and destroying competition and quite another to merely prohibit all such sales regardless of intent. It may well be that an absolute prohibition regardless of intent would be unreasonable. See Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 47 S.Ct. 506, 71 L.Ed. 893, 52 A.L.R. 163."

In People v. Pay Less Drug Store, 25 Cal.2d 108, 153 P.2d 9, an injunction was sought by plaintiff to restrain the defendants from violating certain provisions of the Unfair Practices Act as amended by Statutes of 1937. The complaint charged defendants with selling certain grocery items below cost and "loss leaders" with the intention of injuring competitors and destroying competition in violation of the Act. It was there held that the violation of the statute was complete when sales below cost were shown to have been made with the requisite intent and not within any of the exceptions. The Act then, as now, Sec. 17071, provided that proof of sales below cost, together with proof of the injurious effect of such sales is presumptive evidence of the purpose or intent to injure competitors or destroy competition. The court said, 25 Cal.2d at page 114, 153 P.2d at page 12:

> "Proof of injurious effect is permitted to be shown with the proof of sales below cost as presumptive or prima facie evidence that the requisite intent existed. The obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the prima facie showing of wrongful intent. They may present facts showing that they were within the express exceptions regardless of actual intent; or they may introduce evidence of another necessity not expressly included to show that sales were made in good faith and not for the purpose of injuring competitors or destroying competition.
>
> "It is unnecessary here to consider the defendants' suggestion of circumstances other than the expressly designated exceptions, which would justify sales below cost and negative the prima facie showing of unlawful intent. The defendants introduced evidence solely in an attempt to bring themselves within exception (d), which permitted them to make sales below cost in an endeavor in good faith to meet the legal prices of their competitors."

In the instant case there was substantial evidence that the sales were made in good faith and not for the purpose of injuring competitors and the trial court so found.

In Sandler v. Gordon, 1949, 94 Cal.App.2d 254, 258, 210 P.2d 314, 317, the court, quoting from 11 Cal.Jur. 10-Yr. Supp., p. 136, said:

> "'The law prohibits, not all sales at less than cost, but only sales which are accompanied by the requisite intention or purpose—i.e., the purpose of injuring competitors or destroying competition. Unless the fact of intention is shown to have existed, the conclusion is that the sale did not constitute a violation of the statute.'"

In People v. Gordon, 1951, 105 Cal.App.2d 711, 234 P.2d 287, 294, defendant appealed in an action by the People to enjoin certain alleged violations of the Unfair Practices Act, Bus. & Prof.Code, sec. 17000 et seq., to wit, the selling of articles or products at less than cost in the manner prohibited in section 17043 of that code and in the practice of using articles or products as "loss leaders", prohibited in section 17044. The court held that on the showing made there was no abuse of discretion shown in holding, for the purpose of granting a preliminary injunction, that the required intent to injure competitors or destroy competition was present and quoted the following language from People v. Black's Food Store, 16 Cal.2d 59, 61–62, 105 P.2d 361:

> "'The authorities are numerous and uniform to the effect that the granting or denial of a preliminary injunction on a verified complaint, together with oral testimony or affidavits, even though the evidence with respect to the absolute right therefor may be conflicting, rests in the sound discretion of the trial court, and that the order may not be interfered with on appeal, except for an abuse of discretion. (Citations.)
>
> "'In the present case the applications for temporary injunctions were heard on the verified complaints which specifically allege that the merchandise was sold below cost "for the purpose of injuring competitors and destroying competition". Representatives of the defendants testified that they did sell, offer for sale and advertise the goods in question "at prices below their invoice or replacement cost", but that they did so merely "to increase the volume of our business", and that they had no intention of thereby "injuring competitors" nor did they "intend to destroy competition". The evidence in this case therefore created a mere conflict on the material issue regarding the intention with which the goods were sold below cost. A sound discretion was therefore conferred upon the trial court to grant or deny the preliminary injunctions. It does not appear that discretion was abused.'"

[4] In the instant case, as in People v. Black's Food Store, supra, the evidence created a mere conflict on the material issue regarding the intention with which the goods were sold below cost and it does not appear that the trial court abused its discretion in denying injunctive relief.

[5] It is argued that the findings of fact and conclusions of law are inconsistent in that the court in awarding nominal damages recognized that defendants' acts were unlawful and therefore erroneously concluded that they were not guilty of a violation of the Unfair Practices Act. However, the applicable finding of fact is that "the plaintiffs have not been injured by any act and/or practice of the defendants". It was found that defendants were damaged in the nominal sum of $1.00 but the judgment was "that plaintiffs take nothing by reason of their amended complaint on file in the above entitled action". The findings of fact and the judgment are not inconsistent.

In view of what we have here said, it is unnecessary to pass upon the question raised as to whether the preliminary injunction was erroneously issued.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.

Hearing denied; CARTER, J., dissenting.

113 Cal.App.2d 107

DOUGLAS v. WESTFALL et al.

No. 15133.

District Court of Appeal, First District,
Division 1, California.
Sept. 15, 1952.

Rehearing Denied Oct. 15, 1952.

Hearing Denied Nov. 13, 1952.

Action by Grace E. Douglas against Ellen L. Westfall, personally and as trustee, and others, for an accounting by the trustees under two express trusts. Ellen L. Westfall, individually and as trustee, and others filed cross-complaint. The Superior Court of the State of California in and for the City and County of San Francisco, George W. Schonfeld, J., entered judgment, and, from adverse judgment, plaintiff appealed. The District Court of Appeal, Wood, J., held that trustor intended that legal title in the trust property and possession thereof vest immediately in the trustees but gave one trustee duty and power to manage the properties for benefit of trustor during her life time in view of fact that trustor had stated, in trust instrument, that she made trust so that she might be relieved from burden of looking after the property.

Judgment and order affirmed.

1. Trusts 🔑329

Order approving trustee's final accounts would be reviewed upon appeal from judgment following order. Code Civ.Proc., §§ 956, 963.

2. Trusts 🔑126

Trustor, who made daughter trustee of all trustor's property, except for one item made subject to another trust, with direction to distribute the property to trustor's creditors and children upon trustor's death and stated, in trust instrument, that trust was paid to relieve trustor of burden of looking after the property, intended to vest legal title in possession and trustee with duty and power of managing the property for benefit of trustor during her life time, of paying her debts and funeral and burial expenses, and of distributing remainder to trustor's children upon trustor's death. Code Civ.Proc. §§ 956, 963.

3. Trusts 🔑329

Payments made by trustee in accordance with trustor's intent to provide care for trustor from trust income represented moneys which belonged to trustor and in which complaining trust beneficiary had no interest, and, in action for an accounting by the trustee, no purpose would be served in sending case back to trial court to have accounts revised to reflect payments made from trust corpus in view of fact that, if such debts had not been paid during trustor's lifetime, they would have constituted, upon her death, debts which trustee was expressly directed to pay. Code Civ.Proc., §§ 956, 963.

4. Trusts 🔑315(2), 317

Award of $500 to each of two trustees as fees for performance of various services, including administering the trusts and defending action brought against both trustees by some of the beneficiaries and award of additional $500 to one trustee and $200 to attorney of other trustee, plus $2.50 costs, were not excessive as a matter of law and would not be said to have exceeded the 5% per annum of gross income limit on trustee's fees under trust in view of fact that no showing was made as to how much of the $500 allowed trustee was for fees arising out of litigation, for which the trust authorized an additional fee. Code Civ.Proc., §§ 956, 963.

5. Executors and Administrators 🔑104(6)
Trusts 🔑219(2)

Except in cases in which executor or trustee has been guilty of some positive misconduct or wilful violation of duty, he is not to be charged with compound interest and in cases of mere negligence, no more than simple interest is added to loss resulting therefrom.

6. Trusts 🔑219(2)

Where trustee has mingled trust money with his own funds and used them for his own advantage, he will be charged with compound interest, but if trustee can show that he has acted in good faith and has not made any greater profit by use of the fund, he will be charged only simple interest.

7. Trusts 🔑219(1)

The rule charging trustee with interest is limited to cases where it is either shown or presumed that he has profited by his acts or has been guilty of such willful misfeasance as to require compensation therefor.

8. Executors and Administrators 🔑104(1)
Trusts 🔑219(1)

In any case, determination whether executor or trustee is chargeable with even simple interest depends on circumstances of the case.

9. Trusts 🔑219(2)

In action by beneficiary under two express trusts for an accounting by the respective trustees, where trustees had waived delinquent interest on notes due the trust, had not collected note from deceased maker, and had made loans which were disapproved by the court, trial court's charge of 6% interest on amount thus surcharged, except for the unauthorized loan concerning which current savings bank interest rates compounded semiannually were charged, did not constitute an abuse of discretion. Code Civ.Proc. §§ 956, 963; Civ.Code, §§ 2261, 2262.

10. Trusts 🔑329

Any procedure or record made by trial court, in an action for accounting by a trustee, from which it can be intelligently ascertained what the issues were as to controverted items and how such items were disposed of by trial court will suffice whether matter appears in findings, decree, or bill of exceptions showing the controversy and the disposition thereof. Code Civ. Proc. § 953a et seq.

11. Trusts 🔑329

In action by beneficiary under two express trusts for an accounting by the respective trustees, where an accounting was ordered and rendered, objections thereto were filed and heard, accounts were revised by court and approved, and accounts were then incorporated by reference into the findings of fact, an adequate and appropriate record was preserved of items of account in issue between the parties and the trial court's decisions thereon. Code Civ. Proc. § 953a et seq.

12. Trusts 🔑329

Plaintiff trust beneficiary who, in an action for an accounting by the trustees, failed to request of the trial court reimbursement for attorney's fees reasonably incurred in pursuing and preserving the trust property could not make claim therefor in the District Court of Appeal.

13. Appeal and Error 🔑113(1)

Order denying a motion to vacate and set aside a judgment and enter a different judgment is an appealable order.

◆

Chas. N. Douglas, San Francisco, for appellant.

A. Don Duncan, San Francisco, for respondents.

FRED B. WOOD, Justice.

This is an appeal by plaintiff from the judgment rendered, and from an order denying plaintiff's motion for a different judgment on the findings made, in an action by a beneficiary under two express trusts, for an accounting by the respective trustees.

The trial court ordered an accounting and upon the hearing of the accounts and plaintiff's objections thereto, approved some items, disapproved others, and ordered each trustee to surcharge himself in respect to certain other items. Thereafter final accounts conforming to those rulings of the court were filed, approved by the court, and by reference incorporated in the findings of fact.

[1] Respondents claim that the order approving the final accounts was appealable hence not reviewable upon appeal from the judgment, a point not well taken. This is a suit in equity not a proceeding in probate. Hence, the provisions of sections 956 and 963 of the Code of Civil Procedure govern. The order under review is not specifically mentioned in section 963. It is not a final judgment in a collateral proceeding. The accounting is the very purpose of this action, not an incidental feature of it. And the order, although it approved the accounts and allowed compensation to the trustees, did not direct the payment of money or the performance of any act by or against the plaintiff. See Illinois Trust & Savings Bank v. Pacific Ry. Co. [Alvord], 99 Cal. 407, 33 P. 1132, dismissal of an appeal from an order settling a receiver's account, for a discussion of the applicable principles.

The trustor, Ellen L. Sorgenfrey, created each of these trusts by declarations in writing executed by her in July, 1930. By one of these declarations she conveyed to a daughter, defendant Ellen L. Westfall, as trustee, all of her property except an $8,000 debt secured by mortgage on real property, owed by said trustee to the trustor. By the other declaration, the trustor conveyed this debt and mortgage to a son, defendant John F. Sorgenfrey, as trustee. In most respects the two declarations were alike. In the Westfall trust declaration the trustor recited "in order that I may be relieved from the burden of looking after the properties which I now have and the properties which I will acquire from the estate of my deceased daughter * * * I make this declaration of trust conveying * * * to * * * [the designated trustee] to manage exclusively during my lifetime and to dispose of said property in the way I herein direct after my death. * * *" She gave each trustee, respectively, power "to hold, manage, sell, invest and purchase, in the sole discretion of the said * * * [the designated trustee] and to distribute upon my death the said properties in accordance with this instrument. * * *" In the Westfall trust she directed that upon her death the property "be distributed as hereinafter directed, to wit: (1) I direct that my said trustee hereinabove named shall pay out of my said trust estate all of my just debts and the expenses of my funeral and burial as soon after my death as may be practicable." Concerning her beneficiaries, in each of the trust declarations, she said "[u]pon my death I direct my trustee to promptly distribute, transfer and convey, after paying the above expenses of administration, all of the trust estate property held by her [him] as follows, to wit:" in various amounts and proportions to her seven children, including plaintiff and defendants Ellen L. Westfall and John F. Sorgenfrey. The trustor died August 26, 1933.

[2] Among the items of expenditure claimed by trustee Westfall and approved by the court were payments of $75 per month for "board, lodging, care and nursing of Ellen L. Sorgenfrey," the trustor, and various small items described as "sundry expenses" or "sundry extras" for her, all of such payments aggregating nearly $3,000 between July, 1930, and August, 1933. Plaintiff claims that the trustee was wholly without authority to make any such payments, a claim predicated principally upon the fact that the declaration of trust did not expressly authorize the making

of any distribution until after the death of the trustor. This is too literal and narrow an interpretation. The failure expressly to provide for distribution of income during the life of the trustor suggests oversight and inadvertence rather than a calculated purposeful intent to require accumulation of the income during that period and the distribution thereof among her children after her death. The declaration that she made this trust that she might "be relieved from the burden of looking after the properties" bespeaks a desire to be relieved of the burden of management, not to strip herself of the benefit of the income accruing from those properties. We can only infer that the trustor intended immediately to vest legal title and possession in Westfall with the duty and power of managing the properties for the benefit of the trustor during her lifetime, then to pay her debts and funeral and burial expenses and distribute the remainder to the trustor's children. Upon principle, it is quite like the case of Nichols v. Emery, 109 Cal. 323, 41 P. 1089, where the court inferred an intent to retain a life estate and to postpone the enjoyment of the corpus during the period of that estate. In our case, we infer an intent to retain a beneficial interest in the income during the life of the trustor.

[3] It follows that these payments for the care of the trustor, up to the amount of the income, represented moneys which belonged to the trustor and in which plaintiff had no interest. The amount of the excess of debts over income, if not paid during the trustor's lifetime, would upon her death constitute debts which she had expressly directed the trustee to pay. No purpose would be served in sending the case back to have the accounts revised to reflect payment of that excess after the trustor's death instead of before. Indeed, there is some basis for an inference from the declaration of trust that the trustor intended the trustee to pay these debts as they accrued.

[4] Plaintiff also claims that the court erroneously allowed each trustee, and the attorney for each, certain fees. The court allowed each trustee $500 as fees for the performance of various services including administering the trust and defending the action of King v. Westfall, an action brought against both trustees in 1934 by some of the beneficiaries. For similar services the court allowed the attorney for trustee Westfall $500 and the attorney for trustee Sorgenfrey $200 and $2.50 costs. No fees, to trustee or attorney, were allowed for services in the present action. Each declaration of trust expressly allowed fees to the trustee and his attorney. This clause of each trust read as follows: "my said trustee shall be entitled to reasonable compensation for acting as trustee under this trust, said compensation not to exceed five per cent (5%) per annum of the gross income from said trust property, except that in case of litigation said trustee is to be entitled to an additional fee. Said trustee is also to be entitled to reasonable compensation for her [his] attorney as such trustee for performing all necessary legal services in connection with said trust property, including any litigation which may arise." We cannot say as a matter of law that any of the fees mentioned were excessive. Plaintiff, having furnished only a clerk's transcript, has not brought up the record of the evidence upon which these allowances were based indicating the reasonable value of the services involved. See Utz v. Aureguy, 109 Cal.App.2d 803, 806–807, 241 P.2d 639, and Palpar, Inc., v. Thayer, 83 Cal. App.2d 809, 811, 189 P.2d 752. Since we do not know how much of the $500 allowed each trustee was for litigation, we do not know and do not infer that the portion thereof awarded for other services exceeded the 5% limit.

Plaintiff contends that in certain instances where the court surcharged a trustee with interest, it did so at an insufficient rate, plaintiff claiming in most instances the rates should have been 7% compounded annually. Upon payment in 1943 of the principal of a $1,000 note of Charles M. Sorgenfrey, Westfall waived delinquent interest which had accrued since December 6, 1937. The court ordered the trustee surcharged with the amount of this delinquent interest computed at 6%, the rate specified in the note. There were two notes of

$2,900 each of John F. Sorgenfrey bearing interest at 6% compounded when delinquent. These notes were renewed in 1940 without interest and trustee Westfall waived delinquent interest. The court surcharged the trustee with amount of the principal and delinquent interest, 6% compounded to the date of renewal, and thereafter simple interest, at 6%, to August 18, 1948, when the trustee cancelled the notes as paid. There was a $500 note of Anna LiCavoli bearing interest at 6%. Anna died in 1931 and the note was never paid. The court surcharged Westfall with the principal and interest at 6% compounded until the four-year statute of limitations had run and thereafter simple interest until March 14, 1950, when the trustee's account was filed. The court disapproved four loans by Westfall to George W. Dutton and W. D. Calkins and charged the trustee with the principal amounts thereof and current savings bank interest compounded semi-annually from the respective dates of the loans to the filing of the trustee's account, based upon the rates paid by Wells Fargo Bank & Union Trust Company where the trustee kept one of her accounts. Trustee Sorgenfrey approved in 1940 a renewal of the $8,000 note of Westfall without interest and waived interest on the first note. The court ordered Sorgenfrey charged with the amount of the principal as being paid on August 18, 1948, and also charged him with interest at 6% compounded annually on the first note to the date of the second and at 6% simple interest thereafter until August 18, 1948. Plaintiff contends that in these matters the trial court attempted to waive interest after August 18, 1948, and as to the rate should have surcharged the trustees with interest at 7% compounded annually.

[5–7] We have found no statute applicable. Section 2262 of the Civil Code applies only when a trustee "omits to invest the trust moneys according to the last section [section 2261]". Section 2261 at the time of the enactment of 2262 required a trustee to invest money as fast as he collected a sufficient amount. We are not here concerned with a failure to invest or with delays in making investments. We find the applicable principles well expressed in Wheeler v. Bolton, 92 Cal. 159, at page 172, 28 P. 558, at page 561: "The general rule applicable to an executor, as well as to any other trustee, is that, except in cases in which he has been guilty of some positive misconduct or willful violation of duty, he is not to be charged with compound interest. In cases of mere negligence, no more than simple interest is ever added to the loss or damage resulting therefrom. In cases where he has mingled moneys belonging to his trust with his own funds, and used them for his own advantage, courts have charged him with compound interest, upon the theory that, in the absence of evidence to the contrary, he will be presumed to have received such profits from their use. [Citation.] This rule is of modern growth, and is applied more frequently in this country than in England. It has been adopted, 'not for punishing the delinquent trustee, but for the purpose of attaining the actual or presumed gains, and to make certain that nothing of profit or advantage remains to the trustee, except, perhaps, his commission or compensation.' [Citations.] But, even in such case, if the executor can show that he has acted in good faith, and has not made any greater profit by the use of the funds, he will be charged only simple interest. Perkins' Estate v. Hollister, 59 Vt. 348, 7 A. 605. The rule charging him with interest is, however, limited to cases in which it is either shown or presumed that the executor has himself profited by his acts, or has been guilty of such willful misfeasance as to justify the court in requiring from him compensation therefor.

[8, 9] "Whether, in any instance, the executor is chargeable with even simple interest, must be determined by the trial court from all the circumstances of that case. It cannot be said, as matter of law, that interest is to be added to the value of the property that has been lost by his neglect. The circumstances connected with its loss may so completely exonerate him from any charge of neglect that he would not be held liable for even its value, and his neglect may have been so technical that the court

would not feel justified in requiring from him more than a restoration of the value of the property; and it has been held that the heir himself may have been so negligent in prosecuting his claim that the court would consider that the executor should not be charged with interest." See, also, Estate of Cousins, 111 Cal. 441, 451–452, 44 P. 182, and Katz v. Enos, 68 Cal.App.2d 266, 278–279, 156 P.2d 461. In the light of these principles and the trial court's findings that there was no commingling of assets and that each trustee acted in good faith, we cannot say as a matter of law that the interest and rates of interest surcharged by the trial court in the instant case were erroneous or that in imposing them the court committed an abuse of discretion. Nor can it be said as a matter of law that the trial court abused its discretion in terminating the 6% interest on the Westfall and Sorgenfrey notes as of August 18, 1948, the date as of which the respective trustees were charged with receipt of the principal.

[10, 11] Plaintiff assigns as error the failure of the court to make findings in respect to the several contested items of the accounts, citing Whann v. Doell, 192 Cal. 680, 221 P. 899, 901. In that case a trial was had without reference to a master or referee and without an interlocutory decree ordering an accounting. In such a case, the court observed, a mere statement of the balance due in the findings of the court was not a proper disposition of the action. But the court in that case also said: "On the other hand, the contention that an account must be stated in accepted bookkeeping fashion cannot be maintained. The question presented by such an appeal is a practical one in such cases, particularly in view of our restricted powers under the Constitution (article 6, § 4½), namely: Can this court upon the whole record say that there has been a miscarriage of justice in the trial court? Any procedure or record from which it can be intelligently ascertained what the issues were as to the controverted items and how these issues were disposed of by the trial court will suffice for the purpose, whether the matter appears from the findings, the decree or a bill of exceptions, showing the controversy, and the disposition thereof. It may be possible, also, to show such action by a typewritten record prepared under section 953a et seq., Code of Civil Procedure." 192 Cal. at page 684, 221 P. at page 901, quoted with approval in Sears v. Rule, 27 Cal.2d 131, 149, 163 P.2d 443, and Davis v. California Motors, 73 Cal.App.2d 241, 246–247, 166 P.2d 52. See also Rochat v. Gee, 137 Cal. 497, 501–502, 70 P. 478, settlement of the account of a receiver, and In re Estate of Tretheway, 32 Cal.App.2d 287, 293, 89 P.2d 679, settlement of an executor's account. The record in our case complies with these requirements. An accounting was ordered. Accounts were rendered. Objections thereto were filed and heard. The accounts were revised in accordance with the rulings of the court, and were thereafter approved by the court. The accounts were then incorporated by reference into the findings of fact. With or without such incorporation by reference, we think this method of proceeding adequately and appropriately preserved a record of the items of the account in issue between the parties and the decisions of the court thereon.

[12] Finally, plaintiff claims error in the failure of the trial court to award her reimbursement for attorney fees reasonably incurred in pursuing and preserving the trust property. But she makes no claim or showing that she made such a request of the trial court. It is too late now for her to claim it.

For the foregoing reasons the judgment should be affirmed.

[13] Plaintiff also appeals from what she calls an order denying a "motion for judgment in her favor on the findings." It is not clear from the record that such a motion was made or denied. However, an order denying a motion, made under Code of Civil Procedure, § 663 and § 663a to vacate and set aside a judgment and enter a different judgment, is an appealable order. We will consider this appeal as including an appeal from such an order. We are convinced, after a careful review of the record and the conclusions reached after a

consideration of the appeal from the judgment, that the trial court did not err in denying the motion. The order should be affirmed.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

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113 Cal.App.2d 389

GREENBERG et al. v. LOS ANGELES COUNTY.

Civ. 19150.

District Court of Appeal, Second District, Division 1, California.

Sept. 30, 1952.

Action by Isador Greenberg, and others against county of Los Angeles for death of named plaintiff's wife, allegedly caused by negligent operation of a motor vehicle by officers, agents and employees of defendant. The Superior Court, Los Angeles County, Roy C. Herndon, J., sustained defendant's demurrer to plaintiffs' complaint without leave to amend, and plaintiffs appealed. The District Court of Appeal, Doran, J., held that where driver of county ambulance carrying decedent to hospital took indirect route and stopped to pick up another patient, thus delaying decedent's arrival at hospital for nearly an hour, during which time decedent died, her death was not due to negligent operation of county owned motor vehicle.

Judgment affirmed.

1. Municipal Corporations 🔑745½

Negligence of public employees in performing governmental function will not be imputed to the taxpayers in the absence of a statute imposing such liability.

2. Automobiles 🔑187

Statute providing that state or county owning motor vehicle is responsible for injuries from negligent operation of said motor vehicle by an officer, agent or employee, or of any other motor vehicle by officer, agent or employee when acting within scope of employment, should not be extended in effect beyond the ordinary meaning of the language used. Vehicle Code, § 400.

3. Automobiles 🔑187

Where driver of county ambulance carrying decedent to hospital took indirect route and stopped to pick up another patient, thus delaying decedent's arrival at hospital for nearly an hour, during which time decedent died, her death was not due to "negligent operation" of county owned motor vehicle, and county was not liable for the death. Vehicle Code, § 400.

See publication Words and Phrases, for other judicial constructions and definitions of "Negligent Operation".

Kenny & Morris, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment based upon an order sustaining respondent's general demurrer to plaintiff's original complaint without leave to amend. The essential allegations of the complaint are that Lena Greenberg died on November 27, 1951 leaving the plaintiff widower and children surviving; that the death was proximately caused by "the negligent operation of a motor vehicle by officers, agents and employees of the defendant county of Los Angeles."

The complaint particularizes the cause of action as follows: "On said day decedent had been stricken with a critical cardiac and diabetic condition. Plaintiffs are informed and believe that Murray Abowitz, M. D., her attending physician, telephoned the Los Angeles General Hospital at or about 9:00 A.M. on said date, and requested that an ambulance be sent to 2519 Palm Grove Avenue, Los Angeles 16, to take decedent with all possible speed to said hospital. An ambulance was dispatched by said hospital and arrived at 2519 Palm

Grove Avenue at or about 10:15 A.M. At that time decedent was placed in the ambulance, accompanied by her daughter Claire Bernstein. Plaintiff Bernstein repeated to the ambulance driver and attendant the instructions of Dr. Abowitz that Mrs. Greenberg be driven with all possible speed to the Los Angeles General Hospital. (b) Plaintiffs are informed and believe that it was imperative that decedent be immediately tested for a deficiency or excess of sugar and that if such test had been promptly made the decedent could have been treated accordingly and her life saved. (c) The ambulance driver and attendant refused to carry out the said instructions, and delayed the trip to the hospital for nearly an hour by taking an indirect route and stopping to pick up another patient at 1740 South Hoover. (d) As a result of the delay in taking decedent to the hospital, she lapsed into a coma and died before the ambulance arrived at the Los Angeles County Hospital." The complaint further alleges the filing of a claim with the Board of Supervisors and the denial thereof, and asks damages "for the loss of her support, society and comfort in the sum of $50,000.00."

Appellants' cause of action is predicated upon Section 400 of the Vehicle Code, which provides that "The State, and every county * * * owning any motor vehicle is responsible to every person who sustains any damage by reason of death, or injury to person or property as a result of the negligent operation of any said motor vehicle by an officer, agent, or employee or as the result of the negligent operation of any other motor vehicle by any officer, agent or employee when acting within the scope of his office, agency or employment; and such person may sue the State, county * * * in any court of competent jurisdiction in this State in the manner directed by law."

It is stated in appellants' brief that "Respondent's agents were under a duty to save decedent's life by so operating their vehicle as to get her to the hospital in time for effective medical attention. Despite the fact that they had been put on notice of this situation, they proceeded to drive the county's ambulance in a meandering indirect route with the result that the delay was responsible for the death."

In the respondent's brief the argument is stressed that "the death of the decedent was in no way caused by the 'negligent operation' of a motor vehicle" within the intent of Section 400 of the Vehicle Code. In this connection is cited Chilcote v. San Bernardino County, 218 Cal. 444, 23 P.2d 748, 749 holding that "it was the intention of the Legislature to use the word 'operation' in its popular and ordinary sense as applied to motor vehicles."

In the present case, there is no negligence alleged other than the delay in getting decedent to the hospital. So far as can be judged, the ambulance was driven with all due care, and the delay in question was apparently the result of stopping to pick up another patient. That the needs of such other patient also required consideration can hardly be doubted.

[1, 2] It is true, as respondent's brief points out, that "Negligence of public employees in performing governmental functions will not be imputed to the taxpayers in the absence of a statute imposing such liability," and that such a provision as Section 400 of the Vehicle Code should not be extended in effect beyond the ordinary meaning of the language used.

[3] The present complaint contains no language which can reasonably be interpreted as alleging anything ordinarily understood as "negligent operation" of a motor vehicle. And appellants have cited no case either in this state or elsewhere, containing a holding in support of the present contention. Such being the situation, no error was committed in sustaining a demurrer to the complaint without leave to amend.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

113 Cal.App.2d 243

BOIES v. WYLIE.

Civ. 14893.

District Court of Appeal, First District,
Division 2, California.

Sept. 25, 1952.

Rehearing Denied Oct. 25, 1952.

Hearing Denied Nov. 20, 1952.

Action by Lewis Boies against C. Ellsworth Wylie to recover on a note. The Superior Court, City and County of San Francisco, Franklin A. Griffin, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Goodell, J., held that conflicting evidence presented a question of fact for trial court.

Judgment affirmed.

1. Evidence 🔑462

Parol evidence that note sued on was given in reliance on payee's representations that he wanted note for personal reasons and would not treat it as a note or obligation of maker and that no effort would be made to collect it was admissible.

2. Evidence 🔑428

While parol evidence is inadmissible to vary the terms of a written instrument, such evidence is admissible to show that there was no agreement.

3. Appeal and Error 🔑994(3), 1012(1)

What credit and weight should be given to testimony is for trial court to determine, and appellate court cannot control a finding or conclusion denying credence, unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony.

4. Appeal and Error 🔑991

Payee's testimony that note sued on had been given by maker in consideration of a loan to a committee to assist in political campaign of a particular candidate for office of governor and conflicting testimony of maker that note was given in reliance upon payee's representations that he wanted it for personal reasons and would not treat it as a note or obligation of maker and that no effort would be made to collect note presented a question of fact for trial court, though payee did not categorically deny maker's version of transaction.

Kenny & Morris, Los Angeles, for appellant.

Schofield, Hanson & Sholars, San Francisco, for respondent.

GOODELL, Justice.

This action was brought on a promissory note for $10,000, by the assignee of the payee. Judgment was entered on the findings for $10,000 plus a counsel fee of $1,000 and costs. After the denial of a new trial this appeal was taken.

On April 17, 1946 appellant signed and delivered a document reading:

> "10,000.00 San Francisco, Calif.
> April 17, 1946
>
> "On April 17, 1947, for value received I * * * promise to pay to the order of Frank McArthur at San Francisco, California, the sum of Ten Thousand Dollars lawful money of the United States.
>
> "In the event of suit to enforce the payment of this note, a reasonable additional sum shall be allowed as attorney's fees in such suit and made part of the judgment.
>
> "C. Ellsworth Wylie
> "State Building
> "San Francisco"

It was assigned for collection after maturity.

The answer alleges that the note was obtained by fraud in that the payee represented that he desired it for purposes personal to himself and "did not intend to receive or otherwise deal with said paper as a promissory note or as any obligation on the part of defendant, Wylie; that McArthur represented and stated that he would not seek to enforce the said paper writing by any manner or means, that he had no intention of ever attempting to collect anything on said paper", that such representations were believed and relied on by defendant, and that defendant received no consideration from the payee or otherwise. A cross-complaint containing substantially the same allegations prayed for its surrender and cancellation.

The court found that the note had been executed and delivered as alleged in the complaint; that it was unpaid; that there was a consideration therefor; that $1,000 was a reasonable counsel fee, and that defendant's signature was not obtained by fraud or by any representation that McArthur would not deal with the paper as a promissory note or as an obligation of defendant or that he did not consider the note a binding obligation.

The record shows that Frank McArthur was interested in the success of Robert W. Kenny in his candidacy for Governor in 1946. The latter was then Attorney-General and appellant was a civil service employee in his office in San Francisco. Early in April, 1946 McArthur while in San Francisco sought out appellant and gave him a check for $200 or $250 as an outright contribution to the Kenny campaign fund; it is not involved herein. A few days later McArthur delivered to appellant a check for $10,000 payable to "Kenny for Governor" at which time the note was delivered. That the $10,000 went immediately into the Kenny campaign fund and none of it was retained by appellant is beyond question.

The only witnesses in the case were McArthur and appellant. McArthur testified first and his direct examination was brief. On cross-examination, however, he was questioned at considerable length respecting the circumstances of the payment of the $10,000 and the signing of the note. The defense contends that appellant's testimony was not contradicted and that "Testimony which is not inherently improbable and is not impeached or contradicted by other evidence must be accepted as true." For this reason appellant's testimony will be summarized first.

Appellant testified that the day after McArthur gave him the check for $250 McArthur again contacted him and "expressed a very definite interest in the election of Judge Kenny for Governor, and that he would like to help in a more substantial way. He was thinking over the situation since he gave the $250 check * * * and he again asked how much the * * * Committee could use. I said, 'I have no idea how much they could use,' and he said he would like to see the candidate on the air in a very dominant way. He then suggested that he would be willing to give $10,000. He said, 'Do you think that would be sufficient?' I said, 'The committee would find that very agreeable,' but he said, 'On one condition only.' He said, 'I want you to sign a note for this amount of money.' I expressed very definite surprise at Mr. McArthur, that I should be asked to give a note. I said, 'For what reason should I give a note? As far as I know, this campaign is not borrowing the money.' He said, 'Well, don't worry about it, I have my own personal reasons for wishing to have a note signed by you.' I said, 'Well, tell me the reason.' He said, 'Well, that is a confidential matter, but I have my personal reasons.' Then I said, 'Well, suppose that the * * * Committee, who are certainly men of substantial means, many of them, if they wanted to borrow money they could go to a bank. Why, in God's name, would I be signing a note borrowing money for the campaign, particularly when I am not good for it, and you certainly know that.' He said, 'Well, that doesn't make any difference.' I said, 'Well, there is no go on it. I am awfully sorry, but I certainly will not sign a note,' and that ended the conversation right there that day. * * * He came up the next day and stated he still was anxious to contribute * * * heavily."

According to appellant, he said: "'But I want this note signed,' and he had the note in a blank book, so I said, 'You were talking yesterday about a personal reason. What is the personal reason that you have in mind about this note?'" Appellant testified that McArthur said that certain members of his family had criticized him for spending too much money "and if I have something to show them after giving this $10,000, I will have a reason, and it will prove that this is a bankable name, and they won't criticize me." "I said, 'All right, on the basis that you want this simply as a subterfuge, * * *. You know I am not good for it. * * * It means nothing to me, this whole situation.' He said, 'Mr. Wylie, I assure you, if you sign this note, for that purpose, simply to give me a written acknowledgement of this money, it will help me * * * and you will never hear of the note again, and it will never be attempted to be collected,' and I signed the note and received the check in exchange."

[1, 2] The foregoing testimony went in over respondent's objections. The court ruled that it might be struck out later but it never was struck out. We are satisfied that the defense was entitled to introduce this parol evidence. One of appellant's contentions is that "While parol evidence to vary the terms of a written instrument is not admissible, evidence to show that there is not an agreement at all is admissible." In P. A. Smith Co. v. Muller, 201 Cal. 219, 222, 256 P. 411, 412 the court said: "It is well settled by the decisions in many jurisdictions that evidence that parties never intended a writing to constitute a contract, but that in lieu thereof another contract was entered into between them, is not objectionable under the parol evidence rule. Such evidence does not change a written contract by parol, but serves to establish that such contract had no force, efficacy, or effect. (Citations.)" And in Cooper v. Cooper, 3 Cal.App.2d 154, 39 P.2d 820, an action on a promissory note, the court held that parol evidence was admissible to prove that the document was not executed or delivered as an evidence of indebtedness but was given only as a memorandum and receipt of the sum of money appearing therein.

Respondent's counsel argue that even if this court "were to take the most favorable view of appellant's authorities, it would be doing no more than the trial court has already done" and add: "The record indicates that at the trial the defendant presented much testimony to show that the note in question had been given for a different purpose than that normally accorded to notes. The plaintiff objected and presented his authorities thereon. * * * The court nevertheless *admitted* the evidence, subject to a motion to strike (which motion was not granted). The court heard appellant's testimony; the court as trier of fact judged the credibility of the witnesses; the court gave weight to appellant's evidence and then gave its decision. Respondent is at a loss to understand appellant's attempt to make admission of parol testimony an issue, for appellant cannot refute the record—*he has been heard,* and not believed." (The emphasis is respondent's.)

Appellant "concedes that if Mr. McArthur had taken the witness stand after Mr. Wylie had given his testimony and then denied under oath the latter's testimony, the resulting conflict of evidence would have been unassailable on appeal." This contention narrows the question down to this: Does the testimony of McArthur admit appellant's statements of what happened, or does it present facts and circumstances which are irreconcilable with them and contrary to appellant's version of what happened—regardless of whether McArthur testified before or after appellant, and conceding that McArthur did not categorically challenge the truth of specific utterances of appellant? This brings us to McArthur's testimony.

McArthur testified that he asked appellant to have the endorsement put on the document and that "There was quite a long conversation with Mr. Wylie in regard to the loan."

To the question "Was Mr. Kenny present at any of the conversations between you and Mr. Wylie, pertaining to this note?" he answered "Going through Mr. Wylie's office * * * I stopped and talked to him about it two or more times." And when asked "Did Mr. Kenny say to you anything about "$10,000?" he answered: "He knew that Mr. Wylie was trying to negotiate a loan * * *."

A letter on "Warren for Governor" stationery, dated April 26 had been sent to McArthur, who forwarded it to appellant with the request that he send it on to Warren headquarters. There is a handwritten notation on the bottom thereof wherein McArthur wrote: "When Wylie asked me to join the Kenny for Governor Club I donated $500 and because they claimed they were short of cash I loaned the Kenny for Gov. Club $10,000." McArthur was then directly asked: "You did loan $10,000 to the

Kenny for Governor Club? That is correct, isn't it?" and directly answered "That is correct."

> "Q. You did not loan it to Wylie, you loaned it, as you say in that letter, to the Kenny for Governor Club? * * * A. * * * I loaned it to the Kenny for Governor Club, after Mr. Wylie had told me that, on account of this trip to Los Angeles, that it would be impossible to get them to sign, and he wanted to know if he was not temporarily good for that money. I told him * * * that I would take his signature.
>
> "Mr. Kenny: Q. When you took his signature, did you inquire as to what Mr. Wylie's financial status was? A. No, I did not * * *.
>
> "Q. Did you inquire whether or not he was a Civil Service employee of the State? A. No, I did not.
>
> "Q. Did you inquire as to who were the gentlemen in the Kenny for Governor Club? A. I did not make any inquiry on that at all. I was told by Mr. Wylie that there was a number of people that were financially responsible for $10,000.
>
> "Q. Did you ever ask Mr. Wylie to get their names on a promissory note? A. I was to have had their names, and I asked Mr. Wylie to furnish them to my attorneys * * *.
>
> "Q. You did not ask for any additional names until May 24th, isn't that correct? A. Whenever I told my attorneys to * * *.
>
> "Q. On April 17th, the day you gave the $10,000 check * * * did you make any effort to ascertain from Mr. Wylie who the gentlemen were on the Kenny for Governor Club? A. Only that they were responsible, and that their names would be, he said bankable to me."

He then testified: "Q. Now, before you went to Los Angeles you received a check for $100, isn't that correct? A. I did." He then identified the check dated May 17, 1946 drawn to Frank McArthur by R. W. Kenny on a Los Angeles bank.

He was then asked if he "made the loan without interest because you were anxious to see Kenny elected Governor?" and he answered in the affirmative.

He then testified:

> "Q. * * * I believe you say you expected this note to be endorsed by other persons, isn't that right? A. Yes.
>
> "Q. Just what did you and Mr. Wylie say in that respect? A. Well, at the time the note was given, he said it would be impossible to get those endorsements in the required time, and still have them on the same day that I went down to Los Angeles, or the same evening, if my memory holds up on that.
>
> "Q. Is it not a fact that you thought at that time that the committee to elect Kenny for Governor would pay that note? A. Yes, I did * * *.
>
> "Q. You made that statement at that time to Mr. Wylie? A. Oh, yes, yes, and he wanted to know if his name was not temporarily good for it, and I told him it would be."

A letter dated May 24, 1946 from McArthur's attorneys was sent to appellant, saying that "Mr. McArthur feels that he should have a note payable the 31st day of December, 1946, which, he informs me, was the date agreed upon, and that it should be signed or endorsed by members of the Kenny for Governor Committee, and by Mr. Kenny, in order that it may have some security behind it. * * *"

The following then occurred: "Mr. Kenny: Q. Now, you authorized the firm of Schofield & Hanson, by this letter, to obtain from Mr. Wylie a note from the Kenny for Governor interests, and that that note be payable on December 31, 1946. Do you recall that? A. Yes.

> "Q. Now, why did you want the maturity date advanced from April 17th, 1947 to December 31, 1946? * * * A. In the conversation that I had with Mr. Wylie with regard to the note, I did not read it as clearly as I should have, and I thought that the date that I named was the date that Mr. Wylie and I verbally agreed on it, and I

thought I was dealing with people that keep their word, or try to, and I wanted the security for what I thought was coming to me.

"Mr. Kenny: Q. You believed you were dealing with responsible parties that would make that good, is that right? A. Yes.

"Q. Who were these parties that you believed you were dealing with? A. I thought the Kenny for Governor Club—it was represented to me they were honest people that were financially good, and that they would sign the note, and I took Mr. Wylie's note as a temporary proposition."

Appellant testified that he saw McArthur about May 17 at the Attorney General's office and that McArthur proposed "that he go to Los Angeles, that he could go down there and raise some money for the * * * campaign. He particularly cited a gentleman (naming him) whom he knew * * * and that he was very well-to-do, and that on a friendly basis he was sure he could raise some money from (him) and that whatever (he) gave to the campaign he (McArthur) would match." Appellant testified that McArthur said "I think, however, that Judge Kenny should pay the expenses of the trip down." This surprised appellant, but the $100 check was given as already appears. Appellant testified that on this occasion Judge Kenny thanked McArthur "for the $10,000 donation."

Appellant on cross-examination testified that the $10,000 note was typed in his office and that the part of it providing for interest was deleted at McArthur's request, "He said," appellant testified, "he did not want to take any interest."

With respect to McArthur's handwritten notation on the "Warren for Governor" letter (wherein he wrote that he had made a *loan* of $10,000 to the Kenny committee) appellant testified that he read that statement and

"Q. * * * you were aware that, according to your understanding, he had made a gift of that money? A. Absolutely.

"Q. And when you got this two or three days later, which said he had made a loan, and you knew you had signed a promissory note, at that time did you make any protest to him? A. No, I thought he was a man of his word, and a man of honor, and that did not even occur to me as having any significance until later." Appellant testified that at no time did he produce a new note as requested by McArthur and that he never told McArthur that the maturity should be advanced to December 31, 1946.

To sum up: McArthur testified that he lent the $10,0000 "to the Kenny for Governor Club, after Mr. Wylie had told me that, on account of this trip to Los Angeles, that it would be impossible to get them to sign, and he wanted to know if he was not temporarily good for that money. I told him * * * that I would take his signature * * * I was told by Mr. Wylie that there was a number of people that were financially responsible for $10,000" and "that their names would be, he said, bankable to me." That testimony cannot be reconciled with appellant's statement that McArthur said "if you sign this note * * * simply to give me a written acknowledgment of this money * * * you will never hear of the note again, and it will never be attempted to be collected * * *."

Appellant's principal point on this appeal is that McArthur did not take the stand and categorically deny such statements as those last quoted which appellant attributed to him. But it is only fair to point out that appellant's side is subject to precisely the same criticism. Appellant could have been asked flatly whether he ever made the statements quoted above and attributed to *him* by McArthur (for example: "he wanted to know if he was not temporarily good for that money"). But he was not asked any such questions, and so it turns out that appellant also failed to make categorical denials. The net result is that each witness gave his own version of the transaction—neither of which is reconcilable with the other—without either one of them coming right out with categorical denials of the other's words.

[3] In Lohman v. Lohman, 29 Cal.2d 144, 149, 173 P.2d 657, 660 the court said: "Moreover, a trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it * * *" citing

Berg v. Journeymen's Plumbers & Gas Fitters Union, 5 Cal.App.2d 582, 584, 42 P.2d 1091, 1092. In the Berg case this court said: "The general rule that uncontradicted testimony cannot be disregarded by the trial court is subject to many qualifications and exceptions. The rule has no application unless the testimony is sufficiently positive in its character to be satisfactory from that standpoint, and, even though the evidence is both positive and uncontradicted, it may be disregarded under certain circumstances. (Citations.) As was said in Hufstetler v. Department of Industrial Relations, 107 Cal.App. 741, at page 746, 290 P. 922, 924, quoting from 10 California Jurisprudence [page] 1145: 'As it is within the province of the trial court to determine what credit and weight shall be given to the testimony, *the appellate court cannot control a finding or conclusion denying credence, unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony.*'" (Emphasis added.)

[4] Under the rule just emphasized the appellant cannot successfully attack the trial court's findings herein since, as we have seen, McArthur's testimony laid before the court matters and circumstances which are not reconcilable with appellant's testimony.

One of the leading cases in this state on the direct contradiction of testimony is Clark v. Tulare Lake Dredging Co., 14 Cal.App. 414, 112 P. 564. What is said therein, 14 Cal.App. at pages 431–432, 112 P. at pages 571–572 is particularly apposite. A petition for hearing therein was denied, and the case has been repeatedly cited approvingly.

Appellant cites a group of 13 cases which were reversed because the court failed to give effect to uncontradicted testimony. Three were defaults, i. e., Shepard v. Shepard, 65 Cal.App. 310, 223 P. 1012, where the judge denied plaintiff a divorce because he suspected collusion; Anso v. Anso, 72 Cal.App. 513, 237 P. 814, where a divorce was denied despite a clear showing of extreme cruelty, and Dobson v. Dobson, 86 Cal.App.2d 13, 193 P.2d 794, where an annulment was denied where plaintiff and her corroborating witness testified that defendant was intoxicated at the marriage ceremony, but the judge felt that no ordained minister would have officiated in such a situation. In Hynes v. White, 47 Cal.App. 549, 190 P. 836 the only evidence introduced by the plaintiff was the deposition of the defendant. In Gage v. Billing, 12 Cal.App. 688, 108 P. 664, an action for legal services, testimony was given for the defense respecting a certain conversation, and the attorney (who was present thereat) was in court but did not deny the other side's version of it nor given any testimony of his own which would raise a conflict, as was done here. The remaining 8 cases were simply instances where the evidence on one side presented a set of facts and circumstances and the adversary side neither contradicted them *nor presented any version of its own which was inconsistent and irreconcilable therewith.* In other words in none of the 13 cases were there two conflicting versions of the matter in dispute, each arrayed against the other, as there were in the case at bar.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER, J., not participating.

113 Cal.App.2d 71

CORREIA v. VAN CAMP SEA FOOD CO., Inc. et al.

Civ. 18977.

District Court of Appeal, Second District, Division 1, California.

Sept. 12, 1952.

Rehearing Denied Oct. 8, 1952.

Hearing Denied Nov. 10, 1952.

Anna S. Correia, as special administratrix of the estate of Joseph Edward Correia, brought action against Van Camp Sea Food Company, Inc., a corporation, and others, to recover under the Jones Act for death of deceased member of crew of fishing vessel owned by defendants. The Superior Court of Los Angeles County, Fred Miller, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, White, P. J., held that evidence sustained finding of jury that negligent omissions of defendants proximately contributed to death of deceased.

Judgment affirmed.

1. Seamen ⚷29(5.5)

Jurisdiction over a suit filed under the Jones Act does not depend on place where injury is sustained but on relation of service of seaman to operation of vessel plying navigable waters. Jones Act, 46 U.S.C.A. § 688.

2. Seamen ⚷29(5.5)

Superior Court in California had jurisdiction of action under the Jones Act by special administratrix of estate of deceased member of crew of fishing boat, which operated out of California port, which was of United States registry, and which was fully owned by citizens of the United States, to recover for death of deceased, though death of deceased occurred off the coast of Ecuador. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

3. Seamen ⚷29(1)

Owners of a vessel, in making preparations for a voyage, are under duty to provide vessel manned with sufficient crew and under duty at all times to see to safety of the crew, and a breach of such duty is therefore negligence and actionable under the Jones Act, and liability is not limited to negligence of employer of a seaman in its appliances, machinery, boats, or other equipment. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

4. Seamen ⚷29(5.16)

In action under Jones Act against owners of fishing vessel to recover for death of member of crew, who drowned when he went under water with diving helmet to free bait net which had become snagged at bottom of the sea, on ground that owners negligently failed to provide suitable equipment, failed to provide competent personnel to man air pumps and other diving equipment, and failed to provide a competent lookout or any lookout, whether stoppage of air pump continued for seconds or for minutes was for jury. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

5. Seamen ⚷29(1)

Liability of a ship owner under the Jones Act is predicated on negligence. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

6. Seamen ⚷29(5.12)

In action under the Jones Act, burden of proving negligence on part of ship owner rests on plaintiff. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

7. Seamen ⚷29(5.14)

Sufficiency of evidence to support a verdict in action under the Jones Act, is a question of substantive law as interpreted by federal courts. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

8. Seamen ⚷29(5.14)

In an action under the Jones Act, no mere scintilla of evidence, but substantial evidence, must be produced by plaintiff in order to sustain burden of proof. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

9. Seamen ⚷29(5.14)

In an action under the Jones Act, evidence produced to show that negligence on part of ship owner was proximate cause of accident may be either direct or circumstantial, but it must be substantial, and evidence which leaves determination in realm of mere speculation and conjecture is insufficient. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

10. Appeal and Error ⚷996, 1001(3)

Whenever facts are in dispute or evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on part of those whose duty it is to settle dispute by choosing what seems to them to be the most reasonable inference, and only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear.

11. Evidence ⚷588

Where there is an evidentiary basis for jury's verdict, jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.

12. Appeal and Error ⚷1001(1)

Function of appellate court is exhausted when evidentiary basis for jury's verdict becomes apparent, and it is immaterial that appellate court might draw a contrary inference or feel that another conclusion is more reasonable.

13. Seamen ⚷29(5.14)

In action under Jones Act against owners of fishing vessel to recover for death of member of crew, who drowned when he went under water with diving helmet to free bait net which had become snagged at bottom of the sea, on ground that owners negligently failed to provide suitable equipment, failed to provide competent personnel to man air pumps and other diving equipment, and failed to provide a competent lookout or any lookout, evidence sustained finding of jury that negligent omissions of owners of vessel proximately contributed to death of member of crew. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

14. Appeal and Error ⚷1001(1)

Where plaintiff has proven sufficient facts to justify a verdict on one theory, fact that there may be one or more other seemingly rational explanations of the evidence does not preclude a recovery or invalidate the verdict.

15. Appeal and Error ⚷996

When inferences which may be drawn from evidence to sustain verdict are reasonable, function of appellate tribunal is exhausted, even though appellate tribunal might have drawn a contrary inference or may feel that another conclusion is more reasonable.

16. Evidence ⚷20(1)

It is common knowledge that when a diver is working under water, bubbles come up in bursts, and not in a steady stream.

17. Seamen ⚷29(4)

In action under the Jones Act to recover for death of member of crew of fishing vessel, evidence as to alleged negligence of deceased member of crew or his father would not bar recovery, but was admissible only in mitigation of damages. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

18. Seamen ⚷29(4)

Fact that member of crew of fishing vessel volunteered to make dive in diving helmet to free bait net which had become snagged at bottom of the sea, did not establish that he was guilty of negligence which would require mitigation of damages in action under the Jones Act for his death. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

19. Death ⚷32

Right of recovery under the Jones Act for death of a seaman does not depend on actual necessitous want of beneficiaries, but is based on pecuniary loss sustained, or which will be sustained by the beneficiaries, and the word "dependent" is really broader in scope than actual dependency. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

See publication Words and Phrases, for other judicial constructions and definitions of "Dependent".

20. Death ⚷18(3)

Recovery under the Jones Act for death of member of crew of fishing vessel would not be denied because neither father nor mother of deceased member of crew was actually dependent on him for support or maintenance, where there was evidence that deceased member of crew was kindly disposed towards his mother and father and that he voluntarily turned over to them virtually all of his earnings. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

21. Appeal and Error ⚷1004(1)

Determination of amount of damages is, in first instance, left to exercise of sound discretion by jury, and verdict will not be disturbed by appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than on sober judgment.

22. New Trial ⚷76(1)

On motion for new trial on ground that award of damages is excessive and without support in the evidence, trial judge has power to consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just.

23. Death ⚷99(3)

Award of $42,500 under the Jones Act for death of member of crew of fishing vessel, who was 18 years of age at time of his death, whose earnings were in excess of $6,000 a year, who was kindly disposed towards his mother and father, and who voluntarily turned over to them virtually all of his earnings, was not so excessive as to indicate that it was result of passion or prejudice. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

24. Evidence ⚷506

In action under Jones Act to recover for death of member of crew, who drowned when he went under water with diving helmet, court properly permitted expert witness to testify that an emergency or extra line other than air line was necessary for safety of diver, over objection that testimony invaded province of jury. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

25. Seamen ⚷29(5.17)

In death action under Jones Act, instruction that if jury found from all evidence that vessel, through negligence of owners, was not manned by competent master and crew and that such negligence was a proximate cause of death of seaman, jury should find for plaintiff, was proper. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

26. Seamen ⚷29(4)

Assumption of risk by seaman is not available to owner of vessel as a defense under the Jones Act. Jones Act, 46 U.S.C.A § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

27. Seamen ⚷29(5.17)

In action under Jones Act against owners of fishing vessel to recover for death of member of crew, who drowned when he went under water with diving helmet to free bait net which had become snagged at bottom of the sea, instruction that if jury found from all evidence that shallow water diving was an act within scope of employment of deceased, jury need not consider, in determining negligence, whether any one ordered or requested him to perform diving, was not erroneous, on ground that it took from jury right to determine whether deceased was a volunteer and thereby assumed risk of dive. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

28. Trial ⚷243

In action under Jones Act for death of minor, court did not err in giving instruction that minor may be expected to exercise that degree of care which a person of his age, intelligence, capacity, discretion, and experience would naturally and ordinarily use, and instruction that it is presumed, until contrary appears from evidence, that minor was exercising ordinary care and acting as a reasonably prudent person would act, on ground that instructions were conflicting and were prejudicial to owners because they required owners to overcome unwarranted burden under second instruction if first instruction was followed by jury. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

29. Death ⚷104(3)

In action under the Jones Act for death of minor, wherein evidence established that minor had contributed practically all earnings to parents and that he was unmarried, court did not err in giving instruction as to life expectancy of parties concerned, over objection that jury had no right to consider life expectancies unless administratrix proved that there was a reasonable certainty of damage. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, §§ 1–10, 45 U.S.C.A. §§ 51–60.

30. Trial ⟹295(1)

On appeal, instructions given must not be considered singly by appellate court, but in their entirety.

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Lasher B. Gallagher, Los Angeles, for appellants.

Ekdale, Shallenberger & Toner, Arch E. Ekdale, Gordon P. Shallenberger, George E. Toner, San Pedro, for respondent.

WHITE, Presiding Justice.

Plaintiff as administratrix of the estate of her deceased son, Joseph Edward Correia, brought an action for damages by reason of his death which occurred in the course of his employment as the member of a crew of the fishing boat Sea Hound, a tuna clipper operated out of the port of San Diego, California. The vessel was of United States registry, wholly owned by the defendants, citizens of the United States. The action was brought for the benefit of the surviving parents of the deceased, pursuant to the provisions of the Jones Act, 46 U.S.C.A. § 688. The jury awarded plaintiff damages in the sum of $42,500 and from the judgment on such verdict the present appeal is prosecuted.

At the time of the incidents which resulted in the death of decedent, the Sea Hound was operating in the vicinity of the Galapagos Islands off the coast of Ecuador. In the operation of seining for live bait, it was frequently necessary, and a regular custom, to send a member of the crew overboard, equipped with a diving helmet, for the purpose of freeing the seine or bait net when it became entangled or snagged on the bottom of the sea, the bottom in this area consisting of rough, uneven lava and coral rock, with many crevices, depressions or craters ranging from fifteen to twenty feet in depth. It was while so diving that the decedent met his death by drowning.

It was charged in the complaint that the defendants negligently failed to supply and maintain the vessel, her equipment, fixtures and tackle in a fit and seaworthy condition, negligently failed to equip the vessel with suitable appliances, and negligently failed to provide the decedent with a safe place to work in that they failed to provide competent personnel to man the air pumps used in diving and to man the other diving equipment which the decedent was compelled to use, and negligently failed to provide an adequate or any means of communications between the surface and the said decedent while he was engaged in diving, and negligently failed to provide a competent lookout or any lookout to watch for the safety of the decedent while he was engaged in diving.

The Jones Act provides that the personal representative of any seaman who shall suffer death by reason of personal injury may maintain an action for damages at law. In an action such as the one now before us, the Jones Act provides that "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." The Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60, provides that recovery may be had for death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Appellants contend that the superior court was without jurisdiction of plaintiff's asserted cause of action for the reason that the death of decedent occurred without the territorial limits of the United States. They place great reliance upon the case of New York Central Railroad Co. v. Chisholm, 268 U.S. 29, 45 S.Ct. 402, 403, 69 L.Ed. 828, 832, wherein it was held that the administrator of the estate of an employee of the New York Central Railroad Company operating between New York and Montreal, Canada, who suffered fatal injuries during the course of his employment, at a point some thirty miles north of the international line, did not have a cause of action based upon the Federal Employers' Liability Act. In the case just cited the court held that "The carrier was subject only to such obligations as were imposed by the laws and statutes of the country where the alleged act of negligence occurred, and the administrator could not rely upon any others."

[1] We are persuaded that the Jones Act gives a right of recovery to the seaman as such, and that jurisdiction over a suit filed thereunder does not depend upon the place where the injury is sustained but on the relation of the seaman's service to the operation of the vessel plying navigable waters. As was said in Taylor v. Atlantic Maritime Co., 2 Cir., 179 F.2d 597, 599, with reference to the case of New York Central Railroad Co. v. Chisholm, supra, so strongly relied upon by appellants, "However, the value as a precedent of this decision of the Supreme Court in actions under the Jones Act was at best gravely impaired by Cortes v. Baltimore Insular Line, 287 U.S. 367, 53 S.Ct. 173, 77 L.Ed. 368." The substance of the decision in the case just cited was in the following passage: "We do not read the act * * * (for the relief of seamen) as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water". And it was further said in the case of Taylor v. Atlantic Maritime Co., supra, 179 F.2d at page 598, "The Jones Act gives to an injured seaman an 'action' in which 'all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.' Under the ordinary convention, if a seaman is injured on the high seas, his rights are the same as though he had been injured within the country of the ship's flag; * * *. When a seaman signs articles in a foreign port for service on an American ship, and is injured on the high seas, there is no embarrassment, whether one regards the claim as sounding in tort, or in contract. So far as it sounds in tort, it depends upon American law—the law of the flag—; so far as it sounds in contract, although the law of the place where the contract is made will ordinarily apply, it is a well-recognized exception that in all that concerns the 'internal economy' of the ship the law of the flag controls." See also Cain v. Alpha S. S. Corp., 2 Cir., 35 F.2d 717, 718.

Also in the case just quoted from, in commenting further on the case of Cortes v. Baltimore Insular Line, supra, the court said, 179 F.2d at page 600, "* * * but it does establish beyond question that the Railway Act is not to be taken as a rigid pattern for all rights granted by the Jones Act."

[2] The conditions at sea differ widely from those on land and the diversity of conditions breeds diversity of duties. We are convinced that the weight of authority supports us in saying that in actions of the kind now engaging our attention, before we abrogate the age-old maritime principle that the law of the flag controls in such matters we must find a more definite expression of that purpose by the legislative branch of the government.

Appellants next urge that the evidence is insufficient to support the implied finding of the jury that they were guilty of actionable negligence.

In this regard appellants assert that before actionable liability may be fastened upon them the following factual bases must exist:

(1) The death must result in whole or in part from the personal negligence of one or more of the officers of the corporate defendant or one or more of the other agents or employees of the employer of a seaman; or

(2) By reason of some defect or insufficiency, due to the negligence of the employer of such seaman, in its or his (as the case may be) appliances, machinery, boats or other equipment.

[3] With reference to the second possible factual basis of liability, appellants insist that it refers *exclusively to the physical property* of the employer used in and about the course of the employment of the seaman. With this contention we cannot agree. In an action prosecuted under the

Federal Employers' Liability Act it has been held that the terms "sufficiency" and "defect" are not restricted to physical property, but that the term "sufficiency" applies to the amount of help assigned to do a particular job and to the duty resting upon the employer to furnish his employee reasonably sufficient help, Cheffey v. Pennsylvania Ry. Co., D.C., 79 F.Supp. 252, 258. And, under the Jones Act the cases are uniform in holding that in making preparations for a voyage the owners of a vessel are under a duty to provide a vessel manned with a sufficient crew and at all times to see to the safety of the crew, Koehler v. Presque-Isle Transp. Co., 2 Cir., 141 F.2d 490, 491: The Rolph, 9 Cir., 299 F. 52, 55; Texas Co. v. N. L. R. B., 9 Cir., 120 F.2d 186, 189. A breach of such duty is therefore negligence and actionable under the Jones Act. Liability is not limited to negligence of the employer of a seaman in its or his appliances, machinery, boats or other equipment.

In support of their contention that the evidence was insufficient to support the verdict, appellants contend there was no evidence showing that the Sea Hound was not equipped with proper emergency rope. However, assuming the vessel was equipped with proper rope, there is evidence that the agents and employees of appellants did not use any rope in conducting the diving. If any rope was aboard it was not supplied to aid in the diving operations.

[4] While conceding "for the purpose of argument only" that the stoppage of the air pump supplying air to Correia, the diver, was negligence, appellants excuse such stoppage with the statement that it was but momentary. The answer to this is that there is substantial evidence to support a finding that the stoppage of the pump continued for a matter of several minutes. It was for the jury to determine whether the pumps stopped for seconds or minutes.

Appellants urge that there is no evidence showing that "this short stopping" of the pump proximately caused or proximately contributed to the death of Joseph Correia. Respondent's answer to this claim is thus stated in her brief: "Attention is invited to the type of equipment used which supplied barely enough air for the diver to survive; therefore, any stoppage would be dangerous, for it would increase the carbon dioxide concentration, and even a slight concentration of carbon dioxide (3%) will induce panic, and increased breathing, which in turn increases further the amount of carbon dioxide. Very little carbon dioxide renders a man unconscious. Is it difficult to reason that an unconscious man in the type of equipment used, could stumble, or fall, and lose his helmet in a matter of a second, let alone several seconds or minutes? If he did lose his helmet, while unconscious, it is obvious that he would drown." Appellants' deduction is not the only reasonable inference to be drawn from their premise.

It is urged by appellants that the evidence shows that very frequently shallow water divers remove the helmet and swim to the surface. That in the case at bar, the testimony shows that the decedent sustained a cut on the top of his head. That this cut could only be caused by coming in contact with some hard object. That the reasonable inference is that Joseph Correia had removed his helmet and was attempting to come to the surface when he bumped his head on some hard object thereby causing him to become unconscious. Again, this is not the only reasonable inference deducible. It is conceded that Joseph Correia donned the helmet and descended. It could reasonably be inferred that after the stoppage of the pumps he became unconscious while still in the helmet, that he had lost consciousness through a fall or striking his head. As to the abrasion on Correia's head there is of course no direct evidence as to how the same was caused. But it is equally reasonable to assume that he received it during the rescue attempts or after becoming unconscious as to assume that he received it in the manner urged by appellants.

And if we adopt appellants' theory we are still confronted with the fact that the decedent would not have been required to slip the helmet and rise to the surface had the pumping been carried on in an approved and generally recognized proper manner, with proper signals, proper lines and some one assigned to the air line to receive the diver's signals. If he became unconscious and drowned because of these latter conditions, manifestly his demise was attributable to appellants' negligence.

While conceding there was considerable testimony with reference to the method of signalling between a diver and persons on the surface, appellants urge that respondent offered no evidence of any kind with reference to the signals that may have been discussed and agreed upon by Joseph Correia before he made his dive. We fail to perceive the force of this argument because the evidence is uncontroverted that no one was assigned or present to receive signals. And as respondent states, "However, we have every reason to believe that on the one or two occasions when someone did think to go over to see if there were any signals, that the signals were the same as those used with the other diver, whose testimony we have. Respondent again states that the testimony of every witness who could be secured by respondent was given; therefore, the respondent, and we think, the Court, *must* assume that the other witnesses referred to by Appellants would not have testified any differently, otherwise, Appellants would have produced them (said witnesses, if they existed, being their employees). In any event, from all of the evidence, it appears that the signals used generally in this operation were improper to protect the safety of the divers, and that a reasonably prudent employer or person in charge of such operation should have known that! The signals do not even provide that degree of safety found in signals used on other boats in the fleet. Most of them had signals for more air, and some for emergencies (citing reporter's transcript references)."

Appellants urge that the pump operations or lack of them as well as the question of signals and when and why Joseph Correia got out of the helmet are left entirely in the realm of speculation and surmise.

[5-12] It is not disputed that liability of a ship owner under the Jones Act is predicated on negligence and that the burden of proving such negligence rests on the plaintiff. The sufficiency of the evidence to support a verdict in a case such as the one at bar is a question of substantive law as interpreted by the federal courts. As pointed out in the case of Showalter v. Western Pacific Ry. Co., 16 Cal.2d 460, 471, 106 P.2d 895, 901, relied upon by appellants: "Likewise, it is clear under the federal decisions as under the decisions of this state that no mere scintilla of evidence but substantial evidence must be produced by the plaintiff in order to sustain the burden of proof. Pennsylvania R. Co., v. Chamberlain, 288 U.S. 333, 53 S.Ct. 391, 77 L.Ed. 819; [A. B.] Small Co. v. Lamborn & Co., 267 U.S. 248 [45 S.Ct. 300, 69 L.Ed. 597]; Gunning v. Cooley, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720; Southern Ry. Co. v. Walters, 284 U.S. 190, 52 S.Ct. 58, 76 L.Ed. 239; Chicago G. W. R. Co. v. Rambo, 298 U.S. 99, 56 S.Ct. 693, 80 L.Ed. 1066. The evidence produced to show that negligence on the part of the carrier was the proximate cause of the accident may be either direct or circumstantial, but it must be *substantial*. Evidence which leaves the determination of these essential facts in the realm of mere speculation and conjecture is insufficient. (Citing cases.)" Let us therefore look to the federal cases for a yardstick to measure what is mere speculation or conjecture and what amounts to substantial proof. In Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 744, 90 L.Ed. 916, 923, the rule is stated as follows: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclu-

sion is more reasonable." (Emphasis added.) See also Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520, 524, 525.

[13–15] We are persuaded in the instant case that there is not a complete absence of probative facts to support the conclusion arrived at by the jury that the negligent omissions of appellants proximately contributed to the death of Joseph Correia. Where a plaintiff has proven sufficient facts to justify a verdict on one theory, the fact that there may be one or more other seemingly rational explanations of the evidence does not preclude a recovery or invalidate the verdict. These are mere matters of argument to be presented to the jury. When the inferences which may be drawn from the evidence to sustain the verdict are reasonable the appellate tribunal's function is exhausted, and the fact that the latter court might draw a contrary inference or feel that another conclusion is more reasonable becomes immaterial.

[16] Appellants contend that none of the persons in the skiff, three in number, who could have been negligent in so far as Joseph Correia was concerned, were called by either side. It is urged that it must be presumed that each of these men was innocent of wrong, Code Civ.Proc., sec. 1963, subd. 1, and that there is no evidence to controvert such presumption or support a finding that any of these three men did or failed to do anything which proximately caused the death of Joseph Correia. But, as pointed out by respondent, to sustain such contentions would be to ignore the fact that the master of the vessel (who was present in the skiff), and who did testify by deposition, admittedly did not assign any one to the duty of tending the air line for Joseph correia for the purpose of giving and receiving signals. And, as further pointed out by respondent, "It ignores entirely the fact that none of the witnesses who were called heard any such assignments given by the Master, or by anyone, including David Ghio. It completely ignores the testimony that no one observed any one regularly tending Correia's air line, and further disregards the admitted fact that William Perry stopped pumping air to Correia. It misses the fact that steady streams of bubbles were seen for some time prior to the discovery that Joseph Edward Correia was not in his helmet. No one investigated to see if there was anything wrong, although it was common knowledge that when a diver is working, bubbles come up in bursts, and not in a steady stream, although this presupposes someone is interested enough to look, an unsafe supposition in a venture such as was conducted by the Appellants. Frank Gonsalves, who apparently, from the testimony, had taken it upon himself to now and then check Correia's air hose to see if there were signals, did so only cursorily and at infrequent intervals and if, as the evidence indicates, he was the one who assumed that duty, then he was negligent in the manner in which the Master says that duty was performed. To indulge in the presumption called for by the Appellants ignores the chaos and confusion which attended the attempts at recovering Correia's body, and at a time when he may well have been alive. The testimony is uncontradicted that no one directed the rescue, although the Master and the Bait Boss, David Ghio, were both aboard the skiff, and doing nothing else at the time. The failure and omissions attendant on the rescue attempts in and of themselves insured Joseph Edward Correia's death if he had not already become a victim of the other failures, omissions and acts of negligence."

We are persuaded that to hold there was no negligence reasonably established, nor proximate causal connection between such negligence and the death of the seaman Joseph Correia would amount to unwarranted substitution of the judgment of this court for that of the duly established arbiter of the facts.

The next contention of appellants is that the evidence is insufficient to support the implied finding of the jury that neither Joseph Correia nor his father was negligent.

[17] In the consideration of this claim it should be borne in mind that in an action under the Jones Act, negligence of the deceased or his father does not bar a recovery but is received only in mitigation of damages. Title 45 U.S.C.A. § 53.

In support of the claimed negligence of Joseph Correia and his father, appellants assert that the evidence shows that Joseph Correia's father was in a position where he could observe everything that was being done up to and including the time of the discovery of the empty helmet. That both the father and son know that the dive was being attempted without any separate life lines being attached to Joseph Correia. That Joseph Correia was not ordered or requested to make the dive. That he engaged in an argument with Frank Gonsalves and insisted upon making the dive with the equipment which was then and there available. That if this equipment was not sufficient and if such insufficiency of equipment proximately caused or proximately contributed to his death then Joseph Correia was clearly guilty of contributory negligence.

> "And further that the evidence shows without conflict that Joseph Correia did leave the helmet. The evidence also shows that a man with an ordinary face would have to hold the helmet in place and deliberately turn his head to one side or the other in order to get out of the helmet. Therefore it is a reasonable inference that the act of leaving the helmet was a deliberate act on the part of Joseph Correia.
>
> "The plaintiff may contend that permitting Joseph Correia to make the dive without the use of a rope life line was an act of negligence. If that contention is made, it must follow that Joseph Correia and his father were also guilty of negligence. They and each of them knew that there was no such rope."

[18] In making the dive the seaman was performing an act within the course of his employment and the fact that he volunteered to perform such duty cannot therefore be characterized as negligence. With reference to the insufficiency of the equipment used by the seaman, there is no evidence that he knew of the necessity for an emergency line. He was not a ship's officer upon whom devolved the duty of supplying sufficient equipment.

With reference to the claim that the decedent negligently left the helmet, we have already discussed that matter in connection with the other equally reasonable hypothesis that the helmet was pulled from his head or that it became necessary to abandon it. At the trial it was demonstrated that it was not necessary to turn the head from one side to the other in order to remove the helmet; that it could have been pulled off or could have come off if Joseph Correia, for lack of air or other cause became unconscious and fell.

With reference to appellants' claim that the decedent's father was negligent because he saw his son about to dive and should have stopped him, we fail to perceive by what authority the father, who was not a ship's officer, could order his son not to undertake the dive. Appellants fail to explain how the father who was some fifty feet away in another boat performing other duties, could have intervened after his son had donned the helmet. Furthermore, we cannot determine whether the jury found negligence on the part of the father and son or either of them, because such a finding would go only to mitigation of damages. No special interrogatories were propounded to the jury nor was a special verdict requested. The jury may have found negligence and if so, we must assume such finding was taken into consideration in arriving at the amount of the damages assessed.

Appellants next attack the award of damages in the sum of $42,500 as being excessive and without support in the evidence. In this regard, appellants state that "There is not a scintilla of evidence in the record showing that either the father or mother of Joseph Correia was dependent upon him for support or maintenance. In fact, the evidence is all to the contrary".

[19, 20] The word "dependent" is really broader in scope than actual dependency. In construing the word under the Federal Employers' Liability Act the courts have held that grammatically speaking the word "dependent" refers only to the next of kin, Berg v. Atlantic Coast Line R. Co., 108 S.C. 63, 93 S.E. 390. A right of recovery is not

dependent upon actual necessitous want, but is based on "pecuniary loss" sustained or which will be sustained by the beneficiaries. It has been held that a person is "dependent" upon another when he has the moral right to rely and does rely upon such other person for support, whether in whole or in part, Pittsburgh, C. C. & St. L. R. Co. v. Collard's Administrator, 170 Ky. 239, 185 S.W. 1108, L.R.A. 1918E, 273; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U.S. 173, 176, 33 S.Ct. 426, 57 L.Ed. 785, 786; Wells-Dickey Trust Co. v. Chicago, B. & Q. R. Co., 166 Minn. 79, 207 N.W. 186, reversed on other grounds in 275 U.S. 161, 48 S.Ct. 73, 72 L.Ed. 216; Murphy v. Nowak, 223 Ill. 301, 307, 79 N.E. 112, 7 L.R.A.,N.S., 393. It has been held that all that is required is a reasonable expectation of pecuniary benefit from the continuance of the life of the child, Moffett v. Baltimore & O. R. Co., 4 Cir., 220 F. 39, 43; Tobin v. Bruce, 39 S.D. 64, 162 N.W. 933, certiorari denied, 245 U.S. 18, 38 S.Ct. 7, 62 L.Ed. 123.

In the case at bar there was evidence that Joseph Correia was 18 years of age when he met his death; that his earnings were in excess of $6,000 per year; that he was kindly disposed towards his mother and father. There was also evidence that he voluntarily turned over to his parents virtually all of his earnings. That there was a joint life expectancy between the three (mother, father and son) of seventeen years; and between the mother and son of twenty-five years. And, had decedent lived, the ensuing three years would be years of minority during which the parents would have had a claim upon the earnings of the son.

Whatever the parents were earning at the time of the demise of their son, there was evidence warranting the assumption that they could not expect to continue earning wages indefinitely. It was shown that the father was suffering from varicose veins and was assigned to the easiest of jobs aboard ship and that the mother by reason of her physical condition, was compelled to engage only in work which did not require her to stand.

[21] Since the various factors involved in damage cases of this kind are not capable of exact proof in terms of dollars and cents, the only standard is such an amount as a reasonable person would estimate as fair compensation for pecuniary loss. As was said in Roedder v. Lindsley, 28 Cal.2d 820, 822, 172 P.2d 353, 354, "Hence, necessarily, the determination of the amount of damages is, in the first instance, left to the exercise of a sound discretion by the jury and a verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment." (Citing cases.)

[22] Another persuasive argument is that the trial judge, clothed with power to "consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just", see Hale v. San Bernardino, etc., Co., 156 Cal. 713, 715, 106 P. 83, 84, refused to grant a new trial. His action in this regard must be taken to indicate that he did not consider the verdict excessive. In determining whether a verdict was based upon passion or prejudice the conclusion of the trial judge is persuasive.

In the last decade or more, radical changes have taken place in social conditions, and particularly in conditions affecting the costs of living. Courts have recognized this fact as well as noticing the difference in the purchasing power of money.

[23] In the case of Foster v. Pestana, 77 Cal.App.2d 885, 889, 890, 891, 177 P.2d 54, Mr. Justice Goodell, speaking for the court, in a well considered opinion, reviews the law applicable to a consideration on appeal, of the claim that a verdict is excessive. By reason of the facts and circumstances proved in the case now engaging our attention and upon the authority of the case just cited we are constrained to hold, as did the court in Roedder v. Lindsley, supra, on this subject, "The question of what may be reasonable compensation in cases of this kind is a matter on which there legitimately may be a wide difference of opinion (Bellman v. San Francisco High School Dist., 11 Cal.2d 576, 586, 81 P.2d 894), and we cannot say that the amount awarded by the

jury in this case is so large as to indicate that it was the result of passion or prejudice."

It is next contended by appellants that the trial court erred in permitting respondent to introduce evidence of the standard of care which would have been exercised by an expert diver.

[24] This point involves certain testimony given by respondent's witness Garland Suggs, admittedly an expert on the subject of diving, having been in the U. S. Navy for twenty-two years where he was engaged in diving supervision and as an instructor in diving. This witness was asked a hypothetical question containing facts admittedly present at the time and upon the occasion here in question. The interrogatory elicited the answer that an emergency or extra line other than the air line was necessary for the safety of the diver. At the trial the question was objected to by appellants on the ground that it invaded the province of the jury. The same contention is made here. Conceding, as appellants contend, that their liability was to be determined under the general rule which defines negligence as the lack of due care under the circumstances present; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done, we fail to see wherein the province of the jury was invaded by the challenged question. The testimony of the expert witness did not establish the standard of an expert. It simply set forth what is considered a fundamental element of safety in diving under conditions as to depth and otherwise which prevailed when the deceased was diving. These fundamental elements of safety should be known to the Master of the ship, and if he authorizes a dive in disregard of them he and his employers must accept the responsibility. Ship owners and their agents and officers may not set up their own standards of care. It cannot therefore, be said that the operation of shallow water diving at sea, using special equipment therefor, is not the subject of expert opinion. This is not an operation within the scope of common experience. Appellants apparently concede this because they make no objections to other questions asked of and answers given thereto by the expert witness.

Furthermore the jury was properly instructed regarding any expert standards when they were admonished as follows: "You are instructed that in furnishing equipment the defendants were not required to furnish any particular item of equipment unless ordinarily careful employers of seamen fishermen would have done so. The defendants were not required to furnish any item of equipment which an expert diver would consider necessary, unless the plaintiff has proved by a preponderance of evidence that ordinarily careful employers of seamen fishermen would have furnished such equipment. In other words, the legal standard of care required of the defendants is not what an expert person, highly skilled and possessed of extraordinary knowledge and extraordinary skill would have furnished, but what the general average of ordinarily careful employers of seamen fishermen would have furnished under the circumstances existing on December 26, 1949." The objection to the question was properly overruled.

Finally, appellants urge that the court committed prejudicial error in giving certain instructions at the request of respondent and in refusing to give certain instructions proffered by them.

[25] The first complaint covers the giving of the following instructions:

> "You are instructed that the law imposes a duty upon a vessel owner or owners to use reasonable and ordinary care to furnish to seamen a reasonably safe vessel, and that for such a vessel to be reasonably safe it must be manned by a master and crew generally competent for the purposes for which the owners intend such ship and her equipment to be used, and if you find, from all of the evidence, that the vessel, Seahound, was, through the negligence of the defendants, not manned by a master and crew generally competent and that said negligence was a proximate

cause of the death of the decedent, then you must find for the plaintiff."

Appellants insist that the instruction is erroneous in so far as it refers to the duty of the owners of the vessel to furnish a master and crew "generally competent". In view of what we have heretofore said, with supporting citations, as to the differing conditions at sea from those prevailing on land, there is a duty upon the owner to provide a master and crew generally competent, The Rolph, supra, 299 F. at page 54, the instruction was proper. The very nature of a seaman's occupation and his confinement aboard ship creates in the employer a higher degree of care than exists ashore. At sea the seaman is at the mercy of his employer concerning equipment, living conditions, and the competency of fellow crewmen, especially of the ship's officers under whose direction and supervision the seaman must work. The jury was therefore, properly instructed that it was for them to determine from the evidence whether through the negligence of appellants, the vessel in question was not manned by a master and crew generally competent, and whether such negligence, if found by the jury, was a proximate cause of the death of decedent.

Appellants' contention that the instruction was erroneous because being a formula instruction, it omitted an admonition that the burden of proof rested upon respondent to show that she and her husband were and would be actually dependent upon the deceased for support; that he would, with reasonable certainty, have continued to support them; and that the parents thereby actually sustained a pecuniary loss as the proximate result of the death of Joseph Correia, is answered by the statement that the jury was otherwise fully and fairly instructed upon the claimed omitted elements. Hence there was no resultant prejudice from the giving of the challenged instruction.

What we have just said is equally applicable to the other co-called "directed verdict" instructions complained of by appellants.

Appellants' next complaint is directed to the following instruction:

> "You are instructed that if you find from all the evidence presented to you, that shallow water diving was an act within the scope of the employment of Joseph Edward Correia as a fisherman seaman, you need not consider in determining negligence whether anyone ordered, or commanded, or requested him to perform said job."

[26, 27] A reading of appellants' objection to the foregoing instruction would indicate that they contend that it took from the jury the right to determine whether Correia was a volunteer and thereby assumed the risk of the dive he made. Assumption of risk as a defense under the Jones Act, whether in whole or in part, has been abolished by statute and is therefore not available. Title 45 U.S.C.A. § 54. It is conceded that the task Correia was performing was one ordinarily encountered in the service of the ship. The instruction did not invade the province of the jury. In simple and understandable language it informed the jury that if they found from the evidence that shallow water diving was an act within the scope of Correia's employment it mattered not whether he was specifically ordered to perform the task. We find no error in the giving of such an instruction.

[28] Appellants next complain of two instructions given with reference to negligence on the part of decedent. It is urged that the instructions are conflicting and are prejudicial to appellants for the reason that they require the latter to overcome an unwarranted burden under the second instruction if the first so-called conflicting instruction was followed by the jury.

The first of the challenged instructions correctly informed the jury in effect that a minor may be expected to exercise that degree of care which a person of his age, intelligence, capacity, discretion and experience would naturally and ordinarily use, Finnegan v. Giffen, 89 Cal.App. 702, 709, 710, 265 P. 496. This instruction was followed by the admonition that under the law, "it is presumed, until the contrary appears from the evidence, that Joseph Correia at the time and place in question, was exercising ordinary care and acting as a reasonably prudent person would act. This presumption is itself evidence in this case, to which plaintiff is entitled unless rebutted by other evidence." We fail to see wherein the jury could have been misled or confused by the foregoing instruction. The only reasonable construction that could have been placed on the last instruction (following as it did the first instruction and specifically naming Correia) was that the decedent Correia was presumed to have been exercising the degree of care upon which the jury had immediately prior thereto, been instructed, namely, that required of a minor.

[29] In the light of what we have hereinbefore stated we find no prejudice to appellants in the instructions given with regard to the earnings of an unmarried minor child. That the decedent was a single man was the theory upon which the case was tried and the evidence showed that by reason of his unmarried status he was contributing the major portion of his earnings to his parents. Appellants' objections to the instruction on the life expectancy of the parties concerned, on the ground that the jury had no right to consider life expectancies unless respondent had proved there was a reasonable certainty of damage cannot be sustained. The evidence established that decedent contributed practically all of his earnings to his parents. From all of this evidence the jury had before them sufficient facts to determine that in the death of their son the parents had suffered a pecuniary loss. The jury was advised that they were not bound by tables of life expectancy, but could consider other evidence in that regard.

It would unduly prolong this opinion to here set forth appellants' claimed error in the refusal of the court to give certain instructions proffered by them. These requested instructions concerned the necessity for respondent, in order to establish actionable negligence, to prove by a preponderance of substantial evidence that at the time the pump supplying air to Joseph Correia was stopped he was not only conscious and alive but was actually in the helmet, and that the pumping was stopped for a sufficient length of time to proximately cause or proximately contribute to the death of Correia. The court modified the requested instruction but as given, it clearly informed the jury that respondent was required to prove "that during the time the pumping was stopped, Joseph E. Correia was not only alive but that the pumping was stopped for a sufficient length of time to proximately cause or proximately contribute to the death of Joseph E. Correia."

[30] Remembering that instructions must not be considered singly but in their entirety, we are convinced that the trial judge fully and fairly advised the jury as to the kind, quality and degree of proof necessary before respondent could recover. That is all that was required.

For the foregoing reasons the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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113 Cal.App.2d 413

Ex parte SWEET.

Cr. 4886.

District Court of Appeal, Second District, Division 3, California.
Sept. 30, 1952.

Blanche Clara Sweet filed a petition for writ of habeas corpus to secure release from custody. The District Court of Appeal, Shinn, P. J., held that where prosecution of petitioner for three misdemeanors was in two cases, and single judgment was entered in first case stating that petitioner was sentenced under count one to 30 days in county jail and under count two to 30 days in county jail, with sentences to run consecutively with sentence in other prosecution in which judgment was entered sentencing petitioner to 30 days in county jail with sentence to run consecutively with the other two sentences, the two sentences in first prosecution ran concurrently and first 30 days of imprisonment satisfied judgment in first case and second 30 days of imprisonment satisfied judgment in second case.

Petitioner discharged and bond exonerated.

1. Habeas Corpus ⚷4

Ordinarily where a petitioner for habeas corpus has an appeal pending or a right of appeal in which grounds for release advanced in petition for writ could be urged as grounds for reversal of judgment, court would hold that habeas corpus is not an available remedy.

2. Habeas Corpus ⚷4

Where petitioner was denied bail, and petitioner would have served terms of petitioner's sentences before petitioner's appeal to appellate department of superior court would be determined in natural course of that court's business, habeas corpus was remedy available to petitioner, even though ordinarily where a petitioner for habeas corpus has an appeal pending or a right of appeal in which grounds for release advanced in petition for writ could be urged as grounds for reversal of judgment, court would hold that habeas corpus is not an available remedy.

3. Criminal Law ⚷1216(2)

Where there is an existing judgment of conviction and a second judgment of conviction is rendered, the second judgment runs concurrently with first judgment unless second judgment specifies that it is to run consecutively. Pen.Code, § 669.

4. Criminal Law ⚷1216(2)

Where prosecution of petitioner for three misdemeanors was in two cases, and single judgment was entered in first case stating that petitioner was sentenced under count one to 30 days in county jail and under count two to 30 days in county jail, with sentences to run consecutively with sentence in other prosecution in which judgment was entered sentencing petitioner to 30 days in county jail, with sentence to run consecutively with other two sentences, the two sentences in first prosecution ran concurrently and first 30 days of imprisonment satisfied judgment in first prosecution and second 30 days of imprisonment satisfied judgment in second prosecution. Pen. Code, § 669.

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Richard A. Haley, Los Angeles, for appellant.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

SHINN, Presiding Justice.

[1, 2] Ordinarily, where a petitioner for habeas corpus has an appeal pending or a right of appeal in which the grounds for release advanced in the petition for the writ could be urged as grounds for reversal of the judgment, the court would hold that habeas corpus is not an available remedy. But in this case it appears that petitioner was denied bail and although she has an appeal pending to the appellate department of the superior court, before that appeal can be determined in the natural course of that court's business she would have served the terms of her sentences. For that reason it appeared to the court that habeas corpus was her only effective remedy.

[3, 4] This petitioner was convicted of three misdemeanors in the municipal court of Compton judicial district, which were alleged to have been committed on the same day, the 3rd day of May. Prosecution was in two cases. In the first case, number M–9222, there were two counts. In the other case, M–9291, there was a single count. In the first case there was a single judgment which stated that the defendant was sentenced under count one to 30 days in the county jail, and under count two to 30 days in the county jail, the sentences to run consecutively with the sentence in M–9291. In M–9291 petitioner was sentenced to 30 days and the judgment provided that the sentence should run consecutively with the sentences in the other case. Petitioner served a term of 60 days. In her petition she alleged a single ground for her release, namely, that the third offense of which she was convicted was necessarily included in the other two. The judgments were not before the court at the time the writ was

issued, but it appears from the return that the facts are as the court has just stated them. Petitioner has asked leave to raise an additional point and leave has been granted. The point is that the two sentences in the first case ran concurrently. We think this contention is sound, and it is therefore not necessary to pass upon her original contention that the third offense was included in the first two. We may regard the case as one in which the defendant has been convicted upon two counts under a single judgment and has received two sentences without any designation as to whether they run concurrently or consecutively. That procedure is contrary to the requirements of § 669 of the Penal Code. Where there is an existing judgment and a second judgment is rendered, unless the second judgment specifies that it is to run consecutively with the first judgment, it runs concurrently. There is an exception in a case where the court does not know of the earlier judgment or, knowing of it, unintentionally fails to designate whether the sentences run concurrently or consecutively. In that case the error can be corrected within 60 days. That was not done in this case. The point was before the court in In re Radovich, 61 Cal.App.2d 177, 142 P.2d 325, where the original section and various amendments were considered and the court construed the section as we now construe it. In People v. Finkel, 94 Cal.App.2d 813, 211 P.2d 888, it was held that the section applies, even in case of a single judgment containing sentences under two separate counts. So it is quite clear to the court that the two sentences in the first case, M–9222, ran concurrently, and although they ran consecutively with the other sentence in M–9291 and that ran consecutively with the two sentences in M–9222, the first 30 days of imprisonment satisfied the judgment in the first case, and the second satisfied the judgment in the second case, so that at the end of 60 days the sentences had been fully satisfied.

The petitioner is discharged and her bond is exonerated.

PARKER WOOD and VALLÉE, JJ., concur.

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113 Cal.App.2d 439

BOLOYAN et al. v. CONTENTE et al.

Civ. 8125.

Sac. 6245.

District Court of Appeal, Third District, California.

Oct. 1, 1952.

Action by Sam Boloyan and another against Irving J. Contente and another to quiet title to real and personal property. From an adverse judgment of the Superior Court, Sacramento County, John Quincy Brown, J., defendants appealed. The District Court of Appeal, Van Dyke, J., held that any illegality in transaction by which FHA loan was procured by an accommodation party did not invalidate or preclude enforcement of subsequent agreement by vendors to sell realty to real purchasers.

Judgment affirmed.

1. Contracts ⚷140

Any illegality in transaction by which accommodation party, having no intention to occupy realty, procured FHA loan and contracted to sell realty to real purchasers and vendors conveyed realty to accommodation party without receiving all of agreed down payment, taking a quitclaim deed from accommodation party, did not invalidate or preclude enforcement of subsequent agreement by vendors to sell the realty to purchasers for a reduced price which approximately credited to purchasers amounts they had theretofore paid on original purchase price.

2. Contracts ⚷140

A bargain collaterally and remotely connected with an illegal purpose or act is not rendered illegal thereby if proof of the bargain can be made without relying upon the illegal transaction.

3. Contracts ⚷140

How closely a bargain must be connected with an illegal purpose in order to make the bargain itself illegal is a question of degree.

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Horace E. Dunning, Sacramento, for appellant.

Albert L. Wagner and E. R. Vaughn, Sacramento, for respondent.

VAN DYKE, Justice.

This action was brought by plaintiffs (respondents here) to quiet their title to certain real and personal property. Their complaint alleged that they had contracted to sell the same upon terms to defendants (appellants here); that the buyers had breached the agreement; that notice of cancellation had been served upon them with demand for possession and that they had refused either to pay the price or to deliver possession of the property. Defendants answered, setting up a defense which for our purposes here can best be stated by summarizing the evidence received in support of it.

Early in September of 1948, plaintiff, Sam Boloyan, was engaged in the purchase of certain real property from an estate in course of probate. He agreed to resell this property to defendants upon certain conditions which included the negotiation by the purchasers of what is commonly called an "FHA" loan secured upon the property. Defendants made application for the loan to the Bank of America. The property qualified as security but Mr. Contente, for reasons not stated, was not accepted as a borrower. Boloyan suggested that Contente's brother-in-law, one Gus Economou could qualify for the loan and Economou agreeably made application therefor which was approved. During all this time Contente was in possession of the property, having made a partial down payment of $1,000 to Boloyan. Economou, as between Boloyan, Contente and himself, was merely an accommodation party. Contente was to be the real purchaser. The purchase price was set at $10,000 with a down payment of $3,500, the FHA loan being sufficient to furnish the balance. In concluding the transaction the following occurred: Boloyan conveyed the property to Economou, receiving, in addition to Contente's payment of $1,000, the $6,500 produced by the loan. Boloyan made his conveyance without receiving the $2,500 deficit in the down payment. Economou executed to the defendants a written agreement to sell the property to them for a purchase price of $9,000, thus giving credit for the amount defendants had paid to Boloyan. The agreement stipulated that defendants would pay installment payments of $150 a month and otherwise contained provisions generally found in such agreements. Actually it was planned that these payments should be made direct to Boloyan who would dispose of each payment by, first, discharging the installment payments due the bank upon the loan, and, second, by applying the balance in payment to himself of the $2,500 which he had not received. To protect himself in respect of this debt he took a quitclaim deed from Economou. It was understood that Contente would occupy the property. Contente made payments for a while and then paid nothing further for about six months. Boloyan recorded the quitclaim deed. At this time, and obviously to readjust matters, there was executed by plaintiffs and defendants the contract referred to in the complaint, which contract stated the purchase price to be $8,612.40. Matters then stood in such way that the title subject to the loan was in Boloyan, subject to a contract of sale by plaintiffs to defendants for a reduced price which approximately credited to defendants the amounts they had theretofore paid on the original purchase price of $10,000. Thereafter defendants made no further payments, remained in possession of the property, failed and refused to pay on demand and sought to hold the property without further compensation to Boloyan. Their position was, and is here, that the proceedings recited involved two violations of FHA statutes and regulations: 1. Economou, who procured the loan, had no intention to reside, and did not reside, upon the property; and, 2. The arrangements concerning the $2,500 gap between the down payment and the loan fund constituted secondary financing. These violations, say appellants, rendered illegal and void all undertakings respecting the property, including the contract sued upon, since that contract was executed, as appellants claim, in aid of and for the purpose of carrying out the illegal arrangements that tainted the preceding conventions. The court therefore, say appellants, should have denied any relief to respondents and in addition should have given judgment in favor of appellants against respondents for all moneys paid them by appellants.

[1-3] We think the basic premise of appellants' arguments does not exist. Assuming, without deciding, that the violations of FHA statutes and regulations did occur, as contended by appellants, the result would not necessarily be that the contract of sale between respondents and appellants here sued upon would itself be illegal. The acts relied upon as acts of illegality had occurred long before this contract arose. Whatever effect they may have had on the legality of the original arrangements between Boloyan, Contente and Economou, the long-continued breach by appellants of their contract with Economou had resulted, as contemplated by all three parties, in the recording of the quitclaim deed from Economou to Boloyan. It was under those circumstances that Boloyan and Contente negotiated together concerning a direct purchase of the property by Contente from Boloyan. We think that the contract sued upon which resulted from these negotiations did not carry with it any taint that may have affected the prior agreements. On the contrary, we think that this last contract was well within the rule laid down in Restatement of Law of Contracts, section 597, that "A bargain collaterally and remotely connected with an illegal purpose or act is not rendered illegal thereby if proof of the bargain can be made without relying upon the illegal transaction." As stated in the Comment to the quoted section, "How closely a bargain must be connected with an illegal purpose in order to make the bargain itself illegal is a question of degree." We think the trial court was justified in impliedly finding what it expressly declared in its memorandum opinion that the connection between the agreement sued upon and the antecedent illegal acts we have referred to was too remote to warrant the court in refusing to enforce the contract relied on by respondents.

The judgment is affirmed.

SCHOTTKY, J. pro tem., and PEEK, J., concur.

PEOPLE v. HOWERTON.*

Cr. 4837.

District Court of Appeal, Second District, Division 1, California.

Oct. 3, 1952.

Hearing Granted Oct. 30, 1952.

Defendant was found guilty of violation of the Penal Code, § 288. On the same day the Superior Court, Los Angeles County, Clement D. Nye, J., invoked the provisions of Welfare and Institutions Code relating to sexual psychopaths. Execution of sentence was suspended. Thereafter the court ordered that sentence theretofore imposed be placed in full force and effect and defendant filed notice of appeal. The People of the State of California moved to dismiss the appeal. The District Court of Appeal, White, P. J., held that the order suspending sentence was an appealable order and notice of appeal filed within ten days therefrom, was timely.

Motion to dismiss the appeal denied.

1. Criminal Law 🔑1083

A timely and proper notice of appeal vests jurisdiction of the case in the reviewing court to which it is appealed and divests the trial court of jurisdiction pending appeal.

2. Criminal Law 🔑1069(5)

Where defendant was found guilty, court pronounced judgment and sentence but suspended sentence pending proceedings on issue of sexual psychopathy and thereafter ordered sentence theretofore imposed placed in full force and effect, the judgment ordering sentence placed in effect rather than prior pronouncement of judgment was the appealable "final judgment" and an appeal taken within ten days therefrom was timely. Pen.Code, § 288; Welfare and Institutions Code, §§ 5501, 5512; Rules on Appeal, rule 31; Code Civ.Proc. § 577; Pen.Code, §§ 4, 1237.

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* Subsequent opinion 253 P.2d 8.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

Motion to dismiss appeal. On January 10, 1952, appellant was found guilty of a violation of section 288 of the Penal Code. On the same day the court invoked the provisions of the Welfare and Institutions Code relating to sexual psychopaths, secs. 5501, 5503, 5503.5, 5504. After advising appellant that he was "charged by the court with being a sexual psychopath," advising him of his rights under section 5503, supra, the court referred the matter to the probation officer, appointed two psychiatrists, secs. 5503.5, 5504, supra, and continued the matter to February 6, 1952, for further proceedings.

On the last named date appellant's application for probation was denied; judgment was pronounced and he was sentenced to the state prison for the term prescribed by law. Execution of the sentence was thereupon suspended and proceedings on the issue of sexual psychopathy commenced. Thereafter, on the same day, the court found the appellant to be a sexual psychopath and committed him to Norwalk State Hospital for a 90-day observation period, Welf. & Inst.Code, sec. 5512.

Appellant made no motion for a new trial and no notice of appeal from the judgment was taken within ten days after it was made and entered on February 6, 1952.

On April 9, 1952, appellant again appeared before the court with his counsel, at which time the court stated: "This matter * * * is here as a result of the report of the Superintendent and Medical Director of the State Hospital under a verified statement that they have examined the defendant under the provisions of the Welfare and Institutions Code and diagnosed his case; that while he is a sexual psychopath and is a menace to the health and safety of others and falls within the provisions of Section 5500 of the Welfare and Institutions Code that he could not benefit from treatment at the Norwalk State Hospital; that he would benefit just as much from treatment at a penal institution to which he otherwise would go."

Thereupon, the court inquired as to whether there was "any legal cause why judgment should not now be pronounced." After appellant's counsel answered in the negative the court proceeded as follows: "Sentence has heretofore been pronounced and continued to this date. The defendant was sentenced to the State Prison for the term prescribed by law, and the sentence was ordered suspended pending these proceedings. In view of the report of the Superintendent and Medical Director of the Norwalk State Hospital the court finds that the defendant is a sexual psychopath within the meaning of the Welfare and Institutions Code, and orders the sentence heretofore imposed be placed in full force and effect. The defendant is remanded to the custody of the Sheriff of Los Angeles County to be by him delivered to the Director of Corrections at the California Institution for Men at Chino, California, * * *."

On April 14, 1952, appellant filed notice of appeal from "the judgment of the court made and entered on the 9th day of April, 1952."

Respondent insists that the appeal taken from the "judgment * * * made and entered on the 9th day of April, 1952" is not an appealable order. It is urged that the proceedings had upon the last mentioned day amounted only to an order directing that the judgment pronounced on February 6, 1952, and suspended be put into full force and effect following the court's finding, pursuant to a report from the medical superintendent of Norwalk State Hospital that although appellant was a sexual psychopath, he would not benefit from treatment at the state hospital.

Section 1237 of the Penal Code provides that, "An appeal may be taken by the defendant:

"1. From a final judgment of conviction; an order granting probation shall be deemed to be a final judgment within the meaning of this section;

"2. From an order denying a motion for a new trial;

"3. From any order made after judgment, affecting the substantial rights of the party."

With reference to the time within which an appeal may be taken, Rule 31 of Rules on Appeal provides that, "In the cases provided by law, an appeal may be taken by filing a written notice of appeal with the clerk of the superior court within 10 days after the rendition of the judgment or the making of the order, except that an appeal from an order denying a new trial shall not be taken until after the granting of probation or the rendition of judgment, and except that the 10-day period for appealing from an order denying a new trial shall be extended until 10 days after the making of an order granting probation or the rendition of judgment, whichever shall occur sooner."

In the case of Metropolitan Water Dist. v. Adams, 19 Cal.2d 463, 468, 122 P.2d 257, 260, it is said: "A judgment is defined by the code as 'the final determination of the rights of the parties in an action or proceeding.' Sec. 577, Code Civ.Proc.; 14 Cal. Jur. 852. It is 'the law's last word in a judicial controversy.' 30 Am.Jur. 821."

[1] In view of the provisions of the Welfare and Institutions Code, secs. 5501, 5512 can it be said that the judgment pronounced and suspended on February 6, 1952, was "the law's last word" in the judicial proceeding? We think not. Subdivision (c) of section 5501 of the Welfare and Institutions Code provides that in a case such as this, upon conviction, "the court shall adjourn the proceeding or suspend the sentence, as the case may be," while section 5512, supra, provides that "If the superintendent of the hospital or person in charge of the county facility reports to the court that the person is not a sexual psychopath *or that he is a sexual psychopath but will not benefit by care and treatment in a state hospital, the person shall be returned to the court for further disposition of his case.* The court shall then cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge." (Emphasis added.) In view of these and other provisions of the Welfare and Institutions Code to which we have adverted, we are persuaded that the final judgment under the circumstances of this case was rendered on April 9, 1952, when the rights of the parties to the litigation were finally determined. Were we to hold otherwise, and had a timely appeal been taken following the proceedings on February 6, 1952, we would be met with the long established rule that a proper notice of appeal vests jurisdiction of the case in the reviewing court to which it is appealed and divests the trial court of jurisdiction pending the appeal, Associated Lumber & Box Co. v. Superior Court, 79 Cal.App.2d 577, 581, 180 P.2d 389.

[2] Construing the provisions of the Penal Code and the Welfare and Institutions Code together and according to the fair import of their terms, with a view to effect their objects and to promote justice, Pen.Code, sec. 4, we are satisfied that in the case at bar, "the law's last word" in this judicial controversy must be held to be the pronouncement of judgment made on April 9, 1952, following the "suspension" of proceedings on February 6, 1952, in compliance with the mandatory requirements of the provisions of the Welfare and Institutions Code. An appeal therefrom, having been taken within ten days thereafter, was timely.

The motion to dismiss the appeal is denied.

DORAN and DRAPEAU, JJ., concur.

113 Cal.App.2d 392

FIRST BAPTIST CHURCH OF SAN FERNANDO v. LOS ANGELES COUNTY et al.

Civ. 18956.

District Court of Appeal, Second District,
Division 2, California.
Sept. 30, 1952.

First Baptist Church of San Fernando, a corporation, brought an action against the County of Los Angeles, a political subdivision of the State of California, and city of San Fernando, California, a municipal corporation, for a refund of real property taxes plaintiff paid under protest. The Superior Court of Los Angeles, J. F. Moroney, J., rendered a judgment adverse to the plaintiff and the plaintiff appealed. The District Court of Appeal, Fox, J., held that property involved was not exempt from taxation under constitutional provision that buildings and so much of realty on which they are situated shall be exempt from taxation when used solely and exclusively for religious worship.

Judgment affirmed.

1. Taxation 🔑204(2)

Constitutional provisions and statutes granting exemption from taxation are to be strictly but reasonably construed.

2. Taxation 🔑244

Constitutional provision that buildings and so much of realty on which they are situated shall be exempt from taxation when used solely and exclusively for religious worship contemplates actual use as differentiated from intention to so use such property. Const. art. 13, § 1½.

3. Taxation 🔑244

Public ground breaking ceremony held by church which planned construction of new church, and public cornerstone laying ceremony which was held by church and marked beginning of construction, did not constitute use of building by church for religious worship, and where structure was not completed by tax date, and no other services had been held in building up to that date, such building was not exempt from taxation under constitutional provision that buildings and so much of realty on which they are situated shall be exempt from taxation when used solely and exclusively for religious worship. Const. art. 13, § 1½.

4. Taxation 🔑251

Evidence established that new church being erected on lots adjacent to lot on which old church was located was not merely an enlargement of old church, and new church was not exempt from taxation as being merely an enlargement of old church. Const. art. 13, § 1½.

5. Constitutional Law 🔑20

Where legislature indicated its interpretation of constitutional provision that buildings and so much of realty on which they are situated shall be exempt from taxation when used solely and exclusively for religious worship, by adopting a resolution proposing to amend such provision so as to exempt from taxation a building in course of construction which is intended to be used solely and exclusively for religious worship, which proposition would be on ballot at next general election, such interpretation was of persuasive significance in construing such constitutional provision. Const. art. 13, § 1½.

* * *

Miller, Beck & Stillwell, San Fernando, for appellant.

Harold W. Kennedy, County Counsel, and Arvo Van Alstyne, Deputy County Counsel, Los Angeles, for respondents.

FOX, Justice.

Plaintiff appeals from a judgment denying its claim for a tax refund.

Plaintiff paid under protest the real property taxes for 1949–1950 on three lots and the structure thereon. It contends the property was eligible for the "church exemption" granted by section 1½ of Article XIII of the California Constitution.[1]

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[1] Constitution of California, Art. XIII, sec. 1½, reads:

"All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship, shall be

On the first Monday of March, 1949, and for some years prior thereto, the plaintiff church corporation was the owner of seven lots contiguous to each other in the City of San Fernando. An old church building was located on four of these lots. This latter property was admittedly exempt from taxation. The remaining three lots, however, "were never exempted from taxation * * during any tax year prior to 1949."

On August 30, 1948, plaintiff church held a public ground-breaking ceremony for the construction of a new church on these three lots. On January 9, 1949, the church held a public corner-stone laying ceremony. These ceremonies were conducted by the pastor of the church pursuant to his duties as such pastor, and were essentially religious in nature, and constituted acts of religious worship. When the corner-stone laying ceremonies took place the new church building was under construction. A portion of this ceremony took place in the old church, which is not located on these lots, and a portion in the immediate vicinity of the front steps of the new building. Many of the persons in attendance at the latter portions of the rites were inside the new building and there observed and listened to the ceremony which took place outside.

The court found that on the first Monday in March, 1949, the new building "was still under construction and was not completed" although it was designed and intended for use as a new church, and that said building was not on that date nor prior thereto used solely and exclusively for religious worship. The first regular Sunday religious services were held in the new church building on April 10, 1949.

Plaintiff contends the ground-breaking and corner-stone laying observances established the building as "used solely and exclusively for religious worship," and hence entitled to the church exemption. This position is not well founded.

[1] The rule of "strict but reasonable construction" applies to constitutional provisions and statutes granting exemption from taxation. Cedars of Lebanon Hospital v. County of Los Angeles, 35 Cal.2d 729, 734–735, 221 P.2d 31, 15 A.L.R.2d 1045.

[2] Applying this principle to the facts at hand, Serra Retreat v. County of Los Angeles, 35 Cal.2d. 755, 758, 221 P.2d 59, plaintiff fails to bring itself within the purview of the church tax exemption provision of the Constitution, Art. XIII, sec. 1½. It is clear, and the court found, that on the taxing date the building was still under construction and was not completed. It is no doubt true that when the ground-breaking and corner-stone laying ceremonies were held plaintiff intended to use the building when completed for religious worship—perhaps solely and exclusively for that purpose. But the constitutional provision unequivocally requires that the property be "used" for the designated purpose. Such express limitation, making *use* the crucial point of determination, contemplates *actual use* as differentiated from an *intention to use* the property for a particular purpose. Cedars of Lebanon Hospital v. County of Los Angeles, supra, 35 Cal.2d at page 742, 221 P.2d at page 39. In applying this principle it was held that under the welfare tax exemption provision of the Constitution, Art. XIII, sec. 1c, which contains substantially the same language as does the church exemption section, Art. XIII, sec. 1½, a hospital was not entitled to tax exemption of its dormitory for student nurses which was 85 percent completed on the taxing date. The fact of use on the tax date rather than an intention to use was the deciding factor. Cedar of Lebanon Hospital v. County of Los Angeles, supra, 35 Cal.2d at page 742, 221 P.2d at page 39; Southern California Telephone Co. v. Los Angeles County, 212 Cal. 121, 125–126, 298 P. 9; Borough of Longport v. Max and Sarah Bamberger Seashore Home, 91 N.J.L. 330, 102 A. 633; Mullen v. Commissioners of Erie County, 85 Pa. 288.

[3] The finding that the building was not used for religious worship on the first Monday in March, 1949, and had not been

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free from taxation; provided, that no building so used which may be rented for religious purposes and rent received by the owner therefor, shall be exempt from taxation."

so used prior thereto is not negated by the ground-breaking and corner-stone laying ceremonies. Certainly the ground-breaking cannot be regarded as a use of the building since that observance merely marks the beginning of construction. The corner-stone laying ceremony was not such a service as to impel the trial court to determine the building was being used for religious worship on the first Monday in March. Such a ceremony simply marked a forward step in the progress of the building program. It is not a use of the building for religious worship but rather an occasion for such a service.

The character of the occasion, the incompleteness of the structure, and the fact that no other services were held in it for a period of three months, justify the inference that the corner-stone laying ceremony was not a use of the building for religious worship and was not even intended as such. The fact that the structure was "still under construction" on the tax date fortifies the finding it was not being used for religious worship at that time, hence it was not entitled to the church exemption from taxation.

A case strikingly similar to this one is Mullen v. Commissioners of Erie County, supra. There a cathedral was under construction but was not yet completed. No religious services had been held on the premises except the services when the corner-stone of said cathedral was laid. The constitution exempted "actual places of religious worship." It was held that the structure was not entitled to the tax exemption.

[4] Plaintiff seeks to establish exemption on the theory that the new structure is merely an enlargement of the old church. See Cedars of Lebanon Hospital v. Los Angeles County, supra, 35 Cal.2d at page 743, 221 P.2d at page 39. While the three lots on which the new structure stands are adjacent to the four lots on which the old church is located they are nevertheless separate parcels of property and not part of the church property. They have never been exempt from taxation as being "required for the convenient use and occupation" of the old church. See Art. XIII, sec. 1½, supra. Furthermore, the structure is new. It apparently is a building that is complete in itself. It is not attached to the old building. It cannot, therefore, be truly said that it is an enlargement of the other building, and the trial court has not so found.

[5] Finally, the Legislature has indicated its interpretation of the church exemption provision of the Constitution, Art. XIII, sec. 1½ as not exempting from taxation *a building in the course of construction which is intended to be used* solely and exclusively for religious worship because the 1951 Legislature adopted a resolution proposing to amend the section so as to provide for such a tax exemption. St.1951, p. 4400. This proposition will be on the ballot at the next general election. The construction placed on this constitutional provision by the Legislature "is of very persuasive significance". Reynolds v. State Board of Equalization, 29 Cal.2d 137, 140, 173 P.2d 551, 553, 174 P.2d 4; Delaney v. Lowery, 25 Cal.2d 561, 569, 154 P.2d 674, and serves to fortify the conclusion we have reached.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

113 Cal.App.2d 472

KEMPPAINEN v. HESTER.

Civ. 19162.

District Court of Appeal, Second District,
Division 2, California.

Oct. 3, 1952.

Hearing Denied Dec. 1, 1952.

Action by Michael John Kemppainen, a minor, by his guardian ad litem, Helen E. Kemppainen against Coy Hester, to compel defendant to support and maintain the plaintiff. The Superior Court, Los Angeles County, O. H. Rhodes, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Fox, J., held the evidence did not support the full amount of court's award but that record disclosed no reason why father should not contribute $35 a month toward the support of his child.

Judgment modified and affirmed.

1. Bastards ⚷78

An order for support and maintenance of illegitimate child is to be made by court in exercise of its sound discretion considering the needs of child and financial ability of father. Civ.Code, § 196a.

2. Bastards ⚷78

In fixing award against father for support of his illegitimate child, court, in weighing and evaluating father's testimony, could take into consideration his interest and bias. Civ.Code, § 196a.

3. Bastards ⚷78

The fact that father's expenses and $427 per month average income were substantially equal did not establish his inability to contribute to the support of his illegitimate child, in view of fact that he voluntarily supported foster child but award of $60 per month was excessive and would be reduced to $35 per month. Civ.Code, § 196a.

4. Bastards ⚷16

Father may not take on the voluntary support of a child not his own and thus render himself financially unable to discharge his legal obligations to illegitimate child. Civ.Code, § 196a.

5. Bastards ⚷19

The issues involved in fixing the amount for support of an illegitimate child are of equitable cognizance. Civ.Code, § 196a.

6. Bastards ⚷16

Under statute providing that father, as well as mother, of an illegitimate child, must give him support, the father cannot escape his legal obligation because mother earns sufficient income to care for the child. Civ.Code, § 196a.

◆

Krag & Sweet, Alhambra, for appellant.

Emmett A. Tompkins, Los Angeles, for respondent.

FOX, Justice.

Defendant appeals from a judgment awarding plaintiff sixty dollars per month for his support and maintenance until he attains his majority or until further order of court.

Plaintiff was born on January 29, 1951. He is the illegitimate child of defendant. The testimony of the child's mother shows that $100.00 per month is required for the child's care. Approximately three fourths of this amount is paid to a woman who takes care of the child five or six days a week so that the mother can carry on full-time employment.

[1] Under section 196a, Civil Code, the father as well as the mother of an illegitimate child must give him support. In making such an award the court, in the exercise of a sound discretion, must be guided by the financial ability of the defendant to pay, and the needs of the child. Berry v. Chaplin, 74 Cal.App.2d 669, 672, 169 P.2d 453.

Defendant earns an average of $427 per month as a door to door salesman. He married in December, 1951, and is supporting his wife and her child. He is paying, under court order, $50 per month for support of another child by a former marriage, and insurance premiums on policies for the benefit of this child amounting to $7.50 or $8.00 a month. Defendant's car payments are $67.50 and the expense of operating it $50 per month. He also owes a bank $500 on which he is making monthly payments of $40.00. After deducting rent, the cost of food and clothing, utilities, insurance, and income-tax payments, defendant claims his monthly expenses exceed his income by approximately $47.50.

Defendant contends the court abused its discretion in requiring him to pay $60 per month for plaintiff's support because the evidence fails to show his financial ability to make such payments. In fact, defendant seeks to avoid making any contribution to plaintiff's support on the theory that his expenses are greater than his income. In his calculations, however, defendant gives himself an undue advantage. In figuring his monthly net income after taxes defendant takes $5,000 as his annual income and only a married man's income tax exemption. The first discrepancy is that $427 per month produces $5,124 on an annual basis. Thus there is an additional $10 per month income over defendant's figures. Since defendant is supporting his wife's child he is entitled to claim it as an income-tax exemption. If the payment he is making for the support of his five-year-old child by his former marriage amounts to more than half of its maintenance he is entitled to also claim an exemption for it. His six hundred annual cost of operating his car is a business expense and deductible. Interest on his bank loan and on the balance due on his car are of course deductible items as is a standard percentage for sales tax. These items will total well over the ten percent of his gross income that defendant would be entitled to deduct automatically. It is thus apparent defendant has over-estimated his income-tax liability by approximately $20 per month.

[2] Since the trial court was entitled to take into consideration defendant's interest and bias, People v. One 1937 Buick Coupe, 89 Cal.App.2d 556, 561, 201 P.2d 402; Hannah v. Pogue, 23 Cal.2d 849, 859, 147 P.2d 572, in weighing and evaluating his testimony the court may well have concluded defendant's estimate of his car expense was excessive. Of course any reduction in this item would be reflected in defendant's business expense deductions in his income-tax return. This, however, would be small when compared to the direct savings by reducing his monthy automobile expense.

The court may also have concluded defendant did not need such an expensive and heavy car with which to carry on his door to door sales work; that he might well procure a lighter car which would be less expensive to operate and arrange payments on any balance there might be on a less burdensome basis; or, that he might refinance his present car so as to reduce his present heavy monthly payments.

It is thus clear that defendant's income approximately matched his outlay at the time of the hearing and that by some prudent adjustments in his business operations his income would more than match his necessary and reasonable expenses.

[3–5] The fact defendant's expenses and income were substantially equal does not, however, establish his lack of ability to contribute to plaintiff's support. Defendant is supporting his wife's child. Such expense is reflected in food and clothing bills, and perhaps in rent, as well as in other items. Defendant is under no legal obligation to support this child which is not his own. He is under the legal duty to support plaintiff since he is his own child. Defendant may not take on the voluntary support of a child not his own and thus render himself financially unable to discharge his legal responsibilities to plaintiff. This is one of those situations where defendant "must be just before he is generous." It has been said that the issues involved in fixing the amount of support under § 196a, Civil Code, are of equitable cognizance. Kyne v. Kyne, 70 Cal.App.2d 80, 82, 160 P.2d 910. It certainly would not be equitable to allow defendant to escape contributing to the support of his own child simply because he was voluntarily supporting some other person's child. Neither the age nor the expense of maintaining the child of defendant's wife appears, but from the items of household and family expense that are either given or estimated, $35 per month appears to be a reasonable portion of defendant's expense to allocate to the support of this foster child. This sum marks the amount of defendant's ability ao support plaintiff under the evidence. The order of support must therefore be accordingly reduced.

[6] Defendant further argues he should be relieved of contributing to the support of plaintiff because the mother is making sufficient salary to provide for herself and the plaintiff. The simple answer to this argument is that under section 196a "the liability for support of an illegitimate child is the mutual obligation of both the father and mother." Reed v. Hayward, 23 Cal.2d 336, 340, 144 P.2d 561, 563. The father cannot escape this obligation by the mere circumstance that the mother may be able to earn enough to take care of the child. This would not be applying equitable principles in fixing the extent of their respective obligations. Kyne v. Kyne, supra. Although

the evidence does not support the full amount of the court's award, nevertheless the record does not disclose any equitable or other reason why defendant should not, pending the readjustment of his business affairs, pay $35 per month for plaintiff's support and maintenance.

The judgment is modified by striking out "Sixty Dollars ($60)" and inserting in lieu thereof "Thirty-five Dollars ($35)."

As so modified the judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

113 Cal.App.2d 443

BOYD v. SUPERIOR COURT OF SOLANO COUNTY.

Civ. 8285.

District Court of Appeal, Third District, California.

Oct. 1, 1952.

Petitioner was informed against for certain alleged felonies arising out of robbery of liquor store. The Superior Court of Solano County denied petitioner's motion to set aside the information, and petitioner filed petition for writ of prohibition. The District Court of Appeal, Van Dyke, J., held that there was no evidence connecting petitioner with robbery.

Writ of prohibition issued.

1. Indictment and Information 🔑10

To justify an indictment or information there must be some evidence to connect the person charged with the commission of the crime charged, and affording rational ground for assuming the possibility that accused is guilty. Pen.Code, §§ 995, 999a.

2. Prohibition 🔑5(4)

Where petitioner was accused by information of felonies arising out of robbery of filling station and admitted association on evening of robbery with men shown to have been involved in offense, and petitioner had been involved in commission of similar crimes with same men, but there was no evidence, direct or circumstantial, to connect petitioner with crime in question, petitioner was entitled to writ of prohibition against further prosecution. Pen.Code, §§ 995, 999a.

◆

Winters & Winters, Benicia, for petitioner.

Gail A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

Petition for writ of prohibition. A complaint was issued charging petitioner here with the commission of felonies. By Count I therein he was charged with violation of section 217 of the Penal Code; by Count II with violation of section 211 of that code; by Count III with violation of section 459 of that code, and by Count IV with violation of section 503 of the Vehicle Code. There were other counts with which we are not here concerned. These alleged violations were claimed to have arisen out of a robbery in a liquor store in Benicia at about midnight of May 30th of this year. A preliminary examination was held and petitioner was bound over to the superior court. Thereafter an information was filed in the Superior Court of Solano County conformable to the complaint. The record discloses the following: Two men identified as Samuel Termine and Richard Fouts entered the Black and White Liquor Store in Benicia. While the men were in the store police officers arrived and Richard Fouts was killed when he resisted the officers. Termine surrendered and he was charged in the complaint and information referred to as a codefendant with petitioner Boyd. Petitioner contends that the evidence taken at the preliminary examination does not in any way connect him with any of the four offenses charged. He makes further objections concerning procedural matters and the receipt of evidence by the magistrate, but since we have concluded that his first contention must be sustained it will be unnecessary to examine these further claims of error.

None of the witnesses who testified at the preliminary examination said that they had seen him at the scene of the crime and there was no direct evidence that he participated in any way in the commission of the crimes charged. As to him, the state's case was entirely circumstantial and consisted of the following: Witness Lavezzo, Chief of Police of Benicia, and one of the officers who arrived on the scene, said that as he approached the liquor store he saw a third person get out of a parked car near the liquor store, leaving the motor of the machine running. He neither identified in any way nor attempted to describe this person. The officer did testify as to a conversation had with petitioner the day before the preliminary examination, wherein petitioner told the officer he had been in Vallejo with Sam Termine and Richard Fouts the afternoon of the day of the alleged crimes and had driven to Vallejo from Los Angeles with them. There was evidence that the car parked near the store while the crimes were committed had been stolen earlier in Vallejo and the officer asked petitioner if he, petitioner, had driven over to Benicia in that particular car. The petitioner refused to answer. Also the petitioner had told the officer that he had parked his (petitioner's) car in Vallejo that particular night and refused to tell the officer how he came to Benicia. He also refused to say whether or not he had come to Benicia from Vallejo with Termine and Fouts. He stated he had been in Vallejo on the evening of the day the crimes were committed. In refusing to answer he stated to the officer that, while he would not lie to him, he would not answer the questions at that time. Officer Horton stated that petitioner in a conversation had told him that he did not know why he was being questioned, would not at first admit knowing either Fouts or Termine, but finally said he had seen Fouts in Los Angeles two and a half weeks before the crime date, had met Termine about a week before and brought both to Vallejo in petitioner's car (that was on Wednesday, the 28th of May); that the three men then went to Oroville and returned on Thursday, the 29th, spent the night in a motel and the next day and evening spent some time at a club, playing poker; that Fouts and Termine had made it known to him (petitioner) they were coming to Benicia to rob a liquor store, but he said he didn't want any part of it, so he let them out of his car on Tennessee Street in Vallejo, parked his car and walked along the street; that he then hitch-hiked to Benicia to borrow money from an aunt, which took him up to about two o'clock Friday. He and his aunt took a taxicab to Vallejo, picked up petitioner's car where it was parked on Tennessee Street and rode to Napa. They stopped at a side road and petitioner threw certain belongings of Fouts from the car "so that he wouldn't be implicated in any way with Fouts." Prior to the incidents involving the crimes with which he stands charged, petitioner had been involved in at least one crime of robbery in Benicia and it is a fair inference that he was then associated with Fouts and Termine.

[1, 2] Petitioner moved to set aside the information with respect to the counts charging the crimes hereinbefore referred to and his motion was denied. He thereupon filed his petition here upon the ground that he had been committed on an information without reasonable or probable cause. Secs. 995 and 999a of the Penal Code. The rule applicable in the instant proceeding is stated in Greenberg v. Superior Court, 19 Cal.2d 319, 320, 121 P.2d 713, and Dong Haw v. Superior Court, 81 Cal.App.2d 153, 183 P.2d 724. Briefly stated, it is that to justify indictment or information there must be some evidence to connect the person charged with the commission of the crime charged. This evidence may be purely circumstantial in nature and of slight weight, but unless it affords a rational ground for assuming the possibility that the person charged is guilty, he is entitled to a writ of prohibition to prevent further proceedings against him. Applying the rule to the facts here, we think it clear that the evidence does not furnish the required basis for the information. In arguing against the issuance of the writ, the Attorney General puts the matter in this way: The petitioner in his admission to police officers revealed that he had been in Vallejo the evening of the robbery and that he left his car in that city A short time later he was in the neighboring city of Benicia and very shortly after the commission of the robbery returned to Vallejo in a hired cab. He had in his possession in his car clothing belonging to Richard Fouts which he disposed of a few hours after the robbery, thus indicating his guilty knowledge of the commission of the offense. In addition, it is argued that petitioner had been involved in a series of similar crimes in Benicia in company with Fouts and by his own admission he was in company of Fouts and Termine, both of those men having been shown to have been involved in the commission of the offense in question. Then says the argument: "This petitioner when questioned and accused by the police officers respecting his participation in the commission of this offense, refused to answer questions and failed to deny the accusations against him." Generally speaking, this summary of the record discloses association between petitioner on the one hand and Fouts and Termine on the other, including, it may be assumed, participation with them in other crimes of like character, but there is complete absence of any direct or circumstantial evidence that connects petitioner with this particular crime. His possession of the clothes of Fouts and his disposition of them a few hours after the robbery by throwing them away may indicate guilty knowledge of the commission of the offense, but does not indicate participation. He refused to answer certain questions concerning his itinerary, but these questions were not accusatory in the sense of accusing him of participation in the crime. The brief in opposition to the writ closes the summary of evidence relied on by saying, "In addition, various bits of circumstantial evidence unerringly point to the participation of petitioner in the commission of this offense", but does not point out these various bits of evidence, circumstantial or otherwise, and our search of the record does not disclose their existence. Summing it all up, petitioner may be guilty of one or more of the crimes of which he stands accused, but nothing produced at his hearing before the magistrate warrants his being held therefor.

Let a writ of prohibition issue as prayed.

SCHOTTKY, J. pro tem., and PEEK, J., concur.

* * *

In re FERRALL'S ESTATE.

HAMILTON v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. *

Civ. 18893.

District Court of Appeal, Second District, Division 1, California.

Oct. 2, 1952.

Hearing Granted Nov. 25, 1952.

Proceeding in the matter of the estate of John C. Ferrall, deceased, wherein the Bank of America National Trust and Savings Association and George D. Ferrall, cotrustees, and John Charters Ferrall, and others, remaindermen, contested petition of Alex C. Hamilton, as guardian of the person and estate of Faye F. Hamilton, an incompetent person and beneficiary of trust, for order instructing cotrustees to invade corpus of trust to pay for beneficiary's care and maintenance. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment for petitioner, and contestants appealed. While the appeals were pending, the beneficiary died, and Alexander C. Hamilton, as executor of last will and testament of Faye F. Hamilton, deceased, was substituted as petitioner. The District Court of Appeal, Drapeau, J., held that where trust provided that if income from corpus was insufficient to meet beneficiary's needs, trustees, in their sole discretion, might pay amounts from corpus sufficient to do so, trustees who, after determining that income was insufficient, refused to invade corpus because beneficiary was not in actual need, abused their discretion.

Judgment affirmed.

* Subsequent opinion 258 P.2d 1009.

1. Trusts ⚿276

Where testamentary trust provided that if income from corpus was insufficient to meet beneficiary's needs, trustees, in their sole discretion, might pay amounts from corpus sufficient to do so, trustees who, after determining that income was insufficient, refused to invade corpus because beneficiary was not in actual need, because of income from other sources, abused their discretion.

2. Trusts ⚿112

In construing trust, governing principle must be the intention of settlor, which intention must be gathered from general purpose and scope of agreement, and if there is any doubt or uncertainty in the trust, it will be construed, if possible, in favor of the beneficiary and against the trustee.

3. Trusts ⚿177

Whenever exercise of a trustee's discretion, absolute or otherwise, is challenged, the basic inquiry is whether trustee acted in state of mind contemplated by the settlor.

◆

Earle M. Daniels, Burdette J. Daniels, and Hallam Mathews, Los Angeles, for appellant trustees.

Eugene M. Elson, Los Angeles, for appellant remaindermen.

Potter, Potter & Rouse, Bernard J. Potter, Jr., Los Angeles, for respondent.

DRAPEAU, Justice.

John C. Ferrall died testate on October 5, 1940. He was survived by a daughter, Faye F. Hamilton; a son, George D. Ferrall, and three grandchildren, John Charters Ferrall, George D. Ferrall, Jr., and Frank M. Ferrall, the sons of George.

By his will testator made specific bequests to his grandsons; devised one-half of the remainder of his estate to his son; and the remaining one-half he devised to his son and the Bank of America National Trust and Savings Association, in trust for the use and benefit of his daughter.

With respect to the uses and purposes of the trust, both the will and the decree of distribution in the estate provide as follows:

> "(d) After payment of any expenses of management of the trust estate and administering this trust, including the compensation for the services of the trustees, all income from the trust which is available for distribution shall be distributed monthly to and for the use and benefit of my daughter, Faye F. Hamilton, during her lifetime, or unless sooner terminated in accordance herewith. *That if at any time the income from the corpus of the trust herein created is insufficient to meet the needs of my daughter, Faye F. Hamilton, then and in that event, in the sole discretion of the trustees herein, the trustees may pay to my said daughter, Faye F. Hamilton, such amounts from the principal or corpus of the trust sufficient to meet her needs, care and comforts.* (Emphasis added.) * * *
>
> "(f) Anything herein contained to the contrary notwithstanding, this trust shall cease and terminate upon the following conditions:
>
> "(1–a) Provided my daughter, Faye F. Hamilton, be living, this trust shall terminate upon the death of Alex C. Hamilton, or his divorce from my said daughter, Faye F. Hamilton, in which event all the property he held by the trustees herein shall be distributed to my daughter, Faye F. Hamilton, or
>
> "(1–b) Upon the death of my daughter, Faye F. Hamilton, this trust shall cease and terminate and all the property held by the trustees under the terms hereof shall be distributed one-half to my son, George D. Ferrall, and one-half to my three grandchildren, George D. Ferrall, Jr., John Charters Ferrall and Frank M. Ferrall, share and share alike."

On August 15, 1950, Alex C. Hamilton, the guardian of beneficiary under the trust, petitioned the court for an order instructing the trustees to invade the corpus of the estate to pay for her care and maintenance which then amounted to $475 per month. It was alleged that said beneficiary was afflicted with multiple sclerosis at the time the will was executed and that the disease had progressed to the point on January 1, 1942, that it was necessary to place her in a sanitarium; that for seven years she had been bedridden requiring the constant care and attention of nurses and physicians; that her condition had resulted in total and permanent disability and incompetency to handle her affairs. That prior to January 31, 1949, beneficiary had used all of her personal assets for care and maintenance, and since December 1, 1942, the only income she had received from the trust averaged $50 per month.

It was also alleged in the petition that on January 31, 1949, said guardian had demanded of trustees that they exercise their discretion and pay $475 per month from October, 1948, to January 31, 1949, and thereafter as required "for her care, needs and comfort" invading the corpus if necessary; that pursuant thereto, trustees made a full investigation and on June 15, 1950 (a year and a half later) refused to resort to the corpus of the estate "for the care, maintenance and comfort of" the beneficiary. That by such refusal, trustees "acted in bad faith and abused their discretion."

Trial of the issues joined by the answer of the trustees and the objections of the remaindermen resulted in a judgment whereby the trustees were instructed "that upon determining in the exercise of their sole discretion the amounts necessary and sufficient, commencing January 31, 1949, to meet, provide and pay for the necessary care, needs and comfort of the beneficiary * * * and the amount of net income derived from the corpus of the trust estate * * * and without regard to or consideration of her separate property or income or her interest in the community property, if any, of herself and her husband, Alex C. Hamilton, or other sources of income, to invade the corpus of the trust estate and pay therefrom amounts representing the difference between the net income from the trust estate * * * and the amounts necessary and sufficient to meet, provide and pay for the proper care, needs and comforts of Faye F. Hamilton."

From this judgment the trustees and the remaindermen filed separate appeals.

While these appeals were pending to-wit: on May 22, 1952, Faye F. Hamilton, the beneficiary of the trust, died testate. Pursuant to motions made in this court and in the Superior Court of Los Angeles County, Alexander C. Hamilton, as executor of the last will and testament of Faye F. Hamilton, deceased, has been substituted as respondent herein, in the place of Alex C. Hamilton, as guardian of the person and estate of Faye F. Hamilton, an incompetent person.

Appellants here urge that (1) the provisions of the will having been construed in Estate of Ferrall, 92 Cal.App.2d 712, 207 P.2d 1077 the court cannot limit or enlarge the discretionary powers of the trustees; and (2) the evidence does not support the finding that the trustees abused their discretion in refusing to invade the corpus of the trust estate.

The first appeal, Estate of Ferrall, 92 Cal.App.2d 712, 715, 207 P.2d 1077, 1079, was from a judgment to the effect that "it was the intent of the testator to provide for the care, needs, comfort and maintenance of Mrs. Hamilton from the trust estate and corpus thereof in the event the income should be insufficient for said purposes; that the income is insufficient for said purposes; that $400 per month is a reasonable sum 'to be paid out of income and corpus' for the care, needs, comfort and maintenance of Mrs. Hamilton; that $400 be paid to her 'from income and corpus' on the 10th day of each month, beginning June 10, 1947, until the further order of court."

This court there said: "Under that provision (of the decree creating the trust) a court is not deprived of power to determine the fact as to whether the income from the corpus is insufficient to meet the needs of Mrs. Hamilton. *By that provision, however, the matter of determining the amounts to be paid from the corpus,* in the event that the income is insufficient to meet her needs, *is left to the sole discretion of the trustees.* Section 2269 of the Civil Code provides: 'A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper court if not reasonably exercised, unless an absolute discretion is clearly conferred by the declaration of trust.' *An absolute discretion, as to the amounts to be paid from the corpus, was conferred by the trust provisions herein.* An absolute discretion, exercised in good faith by a trustee, cannot be controlled by a court on considerations going to the soundness of the discretion so exercised. Neel v. Barnard, 24 Cal.2d 406, 417, 150 P.2d 177. If a trustee in the exercise of a sole or absolute discretion acts in bad faith or fraudulently, his exercise of such discretion is subject to review and control by a court. (Ibid.)" (Emphasis added.)

However, the court there reversed the judgment because "There was no allegation or finding that the trustees, or either of them acted in bad faith or fraudulently, or that they abused their discretion. * * * Findings on those issues were necessary, as above indicated in order that it might be determined therefrom whether the acts of the trustees were subject to review and control by the court. As above stated, there were two trustees herein—George D. Ferrall and the Bank of America. The burden of proof as to bad faith, fraud and abuse of discretion, was on petitioner, and the trustees were entitled to the benefit of the presumption that they acted in good faith. Estate of Canfield, 80 Cal.App.2d 443, 451, 181 P.2d 732. The court erred in not making findings regarding those matters."

In the instant cause, the court found that by their refusal to invade the corpus after determining that the income was insufficient to pay for the needs, care and comforts of the beneficiary, "the joint trustees and each of them exceeded their power and abused their discretion."

Appellants do not contend that the income from the trust was sufficient to pay for beneficiary's care and maintenance in the sanitarium where she had lived for many years, but they take the position that she had never been in need because her husband had adequately provided for her. Also, that testator clearly indicated that so long as his daughter was being adequately cared for, she was to receive only the income from the trust.

An examination of the terms of the will reveals that testator's first concern was to divide his estate between his son and his daughter, because he was concerned with the proper care of his daughter during her lifetime, he then provided that her share be held in trust upon the terms hereinbefore recited.

In the discharge of their obligation it became incumbent upon the trustees to first determine whether "at any time the income from the corpus is insufficient to meet the needs of my daughter." It was stipulated at the trial that the income was not sufficient for that purpose. It then became necessary for the trustees to determine in their "sole discretion" the amounts to be paid from the corpus to meet her needs. Estate of Ferrall, supra, 92 Cal.App.2d 712, 715, 207 P.2d 1077.

[1] The evidence shows that the trustees, having determined that the income from the corpus was not sufficient for the maintenance of the beneficiary, proceeded to consider whether she had other sources of income sufficient to meet her needs. In so doing, they considered the vested interest of the beneficiary in the community property and a small income from her separate estate. Then, having ascertained that her bills at the sanitarium were being paid, they refused to pay any amount from the corpus to meet her needs, care and comforts.

There is nothing in the terms of the will which indicates that testator intended that his daughter be in actual need before recourse to the corpus of the trust estate should be made. As a result, by their refusal to invade the corpus, trustees exceeded their powers and abused their discretion.

[2, 3] "The extent of the discretion conferred upon the trustee depends pri-

marily upon the manifestation of intention of the settlor. The language of the settlor is construed strictly so as to effectuate the purposes of the trust. The mere fact that the trustee is given discretion does not authorize him to act beyond the bounds of a reasonable judgment. The settlor may, however, manifest an intention that the trustee's judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee's conduct can be judged. This may be indicated by a provision in the trust instrument that the trustee shall have 'absolute' or 'unlimited' or 'uncontrolled' discretion. * * * In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not sufficient ground for interposition by the court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act. But the court will interfere if the trustee acts in a state of mind not contemplated by the settlor." Section 187, Comment **j**, Restatement, Trusts.

"Both counsel agree that the governing principle must be the intention of the settlor, which intention must be gathered from the general purpose and scope of the agreement, as indicated in Title Insurance & Trust Co. v. Duffill, 191 Cal. 629, 642, 218 P. 14. In that case it is stated that if there be any doubt or uncertainty in the trust it will be construed, if possible, in favor of the beneficiary and against the trustee. See, also, Williams v. MacDougall, 39 Cal. 80; and Estate of Canfield, 80 Cal.App.2d 443, 181 P.2d 732, where it is stated that the basic inquiry, whenever the exercise of a trustee's discretion, absolute or otherwise, is challenged, is always whether the trustee acted in the state of mind contemplated by the trustor." Estate of Greenleaf, 101 Cal.App.2d 658, 661, 225 P.2d 945, 948.

In support of this proposition, respondent cites In re Hart's Will, Sur., 97 N.Y.S.2d 857, 859, where it is said:

"An examination of the will as a whole shows that the primary purpose of the testator was to provide for his wife. * * * In his evident endeavor to assure the effectuation of such stated primary purpose the testator *directed* his trustees to use not exceeding five per cent of the principal of the trust in any one year to make up any deficiencies of income to provide for the maintenance of his wife. He did not make a condition to the exercise of such power that his widow be shown to be in financial need. * * * Also, it is significant that in providing for invasion of principal in the clause under consideration the testator expressly referred to the 'income from the principal of the trust established for my wife * * *'. The language employed by the testator indicates that he desired to provide for the maintenance of his wife, without limitation, out of the income of the trust and if that proved to be insufficient, out of principal of the trust not exceeding, however, five per cent thereof in any one year. The Court concludes that there is no express or implied requirement that the trustees consider either the individual income of the beneficiary or her other resources." (Emphasis included.)

Likewise here, it is clear from the expressed contingencies upon which the trust should terminate that the testator intended the beneficiary to have the full benefit of his gift to the exclusion of her husband. And that such benefits should be equal in all respects to those conferred upon her brother by the outright gift of an equal share to him.

The finding of the trial court that the trustees abused their discretion in refusing to invade the corpus of the trust estate has sufficient evidentiary support.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

113 Cal.App.2d 493

MILLER v. UNITED INS. CO.

Civ. 8112.

District Court of Appeal,
Third District, California.
Oct. 3, 1952.

Hearing Denied Nov. 25, 1952.

Action by Resa Miller against United Insurance Company to recover death benefits payable under an insurance policy. The Superior Court, Stanislaus County, Sherrill Halbert, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Third District, Peek, J., held that insured who died as result of injury sustained when driver's seat of his automobile tilted and pushed him forward against steering wheel when he applied brakes to avoid a collision was injured by a peril insured against under policy insuring against injury caused solely by collision or upset of any passenger automobile.

Affirmed.

1. Insurance ⚷146(3)

Where uncertainties or ambiguities appear in an insurance policy which may be solved by either one of two reasonable constructions without doing violence to the language used or to clear intention of parties, one which is most favorable to insured and which will give life, force, and effect to policy should be adopted.

2. Insurance ⚷452

General clause in accident policy which referred to peril of collision or upset or of being struck, knocked down, or run over, attempted to afford insured broad coverage for injuries sustained while riding in or driving any passenger automobile, and should not be narrowly construed.

3. Insurance ⚷452

Insured, who died as result of injuries sustained when driver's seat of his automobile tilted and pushed him forward against steering wheel when he applied brakes to avoid a collision, was injured by a peril insured against under accident policy insuring against injury or death caused solely by collision or upset of any passenger automobile, while insured was riding or driving therein.

4. Insurance ⚷455

Insured who died as result of injuries sustained when driver's seat of his automobile tilted and pushed him forward against steering wheel when he applied brakes to avoid a collision was injured by "accidental means" within policy insuring against loss resulting from bodily injuries sustained by accidental means.

See publication Words and Phrases, for other judicial constructions and definitions of "Accidental Means".

5. Insurance ⚷466

Under accident policy containing death benefit provision that loss must result directly and independently from all other causes from bodily injury caused by accidental means, the presence of pre-existing disease or infirmity does not relieve insurer from liability if accident is proximate cause of death, and recovery may be had on policy, even though a diseased or infirm condition appears to actually contribute to cause of death, if accident sets in progress a chain of events leading directly to death.

6. Insurance ⚷466

Insured's death resulting from hemorrhage caused by tear of the bronchi tube which occurred when insured's body was accidentally thrown against steering wheel of automobile was covered by accident policy which contained death benefit provision that loss must result directly and independently from all other causes from bodily injury caused by accidental means, notwithstanding one of insured's lungs had adhered to wall of chest, a condition apparently caused by prior injury.

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Vernon F. Gant, Modesto, for appellant

Nathan B. McVay and C. O. Thrasher, Jr., Modesto, for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment for plaintiff in an action to recover the death benefits payable under an insurance policy issued by defendant to deceased, plaintiff's husband, under which plaintiff was the sole beneficiary.

The facts pertinent to the questions raised show that William R. Miller, husband of plaintiff, while driving his automobile, successfully avoided a collision with another car by turning his car slightly to the left and suddenly applying the brakes. The sudden braking of the car caused him to be thrown forward, apparently striking his chest or side against the steering wheel. In that particular model car the two front seats operate independently of each other. The driver's seat is hinged to the floor at the front end thereof and operates as one unit; so that to gain entrance to the rear seat from the driver's side it is necessary to tilt the entire seat forward, over and against the steering wheel. The hinges are the only means by which the seat is held in place. The front seat on the other side is stationary but the back is hinged, allowing the back to be pushed forward and down.

Mr. Miller made no comment concerning his condition immediately following the accident but after driving approximately one-half block he turned to his wife and said, "That hurt me * * * I believe it broke my ribs." She suggested that he see a doctor but he replied, "No, maybe I'll be all right." But shortly before reaching home he again complained of pain. When they arrived home Mrs. Miller went into the house. Mr. Miller got out of the car, turned on the water in the yard and likewise went into the house. After entering he exhibited further distress, becoming quite pale and having apparent difficulty with breathing. He then got up from where he was sitting and went out to the front porch. Shortly thereafter plaintiff went out on the porch and found her husband dead.

The testimony of the autopsy surgeon who was called by plaintiff was that one of decedent's lungs was adhered to the wall of his chest, a condition probably caused by a prior injury, and that his death was caused by a hemorrhage from a tear of the bronchi tube. In response to a hypothetical question by plaintiff's counsel, summarizing the undisputed facts surrounding the occurrence, the doctor replied that from the history of the accident given to him the only thing to which he could ascribe the fatal injury was the accident. The mortician who assisted the doctor in performing the autopsy testified that the decedent's lung was completely adhered to the body, and although not qualified, he further testified that a twisting of decedent's body "in any way" would have caused his death.

No testimony was offered by the defendant. Following the submission of the case, findings were made in favor of plaintiff and judgment was entered accordingly. In particular the court found:

> "That it is true that on the 28th day of May, 1949, in the County of Stanislaus, State of California, the said William Roscoe Miller, through accidental means, namely, through the accidental over-turning of the seat of the motor vehicle then and there being driven and operated by said William Roscoe Miller, caused by the sudden swerving and stopping of said vehicle in order to avoid a collision with another vehicle, collided with the inside front portion of said automobile, thereby sustaining bodily injuries, which, independently and exclusively of disease and all other causes, resulted in his death on said 28th day of May, 1949."

The defendant insurance company, on appeal, sets forth four separate contentions. However, an analysis of such contentions discloses that in fact there are only two: (1) that the decedent was not injured by a peril insured against, and (2) that even assuming that his injury was caused by such a peril his death was not directly and independently of all other causes from bodily injuries sustained by accidental means.

The pertinent clause of the policy in question insures "against loss resulting directly and independently from all other causes from bodily injuries sustained by accidental means * * * provided, such injury was caused solely by the collision or upset of any passenger automobile, motor bus or motor truck (tractors and trailers excepted), while the insured was riding or driving therein, or by being struck, knocked down or run over by such motor vehicle; * * *."

In support of its first contention appellant argues that since the insuring clause was not against the upsetting of the seat but was against "collision or upset of any passenger automobile * * * while the insured was riding or driving therein" that therefore the finding of the court is not supported by the evidence, and that such finding does not come within the terms of the policy.

Secondly, it argues that the further words of the policy, "being struck, knocked down or run over by any such motor vehicle" likewise excludes decedent from the provisions thereof. This is true, defendant contends, because the words "any such motor vehicle" under the terms of the policy must refer to a vehicle other than the one in which the decedent was driving.

In answer to such contention, and in support of the judgment, respondent argues that the meaning of the word "collision" as used in the policy is not limited to a collision between the car driven by the insured and another vehicle but covers as well a collision between the car so driven and any other object. Hence respondent concludes that since decedent did in fact collide with the steering wheel of the car it was a peril insured against under the policy.

Furthermore respondent argues that if the second clause of the policy, "struck, knocked down or run over by any such motor vehicle" does not cover such a situation then said clause is ambiguous and must be construed in light of the general rule relative to the construction of insurance contracts.

If appellant's contention is correct then the first clause in question would become operative only if there were a collision or upset of the car while the insured was driving or riding therein. However, if respondent is correct then an occurrence such as a collision between the insured and the car which he was driving or riding in, in any way, or an upset such as the upsetting of the seat as in this case, is a peril within the provisions of the clause in question. As to the second clause of the paragraph, if appellant's contention is correct then such provision would become operative only if the insured were struck, knocked down or run over by a second vehicle. But if respondent's construction of the clause is correct then it is immaterial whether the injury resulted from the intervention of another vehicle or by contact with the vehicle in which the insured was riding or driving.

[1] Thus, it is readily apparent that the court is confronted with two conflicting constructions of both of the clauses in issue. If it can be said, and we do so conclude, that such clauses are reasonably susceptible of the construction argued for by the parties, then the problem must be determined in light of the well established rule enunciated in Narver v. California State Life Insurance Co., 211 Cal. 176, 180, 294 P. 393, 395, 71 A.L.R. 1374.

> "It is a well-recognized rule of law that if any *uncertainties* or ambiguities *appear in an insurance policy which may be solved by either one of two reasonable constructions, the one which is most favorable to the insured and which will give life, force, and effect to the policy should be adopted.* The insurance company, having prepared the policy and all documents used in connection with its issuance, should not be heard to put such a construction upon an ambiguity, caused by it, as will defeat the policy and take from the beneficiary the very purpose and object of the insurance, if a reasonable construction upholding the insurance can be had that does no violence to the language used and the clear intention of the parties. (Citations.)" (Emphasis ours.) See also 29 Am.Jur. 180; 13 Appleman Insurance Law & Practice, p. 163.

Reading the insurance policy in the light of the above rule it cannot be denied that the sole object of the insured in contracting with the defendant company for the policy here in question was to obtain insurance coverage while he was either "riding [in] or driving any passenger automobile, motor bus or motor truck."

[2, 3] Pursuant to such object the contract specifically refers to the peril of "collision or upset * * * [or] by being struck, knocked down or run over." Thus it can be seen that the coverage was intended to include the usually anticipated and accepted hazards of motor travel. Such a general clause, we think, attempts to afford the insured broad coverage for injuries sustained while "riding [in] or driving any passenger automobile, motor bus or motor truck" and cannot and should not be narrowly construed. No attempt was made to enumerate specifically all of the situations therein included and from which injury to the insured might result. Hence under a reasonable construction of the contract, coverage is afforded not only as to those injuries which result from the hazards specifically enumerated, when narrowly interpreted, but also as to those injuries from other hazards normally incident while driving or riding in an automobile. A cogent illustration of this latter class of hazard is the injury that might occur from being bounced against the roof of a car if one came suddenly upon and crossed a mound in the road without sufficient opportunity to slow the car. In the instant case the decedent was confronted with an emergency situation and took appropriate action of avoidance. The sudden stop necessitated thereby, caused the driver's seat to raise up and throw him against the steering wheel of the car with sufficient force to cause the fatal injury. Had the defendant company desired to exclude such an accident from the terms of the policy it could have easily done so in clear and unambiguous language. That it did consider exceptions is illustrated by its explicit exclusion of injuries occurring while an insured was driving or riding in a tractor or trailer. We therefore conclude that the peril out of which decedent's injury arose might well be construed by a reasonable man as being within the spirit and object of the coverage of this policy. Whether or not a strict literal reading, as appellant contends, would result in a like conclusion is immaterial. It necessarily follows under the rule enunciated in the Narver case that this court must construe the policy in favor of the insured and against the defendant company.

[4] Appellant's next contention that the insured's death was not "directly and independently from all other causes from bodily injury sustained by accidental means" is likewise without merit. That the death of the insured was caused by "accidental means" as that term is defined by the California decisions cannot be doubted. See Davilla v. Liberty Life Insurance Co., 114 Cal.App. 308, 313–316, 299 P. 831. Certainly it cannot be said that decedent, in turning his car and applying the brakes, intended by so doing either to come in "collision" with or to be "struck" by the steering wheel.

[5, 6] This leaves for consideration only the question whether the insured's death was caused "directly and independently from all other causes from bodily injuries." Appellant contends the medical evidence is undisputedly to the effect that "the cause of death was the diseased condition of the decedent's lung which resulted in a tearing of the * * * bronchi." In so stating the facts appellant has completely disregarded the testimony of the doctor that the cause of his death was "The throwing of his body against the wheel of that car" and that "the reason why he died is because of the tear and of the bleeding, the tearing loose in there and the blood. The only thing I could ascribe it to was the apparent type of accident in the car, that is the only thing I can refer it to. My records show that." Essentially appellant's argument is that decedent's preexisting physical condition was the cause of death, not his being struck by the steering wheel of the car when he put on his brakes and successfully avoided the collision. Although decedent was afflicted with a preexisting infirmity it was not, according to the doctor, such condition which caused his death, rather it was the force of the blow to decedent's chest when he came in contact with the steering wheel causing a tear in

the bronchi, which in turn caused a hemorrhage with the resulting death.

It necessarily follows that the case comes squarely within the rule laid down in Brooks v. Metropolitan Life Insurance Co., 27 Cal.2d 305, 309, 163 P.2d 689, 691, where the court said:

> " * * * in our opinion * * * the correct rule [is], that the presence of preexisting disease or infirmity will not relieve the insurer from liability if the accident is the proximate cause of death; and that recovery may be had even though a diseased or infirm condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause. (Citations.)" See also Happoldt v. Guardian Life Insurance Co., 90 Cal.App. 20, 386, 203 P. 2d 55; 131 A.L.R. 240.
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> The judgment is affirmed.

SCHOTTKY, J. pro tem., and VAN DYKE, J., concur.

Hearing denied; EDMONDS, J., dissenting.

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113 Cal.App.2d 286

ALPAUGH IRR. DIST. v. KERN COUNTY.

Civ. 8101.

Sac. 6226.

District Court of Appeal, Third District, California.

Sept. 26, 1952.

Hearing Denied Nov. 25, 1952.

Proceeding by Alpaugh Irrigation District against County of Kern, to recover taxes paid under protest. The Superior Court, Madera County, Stanley Murray, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that water right of irrigation district constituted land within meaning of constitutional provision that land and improvements thereon located outside of the county, city and county, or municipal corporation owning the same and which were subject to taxation when acquired should not be exempt from taxation.

Affirmed.

1. Taxation 🔑217

Water right of irrigation district which was both prescriptive and appropriative and which gave district authority to pump 18,000 acre feet of water per year from lands owned by irrigation district constituted "land" within meaning of constitutional provision that land and improvements thereon located outside of municipal corporation owning the same and which were subject to taxation when acquired should not be exempt from taxation. Const. art. 13, § 1.

See publication **Words and Phrases**, for other judicial constructions and definitions of "Land".

2. Taxation 🔑348

Assessment based on 50 per cent of the actual cash value of irrigation district's water rights which was not shown by district to be unreasonable was not invalid as a matter of law. Const. art. 13, § 1.

3. Taxation 🔑319(1)

Showing that another taxpayer has escaped taxation affords no reason for invalidating proper assessments.

4. Taxation 🔑47(1)

Tax assessment of $1,600 for land value, and $20,000 for water rights imposed by county on irrigation district's lands did not constitute unlawful double taxation. Const. art. 13, § 1.

5. Taxation 🔑421(1)

Indefiniteness of description of realty in tax assessment which did not mislead taxpayer did not render assessment invalid.

6. Taxation 🔑234

Water rights of irrigation district were not "improvements" made by district to its lands after acquisition, and, hence, not exempt by constitutional provision exempting such improvements from taxation. Const. art. 13, § 1.

See publication **Words and Phrases**, for other judicial constructions and definitions of "Improvements".

W. E. James, Bakersfield, Leroy McCormick and Robert E. Moock, Visalia, for appellant.

Norbert Baumgarten, County Counsel, Kern County, Bakersfield, for respondent.

VAN DYKE, Justice.

This is an appeal from a judgment in favor of defendant in an action brought to recover taxes paid under protest. Appellant is an irrigation district and as such is exempt from taxation except as to lands and improvements thereon located outside of its boundaries which were subject to taxation when acquired by the district. Const. art. XIII, Sec. 1. The district in proper time filed with the State Board of Equalization a petition for the reassessment of its properties after the same had been assessed for purposes of taxation by the county assessor of the respondent county. A hearing was held and the petition was denied. After exhausting its remedies before the board the appellant paid under protest that part of the taxes deemed by it to be invalid and filed this suit to recover the amount so paid. Appellant owns 1,444 acres of land within the boundaries of the respondent county. Numerous wells have been drilled into the subsurface strata of these lands, pumps have been installed and the water thus raised to the surface is collected into canals and transported without the County of Kern and into the adjoining county and delivered to the landowners in the above district. The water thus transported is ground water, that is, water which lies below the surface of the ground. For assessment purposes appellant's lands were described in seven parcels of varying acreage. As to six of those parcels the assessor first described what he called a water right related to the parcel and then described the parcel itself. As an example: "100% Int Water Rights All Sec 35 T25 R23. N½ Excl of Water Rights Sec 35 T25 R23 320A. S½ Excl of Water Rights & M.R. Sec 35 T23 R23 320A." The land, exclusive of water rights, was assessed at about $2.50 per acre with some variations, and, generally speaking, lands surrounding that of the district were assessed at about the same figure. But the water rights ascribed to the various parcels received assessments at a much higher figure. Thus, section 35 described above as to land value received a total assessment of $1,600, whereas the water rights ascribed to that section were assessed at $20,000, making a total assessment for the section of $21,600, or an average assessment per acre of $33.75. Although some complaint was made by the appellant that the land values alone were as to some parcels excessive, the main contentions revolve around the assessment of the water rights. Appellant states its contentions as follows: That the assessments of parcels 2 to 7 are void for the reason that they are not in proportion to the assessed value of surrounding lands, that the assessments constitute double taxation, that they violate the intent of section 1 of Article XIII of the Constitution, that the splitting of the assessments on each parcel is contrary to law, that the assessments are not uniform, that they violate the provisions of the federal Constitution in that the lands are assessed for more than their actual cash value and that the water developed on each parcel is an improvement made by the appellant and therefore not assessable. Additionally, as to one parcel the appellant takes the position that the assessment is void by reason of uncertainty in description.

The State Constitution provides that the State Board of Equalization shall act as an equalization board in respect of taxes assessed against such public agencies as appellant. The findings of that board when it sits as a board of equalization pursuant to the Constitution have the same effect as has been ascribed to the findings of the county boards of supervisors sitting as boards of equalization. Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545. In Universal Cons. Oil Co. v. Byram, 25 Cal.2d 353, at pages 356 and 357, 153 P.2d 746, at page 748, the Supreme Court said:

> "* * * [I]t is well settled in this state that to the authorized county board of equalization has been confided the duty of determining 'the value of the property under consideration for assessment purposes upon such basis as

> is used in regard to other property, so as to make all the assessments as equal and fair as is practicable'; that in discharging this duty, 'the board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment, so far as amount is concerned, constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question,' adjudicating necessarily that 'the property is assessed at the same value proportionately as all the other property in the county'; that such adjudication 'cannot be avoided, unless the board has proceeded "arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers" * * * or unless there be something equivalent to fraud in the action of the board'; and that 'Mere errors in honest judgment as to the value of the property will not obviate the binding effect of the conclusion of the board.'"

Appellant does not dispute the applicability of the foregoing, but contends that a case has been made by it, meeting fully the tests imposed and requiring that the county refund the amounts paid to it under protest. At the trial in the superior court there was introduced into evidence the proceedings taken before the State Board of Equalization; and additional evidence was received by the court. It appears from the record that contiguous lands over a considerable area surrounding the lands of appellant are generally of the same character and quality as are the lands of appellant; that these lands, generally speaking, are of the same value as are the lands of appellant if we consider the land value alone and do not ascribe any assessable value to the right of the district to remove ground water therefrom and transport it to the district's lands; that so far as any witness who testified before the board could testify to the fact the surrounding lands were as productive of water by pumping from wells as are the lands of appellant, that is to say, the ground water conditions are uniform; that the total assessed value ascribed by the assessor to the various parcels of appellant's land is made up in greater part by ascribing an assessability value to the right to pump and transport water therefrom.

[1] Appellant asserts that there was no assessable water right and therefore that the assessable value ascribed to that right and distributed over the parcels of appellant's land is totally excessive since the value of the land without the water right as fixed by the assessor is, generally speaking, proportionate to the assessed value of the surrounding lands. We think that appellant is in error in this contention. The evidence taken before the board and considered by the trial court showed the following: On December 21, 1915, a water users' organization known as "Second Extension Water Company" deeded to appellant district a large portion of appellant's present holdings of 1444 acres, including in the grant the grantor's canals, ditches, pumping plant and appurtenances and what the deed described as "water rights". Appellant has been pumping, transporting and selling water from the lands so granted since the date of the deed. In 1943 appellant purchased additional land from which it has likewise been pumping, transporting and selling water to the lands within its boundaries. Appellant, for the lands, water rights, canals, ditches, pumping plants and appurtenances conveyed to it by the Second Extension Water Company, paid the sum of $83,000. In 1937 an action was brought by the City of Delano (situated about 11 miles east and 4 miles north of appellant's lands) and by certain other landowners by which action the plaintiffs sought to enjoin appellant district from pumping water from its lands. On September 20, 1939, a stipulated judgment was entered wherein it was determined, as far as the rights of the City of Delano, the other plaintiffs, and certain interveners were concerned, that the district could take up to 18,000 acre feet of water from its lands. Thereafter the district conformed to that limitation. The assessor in considering the assessed water right for as-

sessment purposes based his computations as to value upon an assumed right of the district to pump from its lands, transport therefrom and sell to owners within its district 18,000 acre feet of water per annum. We think the foregoing constituted sufficient proof before the board and before the trial court of the existence of the water right assessed. An overlying owner or any other person having a legal right to ground water may take only such amount as he reasonably needs for beneficial purposes and public interest requires that there be the greatest number of beneficial uses which the supply can yield. Water may be appropriated for beneficial uses subject to those who have a lawful priority. Any water not needed for the reasonable beneficial uses of those having prior rights is excess or surplus water and may be appropriated on privately owned land for non-overlying uses, such as devotion to a public use or exportation beyond the basin or watershed. It is the policy of the State to foster the beneficial use of water and discourage waste, and when there is a surplus the holder of prior rights may not enjoin its appropriation. Proper overlying use is paramount and the right of an appropriator, being limited to the amount of the surplus, must yield to that of the overlying owner in the event of a shortage, unless the appropriator has gained prescriptive rights through the taking of non-surplus waters. As between appropriators the one first in time is the first in right, and a prior appropriator is entitled to all the water he needs up to the amount that he has taken in the past, before a second appropriator may take any. Prescriptive rights are not acquired by the taking of surplus or excess water, since no injunction may issue against the taking and the appropriator may take the surplus without giving compensation; however, both overlying owners and appropriators are entitled to the protection of the courts against any substantial infringement of their rights in water which they reasonably and beneficially need. Accordingly, an appropriative taking of water which is not surplusage is wrongful and may ripen into a prescriptive right where the use is open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right. As to the exported water it is clear that the rights of appellant could not be overlying in character and must be either appropriative or prescriptive or an aggregation of the two. The foregoing statement of rules of law relating to ground water are taken practically verbatim from City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 925–7, 207 P.2d 17. These rules constitute the prevailing law on the subject of rights in ground water in this State. When these principles are applied to the factual situation here they afford full warrant for the implied holding of the board and of the trial court that appellant district was the owner during the year of the assessment of both prescriptive and appropriative rights in the water underlying the surface of its lands. Appellant made no use upon its lands of the water which it pumped therefrom, but exported and sold the whole of the water so produced. In so far as such water was surplus, the acts of the appellant were appropriative; in so far as those acts infringed the rights of the surrounding overlying owners they were prescriptive in character. City of Pasadena v. City of Alhambra, supra. A water right is land within the meaning of Article XIII, section 1 of the Constitution and is assessable as such. Waterford Irr. Dist. v. County of Stanislaus, 102 Cal.App.2d 839, 228 P.2d 341. We conclude that appellant's argument that its lands have been excessively assessed cannot be sustained in so far as those arguments are based upon the assumption that there was no water right the subject of assessment and that therefore the comparison of the assessments upon its lands with those upon surrounding lands must be made without consideration of its water rights.

[2] As to the value placed by the assessor upon appellant's water rights, it appeared that these values were arrived at as follows: The assessor considered the fact that the water exported by appellant, and totaling 18,000 acre feet, was being used to irrigate approximately 6,000 acres of land

within the boundaries of appellant district; that the recommended price of water at the diversion point in the Central Valley Project to any irrigation district is $3.50 per acre foot, which figure the assessor took as the selling value of the water; that the cost of production to the appellant district, which cost included power for pumping, repairs to machinery, canals, ditches and the like, lubricants, rentals, plant attendance, depreciation and taxes, amounted to $2.87 per acre foot; that therefore the net value of the water per annum was .63¢ per acre foot. This net value was then capitalized. The assessor used the formula, 18,000 multiplied by .63, multiplied by 11.53 equals $130,750. The assessor took this figure as the actual cash value of the appellant district's water rights. He then, as he did with all property in the county, reduced this figure by 50% for assessment purposes, thus arriving at a value for such purposes of $63,375. The assessor testified that this method of arriving at the assessable value of the water rights was comparable to that used in assessing oil rights and gas rights. We think no proof was made by appellant that this method of arriving at the value of the water rights would not give a reasonable result. It is obvious that in assessing a water right it might be necessary to adopt a method different from that commonly used in assessing land and it cannot be said as a matter of law that there was anything invalid in the method employed by the assessor.

[3] Appellant complains that one other agency engaged in producing, transporting and selling water from its own lands, that is, the California Water Service Company, was not by the assessor assessed for the water right used by it. The contention, even if correct, would not affect the validity of appellant's assessment since it would establish nothing more than that another taxpayer had escaped proper taxation. A showing that another taxpayer has escaped taxation affords no reason for invalidating proper assessments.

[4] What has been heretofore said we think disposes of appellant's contentions that the assessor unlawfully made separate assessments where there were not separable interests and that the assessments made constitute double taxation. The water rights which were here assessed did not arise from mere ownership of the lands and were not a part and parcel of it. They derive from appropriation and prescription. They were the proper subject of separate assessment.

[5] Appellant further contends that the description of parcel 6 is void for indefiniteness of description. The parcel is described as follows: "100% Int Water Rights in 100Ft Strip Approximately parallel to W Line Sec 2 T 26 R 23. 100Ft Strip approximately Parallel to W Line Excl of Water Rights & M.R. Sec 2 T 26 R 23." Appellant points out that there could be innumerable 100 foot strips in a section parallel to its west line. There was no showing that the appellant was confused as to the exact location of the 100 foot strip and appellant "cannot complain that the description * * * is insufficient inasmuch as it has not been misled. It unquestionably knew what property was assessed to it." City and County of San Francisco v. County of San Mateo, 17 Cal. 2d 814, 819, 112 P.2d 595, 598.

[6] Finally, appellant contends that the assessments of the water rights are invalid because the rights constituted an improvement made by the appellant to its lands after their acquisition and hence could not be assessed since Article XIII, section 1 of the Constitution exempts such improvement from taxation. The point is without merit and is answered by what we have heretofore said concerning the nature of the water rights which were assessed. Being the product of appropriation and prescription as against the rights of surrounding landowners whose interests they affected they are not appurtenant to nor a part or parcel of appellant's lands and consequently could not be classified as improvements thereto.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

113 Cal.App.2d 453

ROSS v. MURPHY et al.

Civ. 18966.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1952.

Hearing Denied Nov. 25, 1952.

Action by Ed Carl Ross against A. L. Murphy, and others. The Superior Court of Los Angeles County, Pat R. Parker, J., signed findings of fact, conclusions of law, and a judgment. After the death of Judge Parker, Judge Haas, by an ex parte order, directed county clerk to file them but, after notice to both parties and a hearing, Judge Bull, struck from county clerk's files the findings of fact, conclusions of law and judgment signed by Judge Parker, and defendant appealed. The District Court of Appeal, Mccomb, J., held that Judge Haas's order was void.

Affirmed.

1. Judges ⚷32

Where judge entered minute order giving judgment for defendant in trial over which he had presided without a jury, signed findings of fact, conclusions of law and a judgment, but died before such instruments were filed, ex parte order of another judge directing county clerk to file them was void. Code Civ.Proc. § 473; Government Code, § 1770(a).

2. Judges ⚷32

Where case is tried without jury, and judge signs findings of fact, conclusions of law, and a judgment, but, before they are filed, vacates his office, his successor is without power to order the documents filed. Code Civ.Proc. § 473; Government Code, § 1770(a).

3. Motions ⚷59(2)

One judge of the Superior Court has power to vacate a void order of another judge of the same court who has coordinate jurisdiction with him. Code Civ.Proc. § 473; Government Code, § 1770(a).

4. Judgment ⚷346

Right exists to have a void judgment vacated and set aside upon motion of the aggrieved party. Code Civ.Proc. § 473; Government Code, § 1770(a).

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Porter C. Blackburn, Burbank, for appellant.

Samuel Reisman, Norman Pittluck, Los Angeles, of counsel, for respondent.

McCOMB, Justice.

From an order of Judge Ingall W. Bull setting aside an order of Judge Charles S. Haas, both of the Superior Court of Los Angeles County, directing the county clerk to file findings of fact, conclusions of law and a judgment of Judge Pat R. Parker[1] in favor of defendant which had been signed prior to Judge Parker's death but not filed with the county clerk, defendant appeals.

Chronology

i. March 30, 1948, Judge Parker caused to be entered a minute order giving judgment for defendant, in a trial over which he had presided, in which plaintiff and defendant were parties.

ii. April 30, 1948, Judge Parker signed findings of fact, conclusions of law and a judgment.

iii. August 2, 1948, Judge Parker died.

iv. September 13, 1948, Judge Haas by an ex parte order directed the county clerk to file the findings of fact, conclusions of law and judgment theretofore signed by Judge Parker.

v. November 5, 1948, Judge Bull, after notice to both parties and a hearing, granted plaintiff's motion to vacate the order of Judge Haas (dated September 13, 1948) and to strike from the county clerk's files the findings of fact, conclusions of law and judgment signed by Judge Parker.

[1] It is from this order that defendant appeals.

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[1] Judge Parker, a regular judge of the Superior Court of Mono County, had been duly assigned to the Superior Court of Los Angeles County by the Chairman of the Judicial Council of the State of California.

Questions: First: *Was Judge Haas's order void?*

Yes, and this pertinent rule is applicable:

[2] When a case is tried by the court without a jury and the judge signs findings of fact, conclusions of law and a judgment, but before they are filed he vacates his office,[2] his successor is without power to order the documents filed and such order is void. (Connolly v. Ashworth, 98 Cal. 205 et seq., 33 P. 60. Cf. Reimer v. Firpo, 94 Cal.App.2d 798, 801[4], 212 P.2d 23; Martello v. Superior Court, 202 Cal. 400, 407[7], 261 P. 476; Guardianship of Sullivan, 143 Cal. 462, 467, 77 P. 153.)

Telefilm, Inc., v. Superior Court, 33 Cal. 2d 289, 201 P.2d 811, is not here in point. In the Telefilm case a motion for a new trial was granted by a judge other than the one who had originally tried the case. The Supreme Court upheld this order because of the statutory provisions authorizing this procedure. (See Telefilm, Inc., v. Superior Court, supra, 33 Cal.2d 292[1], 201 P.2d 813.)

[3, 4] Second: *Does one judge of a superior court have the power to vacate a void order of another judge of the superior court who has coordinate jurisdiction with him?*

Yes. Section 473 of the Code of Civil Procedure provides in part: "The court may * * * on motion of either party after notice to the other party, set aside any void judgment or order." (Provencher v. City of Los Angeles, 10 Cal.App.2d 730, 733 [4], 52 P.2d 983.) However, independent of section 473 of the Code of Civil Procedure, the right exists to have a void judgment vacated and set aside upon motion of the aggrieved party. (George Frank Co. v. Leopold & Ferron Co., 13 Cal.App. 59, 61, 108 P. 878; Richert v. Benson Lumber Co., 139 Cal.App. 671, 674[2], 34 P.2d 840.)

Affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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113 Cal.App.2d 309

PECAROVICH v. BECKER et al.

Civ. 15068.

District Court of Appeal, First District, Division 1, California.

Sept. 29, 1952.

Action by Michael Pecarovich against Thomas A. Becker, Virgil D. Dardi, and others, for salary allegedly due plaintiff coach for 1944, 1945, and 1946 under an employment contract. The Superior Court of the State of California in and for the City and County of San Francisco, Twain Michelson, J., entered judgment for $10,500 for plaintiff, and defendant Dardi appealed. The District Court of Appeal, Wood, Fred B., J., held that coach was entitled only to the $2,500, which employment contract provided to be paid coach after cancellation of contract upon stated notice, plus the $1500 earned but not paid for services under contract before the breach thereof.

Judgment reversed with directions.

1. Partnership 🔑217(3)

In action against professional football team owners, who were partners, for salary for 1944, 1945, and 1946 under employment contract between plaintiff coach and one owner, evidence was sufficient to sustain finding that other owner assumed obligations of first owner under the contract. Civ.Code, §§ 1589, 1624, 3521; Corporations Code, § 15017.

2. Appeal and Error 🔑1058(2)

In action against professional football team owners, who were partners, for salary for 1944, 1945, and 1946 under employment contract between plaintiff coach and one owner, limitation of testimony of general manager of team to whether or not there was a conversation concerning the employment contract when the owners were creating their partnership, if error, was cured when manager, upon cross-examination by coach, testified in full on such matter and, upon redirect examination, other owner did not touch upon this subject. Civ.Code, §§ 1589, 1624, 3521; Corporations Code, § 15017.

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[2] There can be no doubt that upon the death of Judge Parker his office became vacant. Section 1770, Government Code, Tit. 1, Div. 4, Ch. 4, Art. 2, reads in part as follows: "An office becomes vacant on the happening of any of the following events before the expiration of the term:

"(a) The death of the incumbent."

3. Evidence ⚷424

The parol evidence rule is not applicable to a controversy concerning meaning of a written contract between a party to such contract and a stranger thereto.

4. Judgment ⚷524

A judgment is tested by the trial court's judicial action, not its judicial comment, as recorded in the findings of fact and conclusions of law, viewed in the light of the evidence received.

5. Frauds, Statute of ⚷103(1)

Under statute declaring invalid an agreement which by its terms is not to be performed within a year unless it, or some note or memorandum thereof, is in writing and subscribed by party to be charged, the partnership agreement of professional football team owners was a sufficient memorandum of one partner's agreement to acquire rights and assume obligations under employment contract between other partner and coach. Civ.Code, § 1624.

6. Frauds, Statute of ⚷51

Statute declaring invalid an agreement which by its terms is not to be performed within a year unless it, or some note or memorandum thereof, is in writing and subscribed by party to be charged does not apply to 3 year coaching contract which gave employer right to terminate the contract by giving the coach written notice of his election at least 90 days prior to Sept. 1 of any year and by paying coach $2,500 upon cancellation of contract for second and third years of its term. Civ.Code, § 1624.

7. Partnership ⚷239(3)

Even if statutory provision, which makes person admitted as partner into existing partnership liable for partnership obligations arising before his admission but limits this liability by requiring it to be satisfied only out of partnership property, applies to formation of partnership where none existed before, it will not prevent a partner from assuming existing obligations, as a matter of contract between the partners, upon buying into going business. Corporations Code, 15017.

8. Damages ⚷118

Where person refuses to perform contract which is terminable by him upon certain conditions, the measure of damages for such breach of contract is amount such person would have had to pay in exercise of his election to terminate.

9. Master and Servant ⚷42(1)

Where pro-football coach's employment contract provided for $4,500 salary for 1944, $5,500 for 1945, and $7,700 for 1946, but gave club owners right to terminate contract upon stated notice and payment of $2,500 if cancelled for second and third years, upon owners' breach of contract, which breach was too late to allow giving of required notice and which prevented performance for last two years, coach was entitled to $2,500 plus the $1,500 earned, but not paid, for first year even though coach earned $4,000 elsewhere after expiration of first year.

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Henry C. Clausen, San Francisco, for appellant.

Partridge & O'Connell, San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant Virgil D. Dardi has appealed from a judgment for $10,500 in favor of plaintiff Michael Pecarovich, in an action for salary for the years 1944, 1945, and 1946, pursuant to a contract between Becker and Pecarovich whereby Becker, as owner of the San Francisco Clippers, a professional football team, employed Pecarovich as coach.

The principal questions upon this appeal are these: (1) Does the evidence support the finding that appellant assumed the obligations toward respondent which were created by the Becker-Pecarovich employment contract, and (2) If he did, does the evidence support the finding that appellant owes respondent $10,500 under that contract?

[1] (1) The evidence supports the finding that appellant assumed the obligations of Becker toward respondent under the Becker-Pecarovich contract of September 26, 1944.[1] He acquired from Becker a one-half interest in the San Francisco Clippers. This he did by agreement in writing executed with Becker on the 16th of October, 1944. In that agreement they recited, "Whereas, the party of the first part [Becker] is the owner of the franchise, issued by the American Professional Football League for the city and county of San Francisco, and as a result thereof, organized and played a team, known and designated as 'The San Francisco Clippers'; and Whereas, Party of the second part [Dardi] is desirous of acquiring a fifty per cent interest in and to said franchise and said Ball Club," and mutually agreed "1. That the said Party of the Second Part will pay to said Party of the First Part the sum of $10,000.00, receipt of which is hereby acknowledged, in payment of a fifty per cent interest in said franchise, club, equipment, contracts, players and all other assets of said Club; 2. That there are certain bills outstanding in the sum of $8130.00; that the sum of $7200.00 is a cash credit and therefore the said Party of the Second Part will contribute an equal sum, the difference between said sum of $8130.00 and the sum of $7200.00 to be paid by Party of the First Part; 3. It is further agreed that the management, control and operation of the team shall be in the hands and under the direction of Party of the Second Part and that at the end of the present playing season and upon the completion of the schedule, an accounting shall be made as between the parties and they shall divide the profits, share and share alike, and contribute in the same manner to the losses, if any. 4. This agreement may be terminated by the sale of the interest of one to the other and in the event the other does not choose to purchase the interest of the one, then it may be sold on the open market at a figure to be agreed upon by the parties. 5. The said Party of the Second Part shall keep true and correct books of account, which shall be open to the inspection of said Party of the First Part upon his request. 6. The parties shall divide the profits and settle up accounts at the end of each playing season."

Here we find appellant saying that he desires to acquire a fifty per cent interest in the franchise and the ball club mentioned in the Becker-Pecarovich contract, the club plaintiff was employed to coach, and the franchise upon the sale of which, in whole or in part, Becker could transfer, in whole or in part, his rights and obligations under the Becker-Pecarovich contract. Next, in the October, 1944, agreement, appellant agrees that he will pay $10,000 for a "fifty per cent interest in said franchise, club, equipment, contracts, players and all other assets of said Club." "Contracts" would seem quite clearly to include plaintiff's coaching contract. Were there any doubt, quite certainly it would be covered by the comprehensive phrase "all other assets" of the Club. By the same agreement appellant became a full partner with Becker in this enterprise and acquired and assumed the "management, control and operation" of that enterprise. It is reasonable to conclude that by their October, 1944, agreement Becker and Dardi made themselves, jointly, the employer of Pecarovich under the Becker-Pecarovich agreement.

About October 10, 1944, Becker told respondent that appellant had bought a half interest in the team and would assume active management, would run the team. Respondent was then about to leave for Seattle and Portland for games to be played there. As soon as he returned to San Francisco, about October 17, respondent went to Dardi's place of business to see him. They discussed the team. Appellant, who had previously owned an Oakland team, said he was going to bring some of those players over and wanted respondent to absorb some of them in the Clippers. He told respondent he had not received a copy of the Becker-Pecarovich contract. That day respondent took his copy of that contract to appellant, who said he wanted to make a copy, kept it a couple of days and then returned it to respondent. Concerning any discussion they had upon the return of that contract, respondent said, "He didn't say very much, he just took it for granted. I said, 'I am going to coach?' and he said, 'Yes.' He said 'I let Mr. Brill, of Oakland, Marty Brill go, of Oakland.'" (Brill had coached appellant's Oakland team.) Asked if "Dardi told you he was going to retain you?", appellant replied, "Yes." Asked if he continued to coach the team, appellant said, "Yes, I coached the team, and I went down every day to see Mr. Dardi * * * and he had come out to all the practice and all the games, so we were very close during the entire year." Appellant told respondent he had bought an interest in the team, that he was the boss, was running everything, and that respondent should come to appellant for anything. The publicity releases which appellant gave out to the press in the fall of 1944 concerning the team and its activities featured respondent as the coach of the Clippers. During 1944, after appellant took charge of the team, respondent received and cashed three checks drawn by Dowd, the general manager, against the team bank account: $1,000 by check dated November 5; $388.60, November 24; $1,000, December 6. Dowd testified that he took $4,500 as the basis, that being respondent's salary for 1944 as specified in the Becker-Pecarovich contract. He figured that Becker owed respondent for the five games that were played before appellant bought in and that the new management became obligated for the remaining $3,000 for the eight games that were played after that date. However, Dowd said he never discussed with respondent the basis upon which he computed this division of salary; he simply drew the checks from time to time on instructions of appellant and never told respondent that he was paying respondent just for the games he coached after the date of the Becker-Dardi contract. The Becker-Pecarovich contract fixed the salary upon an annual basis, payable semi-monthly, not upon a per game basis: $4,500 "for the first year," $5,500 "for the second year, and" $7,500 "for the third year of said employment, payable on the first and fifteenth days of each calendar month * * *" Since but three weeks, including two pay-days, elapsed between the execution of the Becker-Pecarovich contract and the day that respondent and appellant had their first conversation, it was reasonable for the trial court to infer from the words and conduct of appellant and the conduct of his general manager that appellant assumed the obligations and acquired the rights of the employer under the Becker-Pecarovich contract, including the obligation to pay whatever portion of respondent's salary that had accrued at the time appellant acquired a half interest in the team and took over the management.

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[1] The Becker-Pecarovich contract expressly gave Becker "the right to assign and transfer all or part of this contract and his obligations and rights hereunder in the event he shall sell his franchise or any part thereof."

Yet, appellant contends that when he wrote the word "contracts" into that agreement he meant "players' contracts," not the coaching contract. That hardly seems plausible, especially when, as here, the writing expressly lists "players" as well as "contracts," as separate items in the list of assets: "Franchise, club, equipment, contracts, players and all other assets." In support of his contention, appellant tendered and was permitted to introduce evidence concerning the preliminary negotiations between Becker and appellant, held October 9, 1944, at the Biltmore Hotel, Los Angeles. Dowd and a Mr. Bowen were also present. Dowd testified that there was a discussion concerning the Pecarovich contract, that he knew from the discussion there was a contract "but at that time I never knew—we never discussed the terms of that contract, except the amount that was paid for the season, and Mr. Dardi, when this matter was brought up, told Mr. Becker and Bowen that he was not interested in Pecarovich's future or present contract, that he had Brill under contract, and as far as he was concerned Brill was going to be the coach." Dardi testified respecting the same conversation, to the effect that he specifically told Becker he did not want the Pecarovich contract. But Becker, asked if Dardi ever told him that Dardi did not consider himself bound by the Pecarovich contract said "No. We never discussed it." Soon after October 9, the Becker-Dardi contract was drafted at San Francisco, and it appears that the attorney who drafted it had no record or recollection of any instruction or discussion concerning the Pecarovich contract. Thus, the evidence concerning the negotiations was in conflict, a conflict which the trial court resolved in favor of the respondent.

In addition, we have the fact that Becker had a contract for the use of Kezar Stadium. Dowd, who became general manager of this club a day or two after the execution of the Becker-Dardi contract, testified that the Kezar contract "was the main contract of the whole thing. In other words, that was the contract we wanted, the contract with the Stadium." So, according to appellant, "contracts" included players' contracts and the Kezar contract. It is difficult to see how that word could have been used to include those two quite different kinds of contracts and not also include the contract for respondent's services as coach.

[2] Appellant erroneously claims that the court committed prejudicial error in excluding the testimony of Dowd concerning the conversation of October 9, 1944, between Dardi and Becker. It is true that when such a question was first asked of Dowd, the witness was limited to saying whether or not there was a conversation on that subject, Becker having testified there was none. Dowd said there was. Soon thereafter, upon cross examination, respondent asked what that conversation was and Dowd gave the testimony which we have already narrated. We consider that the error, if any, of the former exclusion was thus cured. The testimony did not later come in casually or incidentally. Respondent's counsel pointedly asked the question, indicating he wished the court to have the whole story, particularly in view of the conflict in the testimony of appellant and respondent. Shortly thereafter, upon redirect examination, appellant asked Dowd a number of questions but did not touch upon this subject, and we find nothing in the record to indicate that Dowd had any information additional to that which he gave in response to respondent's question.

[3] The admission of parol evidence was proper. The parol evidence rule is not applicable to a controversy between a party and a stranger to a writing, as to the meaning of that writing. Moreover, the language of this particular writing was susceptible to explanation by the use of extrinsic evidence concerning the intent of Dardi to assume or not to assume the obligations of the employer under the Becker-Pecarovich contract. The evidence by conduct also shows that appellant received the benefits of the Becker-Pecarovich contract, the services of respondent in coaching the team. That brings into play section 1589 of the Civil Code: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Section 3521 of the same code is of similar import: "He who takes the benefit must bear the burden." See Jegen v. Berger, 77 Cal.App.2d 1, 174 P.2d 489, for a discussion of these several principles of law; and Bergin v. Van der Steen, 107 Cal.App.2d 8, 18, 236 P.2d 613, and Walmsley v. Holcomb, 61 Cal.App.2d 578, 582, 143 P.2d 398, concerning the significance of sections 1589 and 3521 of the Civil Code.

[4] Appellant refers to certain remarks by the trial judge concerning the admissibility of parol evidence to explain the Becker-Dardi agreement, and suggests he may have disregarded that evidence. We draw no such inference. Moreover, a judgment is "tested by the trial court's judicial action (not judicial comment), as recorded in the findings of fact and conclusions of law, viewed in the light of the evidence received." Slavich v. Slavich, 108 Cal.App.2d 451, 455, 239 P.2d 100, 102.

[5, 6] Appellant directs attention to the fact that the Becker-Pecarovich contract was for a three year period, and to section 1624 of the Civil Code which declares invalid an "agreement that by its terms is not to be performed within a year" unless "the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged". We consider the Becker-Dardi agreement of October, 1944, a

sufficient memorandum of appellant's agreement to acquire rights and assume obligations under the Becker-Pecarovich contract. Walsh v. Standart, 174 Cal. 807, 810, 164 P. 795, and Dunham-Carrigan & Hayden Co. v. Thermoid Rubber Co., 84 Cal.App. 669, 673–674, 258 P. 663. Moreover, the statute cited does not apply because the coaching contract was not one which by its terms was not to be performed within a year from its making. It gave the employer the "right to terminate this contract by giving the Employee written notice of his election * * * at least ninety * * * days prior to September 1st of any year and by paying to Employee the sum of Two thousand five hundred dollars if Employer cancels this contract for the second and third years of its term * * *" See Dutton Dredge Co. v. United States Fidelity & Guarantee Co., 136 Cal.App. 574, 579, 29 P.2d 316, and Hollywood M. P. Equipment Co. v. Furer, 16 Cal.2d 184, 186–188, 105 P.2d 299.

[7] Appellant invokes section 15017 of the Corporations Code: "A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property." He says this means that his liability, if any, toward respondent is limited to payment out of the partnership assets and that there are no such assets. If we may assume that section 15017 applies to the formation of a partnership where none existed before, as in this case, it did not prevent appellant from assuming existing obligations upon buying into a going business and becoming a partner. That is a matter of contract between the parties. As said of section 2411 of the Civil Code, of which section 15017 is but a continuation, this statute "does not determine the nature of any particular obligation, nor the time when it may be deemed to arise. It does not attempt, in other words, to interfere with the general rules of contract or property." Ellingson v. Walsh, O'Connor & Barneson, 15 Cal.2d 673, 677, 104 P.2d 507, 509.

(2) The evidence does not support the finding that appellant owes respondent $10,500 under the Becker-Pecarovich contract. It would support a finding of $4,000.

The trial court found that appellant and Becker breached the contract on or about August 25, 1945, by failing to perform it according to its terms and by informing plaintiff they would not thereafter operate the San Francisco Clippers Football Team and did not intend thereafter to perform the contract, and by refusing to accept the services of respondent. The court further found that appellant and Becker omitted to exercise the right granted them by the contract to terminate the contract in 1945 or in 1946 "in the manner provided in" the contract.

Accordingly, the court computed the damages upon the basis of the full three-year period of the contract ($4,500 for 1944, $5,500 in 1945, and $7,500 for 1946) less $3,000 paid respondent under the contract and $4,000 earned elsewhere by him during that period and after his discharge. Upon that basis the court made a proper computation.[2]

The termination clause of respondent's contract read as follows: "Employer shall have the right to terminate this contract by giving Employee written notice of his election, signed by Employer, at least ninety (90) days prior to September 1st of any year and by paying to Employee the sum of Two Thousand Five Hundred Dollars ($2,500.00) if Employer cancels this contract for the second and third years of its term, or the sum of One Thousand Five Hundred ($1,500.00) if Employer cancells [sic] this contract for the third year only."

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[2] The court properly excluded from the amount of other earnings deductible, compensation received for services which respondent could have rendered if his employment with appellant had continued. Nuckolls v. College of Physicians, etc., 7 Cal.App. 233, 94 P. 81. See also Wendt v. Smith, 50 Cal.App. 233, 237–238, 194 P. 736; Sanders v. Schenley Products Co., 2 Cir., 108 F.2d 23, 25; and 15 A.L.R. 751, 769.

[8] The trial court erred in the application of this termination clause. We have found no California decisions in point but judicial decisions in other jurisdictions indicate that if a person refuses to perform a contract which is terminable by him upon certain conditions, the amount of money he would have to pay in exercising his election to terminate becomes the measure of damages for his breach. It was so held in French v. Brookes, 1830, 6 Bing. 354, S.C. 4 Moo. & P., 11, 130 Eng.Rep. 1316. The defendant employed plaintiff to superintend mines in America for three years, with a proviso that plaintiff should not be dismissed without twelve months' notice or payment of twelve months' salary and the reasonable expense of his return; if he stayed at the mines three years a reasonable sum would be allowed for the expense of the return of his family. During the three-year period, defendant dismissed plaintiff without giving the required notice or making the required payment. The jury awarded damages measured by twelve months' salary and a reasonable sum for the expense of plaintiff's return. This, the court held proper. It put the plaintiff "in the same situation as if the directors upon dismissing him, had paid at the same time twelve months' salary, and a reasonable sum toward defraying his expenses from South America to England." At page 1319 of 130 Eng.Rep. The court overruled plaintiff's contention that the contract, "not having been determined in the mode pointed out by this agreement, it must be considered as subsisting in the mode originally contemplated" at page 1319 of 130 Eng.Rep. Of like import are The East Anglican Railways Co. v. Lythgoe, 1851, 20 L.J.C.P. 84, 138 Eng.Rep. 287 (3 months' notice or payment of 3 months' salary); Derry v. Board of Education, 1894, 102 Mich. 631, 61 N.W. 61 (a provision for one week's notice called for damages in the amount of one week's pay); Louisiana Oil Corporation v. Bryan, 1933, 165 Miss. 157, 147 So. 324 (a provision for a ten-day notice operated to limit the damages to ten days' pay); Tousley v. Atlantic City Ambassador Hotel Corp., 1947, 25 N.J.Misc. 88, 50 A.2d 472, 475; Watson v. Russell, 1896, 149 N.Y. 381, 44 N.E. 161 (a termination clause requiring one week's notice and payment of one week's salary measured damages at two weeks of pay); Bitterman v. Gluck, 256 App.Div. 336, 9 N.Y.S.2d 1007 (a thirty day notice clause limited damages to thirty days' pay); Freiburger v. Texas Co., 1934, 216 Wis. 546, 257 N.W. 592 (damages limited to the notice period).

[9] Although appellant's breach (August 25, 1945) did not occur 90 days prior to September 1, as required for a notice of termination, it did occur prior to the commencement (September 1) of the 1945 football season, and operated to deprive respondent of his least two years of service. By subscribing to the termination clause, respondent in effect put a value of $2,500 upon the last two year period of the contract. That sum, upon the authority of the cases we have cited, furnishes the measure of his damages.

Accordingly, respondent's damages are measured by the rate of salary for the first year, $4,500, less the $3,000 paid him, plus the $2,500 under discussion. The resultant sum of $4,000 is not subject to deduction for any of the $4,000 earned elsewhere, for those moneys were earned after the expiration of the first year.

The judgment is reversed with directions to the trial court to amend its findings of fact and conclusions of law in accordance with this decision and render judgment on the findings and conclusions as revised. Each party will bear his own costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.

113 Cal.App.2d 365

PEOPLE v. GRIMES.

Cr. 924.

District Court of Appeal, Fourth District, California.

Sept. 29, 1952.

Conviction of burglary in the Superior Court of Riverside County, John G. Gabbert, J., and defendant appealed. The District Court of Appeal, Griffin, Acting P. J., held that the facts pertaining to previous burglaries admittedly committed by defendant were sufficiently similar to offense charged to justify submitting evidence of such previous offenses to jury for limited consideration.

Judgment affirmed.

1. Burglary ⚷41(1)

Evidence was sufficient to support conviction of burglary.

2. Criminal Law ⚷369(1)

Where defendant admits charge of prior convictions, admitting evidence of such previous offenses does not violate statute prohibiting reading or alluding to admitted charge of prior conviction in presence of jury, if the facts of such previous offenses bring such evidence within exception to general rule excluding evidence of other offenses. Pen.Code, § 1025.

3. Criminal Law ⚷372(1)

The admissibility of evidence of other offenses depends upon whether the facts pertaining to such offenses show a general pattern, scheme, or plan, and are sufficiently similar and possess a sufficiently high degree of common features with the act charged to warrant inference that if defendant committed the other acts he committed the act charged, which is generally a primary question for trial court to determine.

4. Criminal Law ⚷1144(15)

On appeal from conviction, it will be assumed that jurors followed the various admonitions and instructions of trial court.

5. Burglary ⚷42(1, 3)

Mere unexplained possession of recently stolen property is insufficient in itself to justify a conviction of burglary, but such possession is a circumstance tending to show guilt when coupled with other suspicious circumstances.

6. Criminal Law ⚷673(5)

The modus operandi and other facts pertaining to previous burglaries admittedly committed by defendant were sufficiently similar to the offense charged to justify submitting evidence of such previous offenses to jury in prosecution for burglary, under instruction limiting jury to consideration of such evidence for purpose of showing identity, intent, and a plan, scheme, system or design, even though several years had elapsed since commission of previous offenses.

7. Criminal Law ⚷369(1)

Remoteness of previous offenses affects only the weight of the evidence of such offenses and not its relevancy or admissibility.

◆

J. David Hennigan, Riverside, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

GRIFFIN, Acting Presiding Justice.

Defendant was convicted by a jury of burglarizing a drugstore in Riverside. He admitted three prior convictions of felonies. Motions for an advised verdict and mistrial were denied. Defendant now contends on appeal: (1) that the evidence is insufficient to sustain his conviction; and (2) that the court prejudicially erred in admitting evidence of other crimes committed by defendant.

In the Arlington district of the city of Riverside the police officers found that the bottom pane of glass in the side door of a drugstore owned by a Mr. Heeres had been kicked or smashed in and the bolt lock pulled back. Entrance to this store was gained in this manner. Two cash registers were found open and the $15 change left in each of them was missing, excepting the pennies and half dollars which were in the rear compartment of the drawer. Several drawers in the prescription room had been pulled open. Two bottles of benzedrine tablets, issued only on prescription, were missing. The stubs of several burned matches were found on the floor. Next to the drugstore, in the rear alley, is Housty's Cafe. Defendant had been in the drugstore and cafe on several occasions. A merchant patrolman had checked the drugstore that evening about 9:30. The screen door was hooked and there was no broken glass in the door at that time. A bartender at Housty's saw defendant in his place of business about 6 p.m. Defendant was in and out at intervals up to one-half hour and on about six different occasions. He had been drinking but not to excess. Defendant called a cab and left at about 11 p.m. The cab man drove him to a liquor store, and after obtaining a bottle, defendant went to his brother's house. Earlier that evening, the cab man took defendant from Housty's to the home of other relatives. A service station attendant saw defendant about 8:30 p.m., when defendant brought his car to the station for some repair work. While the work was being done defendant walked in the direction of Housty's and returned in about 20 minutes. The car was not repaired and defendant departed without it.

An acquaintance of defendant testified he was in the cafe about 9 p.m., saw defendant at the bar, and that defendant left by the front door around 10 p.m.; that he left by the rear door and walked around the front to his parked car; that he saw defendant standing at the side door of the drugstore facing it with his right hand reaching for the door; that defendant did not turn his head; that he started his car and he again looked and saw defendant was still standing in the same position; that he drove away and did not see the defendant again that evening.

The owner of another cafe saw defendant at his place of business about 1 a.m. and testified that he saw defendant and his brother stacking up nickels, dimes, and quarters on the bar. The defendant asked him to change them for four or five one-dollar bills. Defendant bought drinks and food amounting to $1.75 and paid for them in nickels and dimes. Defendant, at one time, had a waitress obtain a dollar bill for some small change, and defendant tipped her with four nickels. Defendant was arrested on December 17th. His right hand had been cut and was bandaged. The officer inquired of him as to the cause and he told him he had injured it while working on his car. He told another officer he cut it on the fan of the car, and on January 3, 1952, he told another officer he cut it on the pan while working on the transmission. Other witnesses stated that they did not notice any cut on defendant's hand the evening of the burglary. Officers went to defendant's residence and conversed with his wife. She went to the bedroom and returned with a bottle containing benzedrine tablets. It was the same kind of a bottle the tablets came in when purchased from the wholesalers and was not the kind used by drugstores in dispensing the tablets. The druggist testified he had a cost mark on all such bottles. None appeared on this bottle, but one witness testified there was evidence that it had been erased. The officers took the bottle to defendant in jail, put it on the table, and said nothing. Defendant commenced to laugh and said in effect: "Oh, I see my wife is trying to put something over on me. She can't even testify against me."

[1] A mere reading of the evidence, when considered as a whole, together with the allowable inferences, clearly demonstrates that there was sufficient evidence to support the verdict. People v. Goodall and Dean, 104 Cal.App.2d 242, 231 P.2d 119; People v. Mercer, 103 Cal.App.2d 782, 230 P.2d 4; People v. Grischott, 107 Cal.App.2d 631, 237 P.2d 712; People v. Kepford, 10 Cal.App.2d 128, 51 P.2d 429; People v. Carroll, 79 Cal.App.2d 146, 179 P.2d 75.

A close question arises in reference to the other claim. Counsel for defendant, who tried the case and who has been appointed by this court to represent the defendant on this appeal, has ably presented defendant's cause. At the trial defendant admitted the prior convictions of felonies as charged, and did not testify. The prosecution offered evidence of similar offenses to that charged, under the claim that such offenses were similar in their commission, and the *modus operandi* was so much like the method used in the instant case as to be admissible under the general principle enunciated by our Supreme Court in People v. Peete, 28 Cal.2d 306, 169 P.2d 924, and cited cases. The court permitted the proffered evidence, under an instruction limiting the consideration of the evidence by the jury for the purpose only of showing the identity of the person who committed the alleged crime, if it was committed; that the defendant entertained the necessary intent; and that there existed in the mind of the defendant a plan, scheme, system or design, for the commission of the offense, and not to prove other and distinct offenses.

Evidence was taken that defendant, in May, *1941*, broke into Stevenson's Drugstore in Riverside, between 11 p.m. and midnight, by kicking out the glass in the side door and crawling in; that a certain amount of change was taken from two cash registers therein, as well as a bottle of whiskey; that defendant later engaged a taxicab and consumed about half of the liquor. Further evidence was produced that on November 19, 1941, he attempted to burglarize the Banks' Drugstore in Riverside between 10 and 11 p.m. by kicking in the glass door at the bottom but that he was, for some reason, frustrated in his efforts and that that same evening he did burglarize the Fairmount Drugstore, and gained entrance by kicking out the glass in one of its two doors; that he took the change on hand in the cash registers and had some drinks; that he then called a cab and at the Park Inn he exchanged six half dollars for three one-dollar bills.

It was then shown that on August 24, 1943, during the evening, defendant was seen beating on the glass door of the Corona Hardware store. After a chase he was apprehended. He apparently had $50 in his possession and quite a sum of it was in small change. Defendant at that time had already burglarized the Stewart's Pharmacy near there by kicking out the glass in the bottom part of the locked door and took money from two cash registers. Some of this evidence consisted of signed statements and admissions or confessions by the defendant of these burglaries.

The prosecution then offered in evidence, over objection, as before, the testimony of the clerk of the court, reading into evidence the information charging defendant with the crime of attempt to burglarize the Banks' Drugstore, the burglary of the Jones Drugstore in 1941, the burglary of the Stewart's Pharmacy in 1943, and defendant's plea of guilty to these charges.

[2] It is defendant's contention that the prior conviction of burglary on August 28, 1943, as charged in the information and admitted by defendant, should not have been admitted in evidence since defendant admitted this charged prior conviction. He cites in support of this argument section 1025 of the Penal Code which reads in part that in case the defendant answers "that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." There is no merit to this argument if the facts of the previous offense come within the exception hereinafter noted. People v. Peete, supra, 28 Cal.2d at page 319, 169 P.2d at page 932.

Defendant concedes that evidence of other crimes is permitted to prove common scheme, system, design, and intent, but avers that past cases indicate such practice is permitted only in relation to crimes committed in the same series; that there is no sufficient evidence of similarities in scheme, system or design in the offenses here established, and they do not contain such common elements peculiar to the *modus operandi* of this defendant which would make it relevant here to admit the evidence herein referred to and, if so, the rule does not permit such evidence dating back eleven years. He cites such cases as People v. Hobbs, 37 Cal.App.2d 8, 98 P.2d 775; People v. Guthrie, 103 Cal.App.2d 468, 229 P.2d 841; People v. Bartnett, 15 Cal.App. 89, 113 P. 879; and the dissenting opinion of Mr. Justice Carter in People v. Peete, supra.

The general rule, so recently applied, is stated in the majority opinion in People v. Peete, supra, and as reviewed in

People v. Burns, 109 Cal.App.2d 524, 534, 535, 241 P.2d 308, 315, which latter case recites:

> "People v. Peete, 28 Cal.2d 306, 169 P.2d 924, contains a long list of California cases and certain law review articles on the subject of the admissibility of evidence of other crimes than the one upon which the defendant is being tried. It sets forth the exception to the general rule that evidence of another and distinct offense is not admissible. It points out that such evidence may not be admitted merely to show criminal disposition. '"* * * But, whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion."' * * * 'The relevance of evidence that proves crimes other than that charged, however, must be examined with care.'" It concluded that "in the Peete case the evidence of the prior crime coupled with that of the one for which the defendant was on trial indicated strongly that the second murder was part of a scheme by defendant to acquire property by murder." It then cites People v. Cassandras, 83 Cal.App.2d 272, 188 P.2d 546, 550, concerning the exceptions to the general rule and says: "'In recent years these exceptions have been so extended that the rule appears to have become the exception and the exceptions the rule.'" It was there recognized that the one exception that is well settled in the law is that evidence of other crimes is admissible to show a general pattern, scheme, design, project or plan of which the two crimes are a part, and that evidence in relation thereto must be restricted to other acts with a sufficiently high degree of common features with the act charged to warrant the inference that if the defendant committed the other acts he probably committed the act charged.

Several cases are cited in which the general pattern, scheme or plan exception has been held applicable insofar as previous burglaries, larcenies, and thefts are concerned, under circumstances similar to the one charged, such as People v. Tibbitts, 35 Cal.App.2d 669, 96 P.2d 812; and People v. King, 4 Cal.App.2d 727, 41 P.2d 593. In People v. McGill, 82 Cal.App. 98, 255 P. 261, the defendant was charged with the crime of burglary. The evidence indicated that he and another were outside window washers at a store in Los Angeles. They returned in the evening and entered the store building on the third floor by way of the fire escape and defendant was apprehended as he was leaving the building. The prosecution offered the testimony of the co-defendant who testified that the defendants had six times previously entered that store *and other stores* and had taken goods therefrom. A police officer testified, over objection, that McGill admitted that the two defendants entered the store on three other occasions and took 30 or 40 pieces of merchandise on each occasion and that they had already made arrangements to dispose of some garments at $1.00 apiece. The court held that evidence of offenses, other than that charged against the defendant, was properly admitted under the facts shown in that case upon the theory that there was shown some similarity in the method and system employed by the defendants in the offense charged to those employed by them in connection with the other offenses. See, also, People v. James, 40 Cal.App.2d 740, 105 P.2d 947; People v. Lapierre, 205 Cal. 462, 271 P. 497; People v. Ross, 98 Cal.App.2d 805, 809, 221 P.2d 280; People v. Coefield, 37 Cal.2d 865, 870, 236 P.2d 570.

[3, 4] The main question here presented then is whether the facts pertaining to the other offenses allowed to be proved, show a general pattern, scheme, or plan, and are sufficiently similar and possess a sufficiently high degree of common features with the act charged to warrant the inference that if the defendant committed the other acts he committed the act charged. Usually this is a primary question for the

trial court to determine. People v. Peete, 28 Cal.2d 306, 316, 169 P.2d 924; People v. Albertson, 23 Cal.2d 550, 577, 145 P.2d 7. It apparently believed that such evidence should go to the jury for its enlightenment under the limited instruction that it could be considered only for the purpose indicated. It will be presumed that the jurors were true to their oaths and followed the various admonitions and instructions of the court. People v. Burkhart, 211 Cal. 726, 733, 297 P. 11.

[5] We will compare some of the facts shown pertaining to the other offenses with the facts pertaining to the offense charged. The charge here indicated involved the offense of burglary. Likewise, the other acts charged involved similar offenses or attempts to commit them. This offense involved a drugstore. So did the others with the exception of one hardware store. The *modus operandi* in the gaining of admission to all of the stores involved was by means of "kicking" or "smashing" a glass door to gain admission, which method of gaining admission, if practiced to the extent indicated, might amount to a system, design, or plan of the defendant, and one ordinarily used by him in such practice. In each instance, where entrance was gained, the defendant's main purpose was to rifle the cash registers for such change as was ostensibly available to him. Coincidental with that was defendant's desire to fortify himself with liquor immediately before and after the commission of the burglaries. Each burglary indicates a similar planned time and place for the commission of the act. Many instances indicate that a taxicab was called by the defendant as a means of transportation from the scene of the crime and a counting and changing of small pieces of money into larger denominations. The jury had the right to believe that defendant had in his home or in his possession a portion of the stolen property, i. e., the bottle of benzedrine, as well as some of the change taken from the drugstore. Mere unexplained possession of recently stolen property by a defendant, standing alone, is not sufficient to justify a conviction of burglary. People v. Boxer, 137 Cal. 562, 70 P. 671. The fact of possession of such property, unexplained, is a circumstance tending to show guilt, when coupled with other suspicious circumstances. People v. Nichols, 39 Cal.App. 29, 177 P. 861. The evidence respecting the *modus operandi* of defendant in reference to the other burglaries did tend to show guilt in connection with the offense charged.

It has been held that evidence of another offense committed by an accused is properly admitted when it is so connected with the offense charged as to throw light on its commission such as, at the time a defendant was being arrested for a prior burglary he was at that time in possession of burglary tools and attempting to commit another burglary. People v. McGilver, 67 Cal. 55, 7 P. 49.

[6] As indicated in the dissenting opinion in People v. Peete, supra, and the concurring opinion in People v. Burns, supra, there is room for an honest difference of opinion as to whether certain described facts may or may not amount to a system or designed plan of operation. We do not desire to extend the rule but since the facts indicated in the Burns and other cases, sustained by the Supreme Court, appear to us to be more dissimilar than those in the instant case, we feel obligated to adopt the rule there applied and to hold that there is sufficient similarity pertaining to the facts to justify the trial court in submitting the evidence to the jury for its consideration under the limited instruction mentioned.

[7] Some complaint is made because of the lapse of time between the other claimed offenses and the one under consideration. Lapse of time is not altogether determinative of the admissibility of such evidence. Remoteness of the prior offenses has been held to affect only the weight of the evidence and not its relevancy or admissibility. People v. Morani, 196 Cal. 154, 236 P. 135; People v. Hall, 25 Cal.App.2d 336, 77 P.2d 244; People v. Miner, 96 Cal.App.2d 43, 214 P.2d 557; People v. Burns, supra; People v. Peete, supra.

Here it appears that defendant, after committing burglary in 1942, was committed to prison in Texas, in 1943 he was committed to prison in California for the same offense, and in 1946 he was again committed to state's prison in this state. This may account for the fact that the offenses were not nearer to the time of the happening of the instant burglary. A lapse of time in excess of eighteen years was sustained in People v. Peete, supra.

We conclude that the evidence fully supports the verdict of the jury and that no miscarriage of justice resulted.

Judgment affirmed.

MUSSELL, J., concurs.

Ex parte MARO.

Cr. 2835.

District Court of Appeal, First District.
Division 1, California.

Sept. 30, 1952.

Opinion Corrected and Rehearing Denied
Oct. 15, 1952.

Hearing Granted Oct. 30, 1952.
Dismissed as Moot.

An inmate of San Quentin prison filed a petition for writ of habeas corpus. The Superior Court of the State of California, in and for the County of Marin, Thomas F. Keating, J., entered an order directing the Adult Authority to grant petitioner a hearing to consider and fix petitioner's term of imprisonment and to determine if and when petitioner could be released on parole, and the warden of San Quentin, where petitioner was incarcerated, appealed. The District Court of Appeal, Peters, P. J., held that the order was not appealable.

Appeal dismissed.

1. Habeas Corpus 🔑113(3)

The word "discharge", as used in statute extending right of appeal in habeas corpus proceedings to orders discharging a defendant after his conviction in all criminal cases, should be broadly and liberally construed to carry out purposes of amendment. Pen.Code, § 1506.

2. Habeas Corpus 🔑113(3)

Before an order in habeas corpus proceeding is appealable it must directly or indirectly discharge defendant from custody. Pen.Code, § 1506.

3. Habeas Corpus 🔑113(3)

An order entered in habeas corpus proceedings directing Adult Authority to grant petitioner a hearing to consider and fix petitioner's term of imprisonment and to determine if and when petitioner could be released on parole was not an order granting petitioner a discharge from custody and was therefore under statute not appealable. Pen.Code, § 1506.

4. Habeas Corpus 🔑53

Regardless of what inmate of prison calls application for a writ, court will treat it as an application for a proper writ if one would lie.

5. Convicts 🔑6

Acting as a plaintiff in a civil suit is a civil right that is suspended during incarceration for a felony.

6. Habeas Corpus 🔑1

At common law habeas corpus would only lie to effect an immediate discharge of one illegally held in custody.

A. E. Bagshaw, San Rafael, for respondent.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for appellant.

PETERS, Presiding Justice.

The warden of San Quentin, where petitioner Maro is incarcerated, appeals from an order made in a habeas corpus proceeding, directing the Authority to grant to Maro a hearing for the purpose of considering and fixing his term of imprisonment, and for the further purpose of determining if and when he may be released on parole. The challenged order did not discharge the petitioner but, in fact, expressly remanded him to the custody of the warden. The basic question that must be determined before the appeal can be considered on its merits is whether the order appealed from is an appealable order. We are convinced that it is not.

Maro is admittedly a second offender. The Adult Authority, by rule, has provided that they will not grant an initial calendar appearance for a second offender to consider fixing the term of his sentence or to consider when such second offender shall be eligible for parole until eighteen months after his commitment,[1] although, under the pertinent provisions of the Penal Code, §§ 3021 and 3041, the Authority is empowered to fix the terms of second offenders and to parole them after they have served six months. On the merits, the basic question involved is the validity or invalidity of that rule. The Superior Court determined that the rule was invalid and void, that there was no other plain, speedy or adequate remedy, and, in the habeas corpus proceeding, issued the following order:

> "1) That the Adult Authority of the State of California, within a reasonable time and without unnecessary delay, give to the said Louis Maro a hearing for the purpose of considering and fixing the term of imprisonment of the said Louis Maro under said commitment, and for the further purpose of determining if and when the said Louis Maro may be released upon parole;
>
> "2) That said Louis Maro be remanded to the custody of the Warden of said penitentiary under said commitment and for further proceedings in conformity with this order."

This order, considered as one entered in a habeas corpus proceeding, is not appealable. In California for many years rulings made on habeas corpus were not appealable at all. Then in 1927 section 1506 of the Penal Code was added making a final order of the Superior Court in a habeas corpus proceeding "discharging a defendant after his conviction, in all criminal cases prosecuted by indictment or information" appealable. This section was broadened in 1951, Stats. of 1951, Chap. 1275, p. 3168, so as to make appealable orders of the Superior Court in habeas corpus proceedings "discharging a defendant after his conviction, in all criminal cases".

[1-3] As already pointed out, prior to 1927, orders made in habeas corpus proceedings were not appealable. Modern Barber Col. v. Cal.Emp.Stab.Com., 31 Cal.2d 720, 728, 192 P.2d 916; Matter of Zany, 164 Cal. 724, 726, 130 P. 710; Matter of Hughes, 159 Cal. 360, 366, 113 P. 684; Ex parte White, 2 Cal.App. 726, 727, 84 P. 242. After the enactment of section 1506 of the Penal Code in that year, it was held, and properly so, that the right of appeal in habeas corpus proceedings was limited to those cases mentioned in the section. In re Cunha, 123 Cal.App. 625, 637, 11 P.2d 902, 18 P.2d 979; In re Page, 19 Cal.App.2d 1, 4; Cunha v. Superior Court of Alameda County, 217 Cal. 249, 251, 18 P.2d 340; In re Page, 214 Cal. 350, 354, 5 P.2d 605; People v. Schunke, 102 Cal.App.2d 875, 877, 228 P.2d 620; In re Alpine, 203 Cal. 731, 744, 265 P. 947, 58 A.L.R. 1500; In re Bruegger, 204 Cal. 169, 170, 267 P. 101; Rose v. Superior Court, 86 Cal.App.2d 173, 178, 194 P.2d 568; Thuesen v. Superior Court, 215 Cal. 572, 576, 12 P.2d 8; Loustalot v. Superior Court, 30 Cal.2d 905, 913, 186 P.2d 673; In re Merwin, 108 Cal.App. 31, 33, 290 P. 1076. All of the above cases dealt with what constituted "a conviction" after prosecution "by indictment or information" as those terms were used in section 1506 as added in 1927. Under the 1951 amendment to the section the right of appeal by the state has been extended to all orders "discharging a defendant after his conviction" in all criminal cases. But the order must still be one "discharging" a defendant. While the word "discharge" may and should be broadly and liberally construed to carry out the purposes of the amendment, In re Larabee, 131 Cal.App. 261, 21 P.2d 132, it still is the law that before an order in a habeas corpus proceeding is appealable

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[1] This rule was first adopted in 1949 when section 3045 of the Penal Code prohibited paroles for second offenders until they had served two years. In 1951 this prohibition was removed by an amendment to section 3045. In January, 1952, the Authority continued the eighteen months' prohibition by an amendment to the rule.

it must directly or indirectly "discharge" the defendant from custody. No matter how broadly or liberally the order here involved be construed, it is obviously not an order "discharging" or even affecting the custody of respondent—in fact, the order remands respondent to the custody of the warden. All the order does is to require the Authority to grant to respondent a hearing, with complete discretion in the Authority to fix respondent's term and to determine when, if ever, he should be paroled. For these reasons, it is quite apparent that the order here involved, considered as one made in a habeas corpus proceeding, does not fall within section 1506, and is therefore not appealable.

In an attempt to avoid the conclusion that the appeal must be dismissed for the foregoing reasons, the appellant argues, in effect, that in recent years the courts have extended the scope of habeas corpus beyond its traditional use of securing a discharge from an illegal custody, and have used it to grant rights to prisoners short of effecting a discharge. Cases such as In re McVickers, 29 Cal.2d 264, 176 P.2d 40, and In re Seeley, 29 Cal.2d 294, 176 P.2d 24, are cited, where the Supreme Court used habeas corpus to test the habitual criminal status of petitioners, and, although the petitioners there involved were remanded to the custody of the warden, the court declared the rights of the petitioners in the matter of sentences to be served at a time when such sentences had not yet expired. These cases undoubtedly represent an extension of the use of the writ of habeas corpus. It is urged that since this extension was the result of judicial action, the courts should now hold that orders in habeas corpus in this field, by simple judicial fiat, are appealable. But, because the courts may have extended the use of the writ, it does not follow that the courts should judicially legislate and declare orders made in such cases appealable. There is a long history of nonappealability in such cases predicated upon a strong public policy to protect petitioners from the delay incident to an appeal by the state. This policy was declared in Ex parte White, 2 Cal.App. 726, 731, 84 P. 242, 244, as follows: "The delay which might and generally would attend the appeal would in many cases work a denial of the very object of the writ, which is to secure the present discharge of the prisoner, and in most cases the value of this bulwark of personal liberty would be so impaired as to lose the distinctive character and office with which it has been clothed ever since King John met the Barons at Runnymeade in 1215, and instead of being the safeguard of human liberty it might become a means of oppression." That policy is certainly applicable to the facts of the present case where petitioner had to wait six months after his commitment before he could file this writ. With the normal delays in the Superior Court, and because of the delay incident to this appeal, the full eighteen months provided in the challenged rule may almost have expired before this decision becomes final. Certainly, sound principles of administration of justice not only suggest but compel the conclusion that if there is going to be any further extension of the right of appeal in habeas corpus proceedings, such extension must come from the Legislature and not from the courts.

[4] The last contention of the state is that the order here involved compelling, as it does, the Authority to grant petitioner a hearing, although made in a proceeding purportedly in habeas corpus, was, in legal effect, an order in mandamus, and is therefore appealable. The state relies on the general rule that regardless of what the petitioner calls his application for a writ, the court will treat it as an application for a proper writ if one would lie.

Certain facts should here be mentioned. In the trial court all concerned, that is, the court and counsel on both sides, treated this proceeding as one in habeas corpus. Rightly or wrongly, the trial court and counsel believed that the proceeding involved was one in habeas corpus. The writ that was issued was one in habeas corpus. The state at no time, in the court below, ever raised the question of the propriety of the remedy, or ever mentioned mandamus as a possible remedy. The contention was never made by the state until in this court the question arose concerning the state's right to appeal. Moreover, the petition alleged that Maro had applied to the Adult Authority for permission to file a writ of mandate but that board had refused to restore Maro's civil rights to that extent.

At the inception of this argument that this proceeding is in fact mandamus and not habeas corpus there arises the most interesting question of whether an inmate of a state's prison whose civil rights, except in certain respects not here pertinent, have been suspended during his incarceration, Penal Code, § 2600, may file a petition for a writ of mandate without the restoration of that civil right by the Adult Authority.

[5] It would appear that acting as a plaintiff in a civil suit is one of the civil rights that is suspended during incarceration for a felony. That is the general rule elsewhere (see cases collected 18 C.J.S., Convicts, p. 105, § 7), is the clear implication of the code section, and seems to be supported by the implications of the available case law. Castera v. Superior Court of Los Angeles, 29 Cal.App. 694, 159 P. 735; Estate of Donnelly, 125 Cal. 417, 58 P. 61; In re Bagwell, 26 Cal.App.2d 418, 79 P.2d 395; Hall v. Hall, 98 Cal.App.2d 209, 219 P.2d 808; see discussion 34 Cal.L.Rev. 167, 177; 2 Cal.L.Rev. 401; 5 Cal.L.Rev. 81.

It is true that there are cases where a prisoner in the state prison has been permitted to file a petition for a writ of mandate, see Roberts v. Duffy, 167 Cal. 629, 140 P. 260; In re Harris, 80 Cal.App.2d 173, 181 P.2d 433, but in those cases the question of suspension of civil rights was not raised or discussed. It is, therefore, extremely doubtful whether mandamus was available to Maro in the present proceeding.

[6] However, even if petitioner's right to file a civil suit was not suspended, and if mandamus is a remedy that petitioner could have used to secure the relief here granted, there can be no doubt that in California habeas corpus is also an appropriate and, at least, a concurrent remedy. At common law habeas corpus would only lie to effect an immediate discharge of one illegally held in custody. This common law rule became the rule in the federal courts of this country. McNally v. Hill, Warden, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238. There the Supreme Court of the United States held that habeas corpus would not lie in a situation somewhat similar to the one here involved, and indicated that mandamus would be the proper remedy. That court came to the conclusion that habeas corpus could only be employed where the discharge of the prisoner or his admission to bail was the immediate relief sought. Some state courts have followed the McNally rule and limited habeas corpus accordingly. Ex parte Shepley, Nev., 202 P.2d 882, and cases there cited.

But these limitations do not apply in California. In the cases of In re McVickers, 29 Cal.2d 264, 176 P.2d 40, and In re Seeley, 29 Cal.2d 294, 176 P.2d 24, the Supreme Court held that habeas corpus was properly used to test the habitual criminal status of prisoners. In those cases the Supreme Court declared the rights of the petitioners in the matter of sentences to be served, although the minimum sentences had not yet expired. In other words, petitioners there were not entitled to be freed from custody under any theory, and in fact, were, as here, expressly remanded to custody. The state, on the oral argument of the instant case, sought to distinguish these cases by the claim that they involved at least attacks upon the judgments of conviction, and that the Supreme Court only intended to extend the rule to this extent. In the present case no attack is made upon the judgment.

The state has misinterpreted the two cases. The judgments of conviction were not under attack in those cases, and the Supreme Court so stated. In the McVickers case, 29 Cal.2d 264, 270, 176 P.2d 40, 44, it is declared:

> "It is important to note that *petitioner here raises no question as to the validity or correctness of a judgment of conviction. His attack is directed only against a determination of facts on which depend the length of time during which he can be legally*

imprisoned and the possibility of his being released on parole.

"The so-called adjudication of habitual criminal status is not and cannot be an element of adjudicated guilt, nor is it, properly speaking, a part of the judgment of conviction." (The italics are those of the Supreme Court.)

Again, 29 Cal.2d at page 271, 176 P.2d at page 45, the court concluded as follows: "It is, therefore, obvious that a determination of habitual criminal status, even though referred to as an adjudication, does not involve the validity or finality of a judgment of conviction, as such, but relates only to the length of the term of imprisonment and the right to parole, and, hence an attack on the adjudication of habitual criminal status is not an attack on the judgment of conviction."

In the Seeley case, decided the same day as the McVickers case, the majority of the court not only followed the McVickers case, but expressly recognized that by these cases the court was broadening the use of the writ of habeas corpus, and pointed out that "in exceptional cases it [habeas corpus] may be issued even though other remedies might have been available." 29 Cal.2d at page 296, 176 P.2d at page 26. The court then gave the following explanation of how it reached its conclusion that habeas corpus was the proper procedural vehicle to use in such cases 29 Cal.2d at page 302, 176 P.2d at page 29: "The petitioner has met the burden of showing that the sentence imposed on him was unauthorized in part and excessive; but it does not follow that he is entitled to his discharge. The rule is settled in this state in accord with the weight of authority that 'where a court has jurisdiction of the person and of the crime, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but leaves only such portion of the sentence as may be in excess open to question and attack. * * *' * * * the petitioner has failed to show that he is entitled to his release at this time. The proper course to pursue is for the constituted authority to refix the sentence of the petitioner in accordance with the declaration of his rights as stated in this opinion."

These cases allow what is, in legal effect, a declaratory judgment of a prisoner's rights upon habeas corpus, while expressly noting that a "discharge" was not involved. See, also, In re Bramble, 31 Cal.2d 43, 187 P.2d 411.

That the Supreme Court did not intend that these cases were to be limited to their peculiar facts is illustrated by later developments. In the case of In re Collie, 38 Cal.2d 396, 240 P.2d 275, the writ of habeas corpus was held a proper remedy to test the validity of a commutation of the death sentence to life without the possibility of parole. Although the writ there was denied on its merits, the court stated, 38 Cal.2d at page 397, 240 P.2d at page 275: "Since the commutation states that petitioner 'shall never be eligible for parole,' it acts as an immediate restraint on him and prevents him from applying for parole, as may ordinarily be done after seven years' confinement by a prisoner * * * serving a life sentence. See Pen. Code, § 3046. The writ of habeas corpus, therefore, is a proper remedy to determine whether the condition which purports to deprive petitioner of the right to seek parole is valid."

There is language in other cases that indicates that mandamus may be a concurrent remedy. In Green v. Gordon, 39 Cal.2d 230, 246 P.2d 38, 39, a writ of mandate was brought against the Adult Authority to compel it to consider petitioner's application for parole. In a footnote on page 242, in explaining that mandate was a proper remedy, the court made the following observation: "Although habeas corpus may be used to test the validity of the terms of a commutation, In re Collie, 38 Cal.2d 396 [397–398], 240 P.2d 275, a petitioner may also use mandate to compel the Adult Authority to entertain an application for parole if it has wrongfully refused to pass on the application."

Some language somewhat inconsistent with this holding is to be found in Phyle

v. Duffy, 34 Cal.2d 144, 208 P.2d 668. In that case the court split three ways (there is no majority opinion) upon the proper remedy to test the determination of the superintendent of a state hospital that a condemned defendant had returned to sanity. Three of the justices, including the author of Green v. Gordon, supra, concurred in the following statement of the law, 34 Cal.2d at page 152, 208 P.2d at page 673: "The normal method of reviewing the legality of a prisoner's detention is by writ of habeas corpus [citing authorities], and where habeas corpus is available and adequate it is the exclusive remedy and mandate will be denied. [Citing authorities.]"

There are some other cases indicating the broad extension made by the California courts to the writ of habeas corpus. In two recent cases prisoners attempted to file writs of mandate and *quo warranto* with the appellate court, but the Adult Authority denied them permission to do so. Habeas corpus was brought to test the validity of this refusal. In both cases habeas corpus was held to be the proper remedy. In re Robinson, 112 Cal.App.2d 626, 246 P.2d 982, and In re Malone, 112 Cal.App.2d 631, 246 P.2d 984. In the Robinson case, 112 Cal.App.2d at page 630, 246 P.2d at page 984, the court stated: "We conclude therefore, that the petitioner had the right to have his so-called Petition for Writ of Mandate forwarded to the District Court of Appeal for filing and that any interference with that right to that extent unlawfully restrained him of his liberty and entitles him to the writ of habeas corpus."

One of the cases there cited to support this unusual use of habeas corpus is In re Rider, 50 Cal.App. 797, 195 P. 965, where habeas corpus was used to compel a superintendent of a juvenile hall to allow an inmate the right to interview her lawyer. In coming to the conclusion that the use of habeas corpus had been extended in this state beyond its traditional limits, the appellate court concluded that deprivation of the right to interview the lawyer was a "restraint" on liberty as such term is used in section 1473 of the Penal Code. That section provides: "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." The court stated 50 Cal. App. at page 801, 195 P. at page 966: "We think that a person may be said to be * * * 'restrained of his liberty,' so as to be entitled to the writ of *habeas corpus,* when, though lawfully in custody, he is deprived of some right to which, even in his confinement, he is lawfully entitled under the Constitution or laws of this state or the United States, the deprivation whereof serves to make his imprisonment more onerous than the law allows, or curtails, to a greater extent than the law permits even in his confinement, his freedom to go when and where he likes."

Reference should also be made to In re Ochse, 38 Cal.2d 230, 238 P.2d 561, where habeas corpus was used to direct a sheriff to permit a criminal defendant to have a private examination by her own doctor in preparation for her defense to a murder charge.

The only case that we have found that is inconsistent with these cases is In re Weintraub, 61 Cal.App.2d 666, 143 P.2d 936, where the appellate court held that habeas corpus was an inappropriate remedy to raise the question of the failure of the prison board to determine the petitioner's term. This holding was criticized in the case of In re Harris, 80 Cal.App. 2d 173, at page 181, 181 P.2d 433, at page 438, where this court pointed out, in discussing the Weintraub case, that "habeas corpus has been used for similar purposes". The Weintraub case is inconsistent with later cases and its holding must be deemed to have been overruled.

From this analysis of the cases it is apparent that California has extended the use of habeas corpus far beyond its common law use. It is also apparent that the courts of this state have used habeas corpus as a procedural vehicle to secure for those lawfully in custody, rights (such as the right to a hearing before the Adult Authority) which have improperly been denied to them. Whether mandate could be used for the same purpose need not here be determined. At most, it is a concurrent remedy. Here habeas corpus was used, and, under the cases, this was a proper remedy. Since the order does not "discharge" the petitioner from custody, it is not appealable, and the purported appeal therefrom should be and therefore is dismissed.

BRAY and FRED B. WOOD, JJ., concur.

Ex parte EMBRY.

Cr. 2836.

District Court of Appeal, First District, Division 1, California.

Sept. 30, 1952.

Rehearing Denied Oct. 15, 1952.

Hearing Granted Oct. 30, 1952.

An inmate of San Quentin prison filed a petition for writ of habeas corpus. The Superior Court of the State of California, in and for the County of Marin, Thomas F. Keating, J., entered an order directing the Adult Authority to grant petitioner a hearing to consider and fix petitioner's term of imprisonment and to determine if and when petitioner could be released on parole, and the warden of San Quentin, where petitioner was incarcerated, appealed. The District Court of Appeal, Peters, P. J., held that the order was not appealable.

Appeal dismissed.

Habeas Corpus 🔑113(3)

An order entered in habeas corpus proceedings directing Adult Authority to grant petitioner a hearing to consider and fix petitioner's term of imprisonment and to determine if and when petitioner could be released on parole was not an order granting petitioner a discharge from custody and was therefore under statute not appealable.

A. E. Bagshaw, San Rafael, for respondent.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Assistant Atty. Gen., for appellant.

PETERS, Presiding Judge.

This petitioner was convicted of a felony and has suffered a prior conviction for which he served time. The Adult Authority, pursuant to its rule, has refused to grant him a hearing in order to fix his sentence or to consider his application for a parole, until eighteen months after his commitment. After six months of his term had expired he filed a petition for a writ of habeas corpus in the Superior Court to compel the Authority to grant him a hearing. That court issued the writ with an order substantially similar to that discussed in Ex parte Maro, Cal.App., 141 P.2d 135. The state appeals.

For the reasons set forth in and upon the authority of In re Louis Maro, the order appealed from is nonappealable, and the appeal must be and is dismissed.

BRAY and FRED B. WOOD, JJ., concur.

113 Cal.App.2d 253

PEOPLE v. COLE.

Cr. 2793.

District Court of Appeal, First District, Division 2, California.

Sept. 25, 1952.

Hearing Denied Oct. 23, 1952.

Defendant was convicted in the Superior Court, City and County of San Francisco, Twain Michelsen, J., on two counts of possession of marijuana and one count of transportation of marijuana, and he appealed. The District Court of Appeal, Dooling, J., held, inter alia, that defendant was prejudiced as to count charging transportation and one count charging possession by conduct of trial judge which amounted to throwing judicial weight on state's side.

Affirmed in part and reversed in part and remanded for new trial.

1. Indictment and Information 🔑127

Where two similar offenses are charged in one indictment to have been committed at the same time, the better practice is to include sufficient matter in the indictment or information to clearly differentiate the facts relied upon to constitute the separate offenses. Pen.Code, §§ 950, subd. 2, 952.

2. Criminal Law 🔑1032(5)

Where defendant did not object to indictment containing two counts charging possession of marijuana in identical language, and that the offenses were committed on the same date, it was not necessary to determine whether the indictment complied with statute requiring such statement of the acts constituting the offense as to enable person of common understanding to know what is intended. Pen.Code, §§ 950, subd. 2, 952.

3. Criminal Law 🔑29

Where charge of possession of marijuana and charge of transportation of marijuana both arose out of presence of marijuana in defendant's automobile, the possession was a mere incident to the transportation and was included in the offense of transportation, and convictions on both counts could not stand.

4. Poisons 🔑4

A specific intent to violate the law is not an ingredient of the crime of possession of a narcotic, but a knowledge that the facts exist which bring the act within the provisions of the pertinent statute is necessary, and therefore, unless defendant knew that the objects that he possessed were narcotics, he could not be convicted of possession of them.

5. Contempt 🔑15

An attorney who is proceeding in good faith to urge on the court an erroneous view of the law cannot be held in contempt for so doing, and in the case of a layman attempting to represent himself, the same rule should apply with somewhat more latitude because of the layman's ignorance of the refinements of trial procedure.

6. Contempt 🔑10

Criminal Law 🔑657

Where defendant himself attempted to impeach state's witness by asking which of two statements was the truth, and the court admonished the defendant that he was not to accuse the witness of perjury, whereupon defendant stated that he could prove it, there was nothing contumacious in such statement of defendant, and court's finding of contempt and censure of defendant before jury seriously discredited defendant and amounted to throwing judicial weight on side of prosecution.

7. Criminal Law 🔑1166½(12)

Although trial judge threw judicial weight on side of state in prosecution on two counts of possession of marijuana, in view of evidence supporting one such count, defendant was not prejudiced thereby.

8. Criminal Law 🔑1166½(12)

Where counts charging possession and transportation of marijuana were based upon presence of small flakes of marijuana in defendant's automobile, and case was submitted on theory that defendant knowingly possessed and transported the insignificant fragments found in the automobile, defendant was prejudiced by trial judge's comments which threw judicial weight on side of state.

9. Criminal Law 🔑1171(3, 5)

In prosecution for possession and transportation of marijuana, district attorney's speaking of defendant as trafficking in marijuana or stating that he knew why defendant did not take the stand was not prejudicial error.

Davis & Colvin, Reynold H. Colvin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of State of California, David K. Lener, Deputy Atty. Gen., San Francisco, for respondent.

DOOLING, Justice.

[1, 2] Defendant was convicted on two counts of possession and one count of trans-

portation of marijuana. The two counts of possession were couched in identical language and each charged that defendant "on or about the 9th day of March nineteen hundred and fifty-one * * * did wilfully, unlawfully and feloniously have in his possession a quantity of marijuana * * *." The charging in identical language of apparently identical offenses, while perhaps permissible under the code which allows each offense to be pleaded in the language of the statute, Pen.Code, sec. 952, is confusing since it is impossible to determine as between the counts upon what facts the jury relied for the verdict of guilty on either count. That it was confusing to the jury as well is demonstrated by the fact, hereafter discussed, that the jury after retiring returned to court and requested a clarification as to what offense was intended to be included in each count. No objection to this uncertainty created by the form of the two counts was made so far as appears from the record but where two similar offenses are charged in one indictment to have been committed at the same time it would appear to be much better practice to include sufficient in the indictment or information to clearly differentiate the facts relied upon to constitute the separate offenses. Whether or not this would be required to satisfy Pen.Code, sec. 950, subd. 2 which requires "A statement of the acts constituting the offense * * * in such manner as to enable a person of common understanding to know what is intended" need not be decided since the defendant went to trial on the information as framed without objection. We simply point out this uncertainty because if the jury, for example, had found defendant guilty on one such count and not guilty on the other it would be impossible for an appellate court to determine the factual basis of the jury's verdict on either count. The simplification of criminal pleadings was a necessary and useful reform but district attorneys should not carry such simplification to the point where uncertainties of the character found in this case are created. The charge of transportation was likewise alleged to have occurred on or about March 9, 1951.

The evidence shows that on March 9, 1951 certain officers approached an automobile parked in front of defendant's residence. The defendant was seated in this car. He told the officers that it was his car and that he was the only person who drove it. A search of the car discovered in the luggage container a kit containing barber's tools in which was a single weedy flake about the size of a finger nail. Scattered on the floor in front of the back seat of the automobile and under the back seat a total of twelve seeds were found. Under the front seat was found an apparently empty tobacco can. From this can a trace of material was scraped. This scraping, the twelve seeds and the single flake were examined by a chemist who testified that they were all marijuana. Defendant disclaimed knowledge of the presence of this material in his car.

On a shelf in an open compartment outside defendant's residence were found a paper bag and two tobacco cans containing a large quantity of loose marijuana and marijuana cigarettes. Defendant at first remained silent on being questioned about this, but later when his wife was being asked about it he said: "She knows nothing about it. They are mine." Later he made a similar admission. When asked by another officer "if the stuff was his" (referring to the marijuana found in the compartment outside his residence) the defendant answered: "Yes."

After the case went to the jury, the jurors returned into court and asked to have the judge clarify the two counts charging possession. The judge then instructed the jury as follows:

> "The Court: Now neither count, as you will observe, refers to any particular evidence specifically as it was presented to you here from the witness stand through the testimony of the People's witnesses. Count 1 may apply to either quantity, either exhibit of marijuana, likewise, Count 2 may apply to either quantity or exhibit of marijuana, and quantity means any substance, small or great, infinitesimal or otherwise, which has been identified as mari-

juana, whether it is from the leaf of the marijuana or whether it is in the form of the seed of marijuana, it is all marijuana.

"There is testimony in the record indicating that marijuana was found on a ledge under the stairway of the premises occupied in part by the defendant and his family; that consisted of bulk marijuana, marijuana seeds, marijuana cigarettes, eight marijuana cigarettes and a butt of a marijuana cigarette. There is also testimony that marijuana was found in the automobile of the defendant, in the trunk compartment, consisting of a flake in the pouch or bag, the bag itself being People's Exhibit 1 in evidence. There was testimony, also, that marijuana seeds were found in the car, and there is also testimony that marijuana was found in a can, which is designated People's Exhibit 7 in evidence, that there was a particle of marijuana or particles of marijuana in that can.

"Now as to those exhibits of marijuana, the last three referred to, the last four, rather, the flake in the pouch found in the trunk compartment of the car, the seeds found under the rear seat, the seeds found in back of the front seat on the floor of the car where the carpeting material was, and the can, as I recall it, in the front part of the car, those substances would apply to one count of possession, and would have nothing to do with the charge of possession involving the marijuana that was found on the ledge in the premises wherein the defendant lived. And that marijuana that was found on the ledge constituting the building or premises, a part of which was occupied by the defendant, that would come under either one of the two counts charging possession, but you mustn't confuse the charge of possession of marijuana, whether leaf, flake, seed or particles of marijuana as, for instance, found in the can, designated People's 7 in evidence, with the marijuana found on the ledge, where the gas meter was, or water meter, whatever it was; they are two separate and distinct charges of possession; in other words, there was no testimony that People's Exhibit 6 in evidence, a big bag, containing a smaller bag, the smaller bag containing, I think, two and one-quarter ounces of marijuana, eight cigarettes, and a butt of cigarette, cigarette wrapping papers, and the two cans of marijuana, they are not to be associated with the marijuana allegedly found in the automobile."

[3] It is clear from this instruction and from the entire course of the trial that the charge of transportation and one of the counts charging possession were both based on the single flake, twelve seeds and trace from the can found in defendant's automobile, and that the verdict of guilty of transportation and one verdict of guilty of possession referred to this material. We are satisfied under the doctrine of People v. Mandell, 90 Cal.App.2d 93, 202 P.2d 348 and People v. Krupa, 64 Cal.App.2d 592, 149 P.2d 416, that any possession of this material must be held a mere incident to its transportation and that one offense was necessarily included in the other and both convictions cannot stand. This is mentioned only because of its importance in case of a second trial since we are satisfied that the judgments on the transportation count and on one count of possession should both be reversed for the reasons hereinafter stated.

The court instructed the jury: "that while there must be a unity of act and intent in every public offense, it is not necessary that the evidence show that the defendant knew that the object or objects which he possessed *were narcotics* or were prohibited by law, so long as * * * he had knowledge of the existence and location of such object or objects and intended to maintain physical control thereof."

[4] The italicized words were erroneous as we understand the law. Under this instruction if the defendant possessed marijuana honestly believing it to be an innocuous substance such as alfalfa or tobacco he would still be guilty. While a specific intent to violate the law is not an ingredient of

the crime of possession of a narcotic, "'a knowledge that *the facts exist* which bring the act * * * within the provisions of this code'" is necessary. People v. Gory, 28 Cal.2d 450, 456, 170 P.2d 433, 437. One of the facts of which a defendant must have knowledge is that the article is a narcotic, because that is one of the facts, indeed the essential fact, "which bring(s) the act within the provisions of this code." To instruct as the court did in this case that it is not necessary "that the defendant knew that the object or objects which he possessed were narcotics" is to authorize the conviction of a defendant who possessed marijuana in the honest belief that it was not marijuana. If that is the law then if I am given marijuana cigarettes, in a package of one of the standard brands of cigarettes made of tobacco, and retain it in my possession in the honest and innocent belief that it is a package of that brand of cigarettes I am nonetheless guilty of a felony, or if I cut a weed from the roadside which is in fact marijuana and use it as a part of a floral decoration in my home not knowing its narcotic character I am equally guilty. It is axiomatic that all laws must be reasonably construed and such a construction would so clearly pass the bounds of reason as to be unthinkable.

The defendant, although represented by counsel, insisted on cross-examining the prosecution's witnesses himself. In an attempt to impeach one of the officers he was trying to establish inconsistencies in his testimony when the following occurred:

> "The Defendant: Q. Mr. Noels, you have stated that you asked those questions back in the house. Now, may I ask which is the truth, which is—this is contradictory to the testimony which you have given here.
>
> "The Court: Now, just a moment, sir. Strike the argument of the defendant. You are not to stand here and argue with any witness, Mr. Cole. You are—
>
> "The Defendant: I'm merely asking the questions, sir.
>
> "The Court: Just a moment, sir. You are not to stand here and arrogate to yourself the function of the jury and say that this witness has fabricated, has committed perjury; that is what you suggested.
>
> "The Defendant: I can prove it.
>
> "The Court: For that, I will hold you in contempt, sir, and will sentence you at the conclusion of this trial. You will prove nothing.
>
> "Make a note of it, that he can prove this witness committed perjury. Mr. Hennessy, I am now going to suggest to you that you counsel with your client.
>
> "Mr. Hennessy: Yes, your Honor.
>
> "The Court: I am going to ask now that you counsel with your client who is guilty of contumacious conduct before this court and before this jury.
>
> "Mr. Hennessy: Well, he understood that to be the law.
>
> "The Court: If necessary, I will sentence him now and continue this case.
>
> "Mr. Hennessy: Now, if the Court please, he was under the impression he could ask that question. It has been done in court on a good many occasions.
>
> "The Court: He has made the statement, 'I can prove it.' You are the attorney of record in this case, Mr. Hennessy, and I very respectfully suggest that you counsel your client to remain within the bounds of propriety. He has been given the right, his constitutional right to act as his own counsel in conjunction with yourself as his advisor.
>
> "Mr. Hennessy: Well—
>
> "The Court: Just a moment, sir. He is now trespassing upon the propriety of court room procedure; he has made an unwarranted attack upon this witness by saying, 'I can prove it,' responsive to my observation. He is not to stand here and charge this witness with perjury. Now, certainly, out of your vast experience as a trial lawyer, a man whom we all respect as an officer of this court, Mr. Hennessy, you are now in a position, I am sure, to properly counsel your client.

"Mr. Hennessy: I will ask your Honor to withdraw the commitment because—

"The Court: I have made no commitment, I have made an adjudication and that stands.

"Mr. Hennessy: I know—about sentencing him for contempt, because he is acting under a misinterpretation of the law through ignorance.

"The Court: I will defer sentence until the conclusion of this trial."

[5] It has frequently been held that even an attorney who is proceeding in good faith to urge on the court an erroneous view of the law cannot be held in contempt for so doing. Raiden v. Superior Court, 34 Cal.2d 83, 86–87, 206 P.2d 1081; Bennett v. Superior Court, 99 Cal.App.2d 585, 595, 222 P.2d 276; Bennett v. Superior Court, 73 Cal.App.2d 203, 217–218, 166 P.2d 318. Here where a layman was attempting, perhaps inadvisedly, to represent himself the same rule should apply with somewhat more latitude to be allowed to him because of his ignorance of the refinements of trial procedure. The defendant was attempting, somewhat awkwardly, to impeach the witness by what he believed were prior inconsistent statements. He framed his question in a layman's fashion inartificially from a lawyer's viewpoint. The judge in attempting to correct the form of his question for the first time injected the word "perjury" into the discussion and the defendant was told by the judge that he would not permit the defendant to say that the witness had committed perjury, something that the defendant had certainly not in terms up to that moment suggested. In natural response to this admonition the defendant then stated: "I can prove it."

[6] We can find nothing contumacious in this statement of the defendant. The purpose of cross-examining a witness about alleged prior inconsistent statements is to develop the fact that he has at different times given different versions of the same transaction. Where he has done so it becomes obvious that one version or the other cannot be correct, or in the language of the defendant's question which precipitated the discussion leading to the announced finding of contempt one of the contradictory versions cannot be "the truth". Whether the incorrect version is inadvertent or deliberate then becomes a question for the jury. If the jury draws the inference that it was deliberate the jury has in effect found that the witness has committed perjury. We cannot say that this layman under the circumstances was acting contumaciously or other than in good faith in giving the answer that he did to the judge's admonition. Being told that he would not be permitted to make a charge of perjury (which up to that moment he had not explicitly done) what more natural than his assurance to the court that his cross-examination of the witness would develop just that?

By his unjustified finding of contempt; by the statement to the defendant: "You will prove nothing"; by the entire discussion before the jury which is quoted above the judge not only seriously discredited the defendant in the jury's eyes but threw his judicial weight onto the side of the prosecution in the presence of the jury by at least implicitly vouching for the credibility of the prosecution's witness.

Our courts have on many occasions pointed out the duty of a trial judge before a jury, both in criminal and civil cases, not to do anything which would lead the jury to believe that the judge was of the opinion that one party or the other should receive the verdict, nor to appear to throw his judicial weight on one side or the other. People v. Mahoney, 201 Cal. 618, 626–627, 258 P. 607; Sanguinetti v. Moore Dry Dock Co., 36 Cal.2d 812, 822, 228 P.2d 557; People v. Byrd, 88 Cal.App.2d 188, 191, 198 P.2d 561; People v. Zammora, 66 Cal.App.2d 166, 209, 152 P.2d 180; People v. Frank, 71 Cal.App. 575, 581, 236 P. 189. These cases reiterate the fact that jurors are eager to find and quick to follow any supposed hint of the judge as to how they should decide the case.

[7] The question always is where such instances occur whether the conduct of the judge under the particular facts has seriously prejudiced the litigant with the jury.

The evidence of the defendant's possession of the considerable quantity of marijuana found in the compartment near defendant's residence was strong and convincing. Two officers testified that defendant admitted to them at separate times that this marijuana was his and the defendant did not take the stand to deny this. We are satisfied that the jury's verdict would have been the same on this count if the incident above recited had not occurred. In view of all the circumstances, including the fact that it is perfectly clear from the evidence that defendant knew that the officers were searching for marijuana, his admissions without qualification that this particular marijuana was his and his failure to take the stand in his own defense, we cannot find that as to this marijuana the error in the instruction above noted was prejudicial. The fact that the compartment in which this marijuana was found was open to others who might have placed it there loses significance in the face of defendant's admissions.

[8] The single flake in the barber's kit, the twelve scattered seeds and the trace scraped from an apparently empty can all found in the automobile stand on a very different ground. Defendant made no admissions concerning this material and disclaimed knowledge of its presence in his car. It strains credulity to believe that he knowingly left a single flake in his barber's kit or twelve scattered seeds in his car or a trace in an apparently empty coffee can or knowingly transported these tiny quantities. On oral argument the attorney for the people suggested that these small quantities were probably inadvertently overlooked by the defendant and their presence in the car would support a finding that he had recently possessed and transported a larger quantity of marijuana of which these were the scattered and forgotten vestiges. The instruction explaining the two counts of possession to the jury and the whole tenor of the trial show that the case did not go to the jury on this theory, but on the theory that defendant knowingly possessed and transported the scattered and insignificant fragments found in the car. The patent improbability of his having knowingly done so makes it clear that the errors above discussed were prejudicial as to these two counts.

[9] We find no merit in the claim that the court unduly interfered with defendant's cross-examination of the prosecution's witnesses. A reading of the transcript indicates that with the single exception of the instance in which the court found the witness in contempt the judge did not go beyond reasonable bounds in clarifying defendant's questions. Nor do we find prejudicial error in the district attorney speaking of defendant as "trafficking" in marijuana or stating that he knew why defendant did not take the stand.

The judgment of guilty of possession under count 1 is affirmed. The judgments of guilty on counts 2 and 3 are reversed and the case on those counts remanded for a new trial.

GOODELL, J., concurs.

NOURSE, P. J., concurs in the judgment.

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113 Cal.App.2d 195

WILLIAMS v. REED et al.

Civ. 15199.

District Court of Appeal, First District,
Division 1, California.

Sept. 24, 1952.

Hearing Denied Nov. 20, 1952.

Action by W. E. Williams against Glen E. Reed and others to enforce payment of notes and foreclose a chattel mortgage. The Superior Court, Contra Costa County, Benjamin C. Jones, J., granted motions for summary judgment and to dismiss and entered judgment dismissing action as to all but named defendants, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that written agreement between plaintiff and named defendant did not operate as a novation and that co-makers were not released from their obligation on notes, by such agreement or judgment obtained thereon against named defendant.

Judgment reversed and cause remanded for trial.

1. Judgment ⇨181(26)

Contention in support of motion for summary judgment against plaintiff in action to enforce payment of a note and foreclose a chattel mortgage given as security therefor that cosigners were accommodation makers and counteraffidavit that cosignatures were given for a consideration and not merely to lend credit to maker presented at most a triable issue of fact. Code Civ. Proc. § 437c; Civ.Code, § 3110.

2. Judgment ⇨186

On motion for summary judgment against plaintiff, the inquiry is limited to ascertaining whether there is an issue of fact to be tried and the issue itself is not to be determined. Code Civ.Proc. § 437c.

3. Novation ⇨12, 13

Novation is question of fact and the party asserting it has the burden of proving a novation. Civ.Code, §§ 1530, 1531, subds. 1–3.

4. Novation ⇨4, 5

Written agreement between payee and one of four comakers of notes and his wife was insufficient in itself to disclose an intent to substitute new obligation for the notes and thereby extinguish the old obligation or to substitute maker who executed such agreement as sole obligor in lieu of the four original comakers and thereby release comakers. Civ.Code, §§ 1530, 1531, subds. 1–3.

5. Chattel Mortgages ⇨241

Execution of a new chattel mortgage covering the same property and the same debt as a prior chattel mortgage but providing for different payments does not extinguish the lien of prior mortgage in absence of an express agreement so to do.

6. Release ⇨28(1)

Written agreement between payee and one of four comakers of notes, even though made in substitution and release of such maker's obligation on original notes, would not necessarily operate to release his comakers. Civ.Code, §§ 1530, 1531, subds. 1–3, 1543.

7. Release ⇨28(2)

Under Civil Code provision that a release of one of two or more joint debtors does not extinguish the obligation of codebtors, a joint debtor who accepts a release is held to have consented that the liability of his codebtors shall be continued together with his own liability to contribution. Civ. Code, § 1543.

8. Release ⇨28(2)

Civil Code provision that a release of one of two or more joint debtors does not extinguish the obligation of codebtors applies to persons jointly and severally obligated as comakers of a note and to release of one of the comakers after obligation has been reduced to judgment. Civ.Code, § 1543.

9. Executors and Administrators ⇨531

Civil Code provision that release of one of two or more joint debtors does not extinguish the obligation of codebtors applies to cosureties on the bond of an administrator. Civ.Code, § 1543.

10. Guaranty ⇨63

Civil Code provision that release of one of two or more joint debtors does not extinguish the obligations of codebtors applies to joint guarantors of a note. Civ.Code, § 1543.

11. Judgment ⇨629

Unsatisfied judgment against one of several comakers on his written agreement with payee of notes which was not a novation and did not release comakers on notes, did not estop payee from maintaining action against judgment debtor and comakers to enforce payment of notes and foreclose chattel mortgage given as security therefor. Civ.Code, §§ 1530, 1531, subds. 1–3, 1543.

12. Bills and Notes ⇨495

Where note is in the form of a promise made in the singular number and executed by each of several comakers, the presumption is that the promise is joint and several making the obligations of comakers joint and several. Civ.Code, §§ 1660, 3098(7).

13. Judgment ⇨628

Parties ⇨30

Joint obligors upon the same contract are indispensable parties to an action thereon and if judgment is obtained in a separate action against one obligor, it bars an action against the others.

14. Judgment ⟹629
Parties ⟹29

Where obligation, whether on contract or in tort, is both joint and several, one or more of the obligors may be sued without joining all and a judgment against one does not bar subsequent action against remaining joint and several obligors.

15. Chattel Mortgages ⟹243
Judgment ⟹629

Written agreement between one of several comakers jointly and severally liable and payee of notes, which did not operate as a novation to cancel the notes, did not extinguish chattel mortgage given as security for payment of notes or preclude mortgagee from resorting to security of the mortgage, and hence obtaining a judgment on such agreement against one maker did not preclude mortgagee from obtaining a deficiency or personal judgment against comakers, particularly where agreement was susceptible of interpretation that maker, executing it, confessed judgment while waiving as to himself the benefit of prior resort to mortgage security and yet keeping mortgage alive and available for the benefit of mortgagee and maker's cosigners. Civ.Code, § 2953; Code Civ.Proc. § 726.

16. Chattel Mortgages ⟹287

Prohibition against waiver by mortgagor of the benefit of prior resort to mortgage security at the time of or in connection with the making of loan and execution of chattel mortgage signified authority in mortgagor later to waive the rights or privileges conferred upon him by statute prescribing the circumstances under which a deficiency judgment may be obtained. Civ.Code, § 2953; Code Civ.Proc. § 726.

17. Appeal and Error ⟹1180(1)

Reversal of judgment dismissing action as to all but one defendant, entered upon the granting of motions for summary judgment and to dismiss, did not warrant inference that plaintiff should have judgment on the issues framed by the pleadings and did not foreclose the determination of any issue of fact upon evidence presented at trial.

◆

Mancuso, Herron & Winn, San Francisco, for appellant.

Athearn, Chandler & Hoffman, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff W. E. Williams has appealed from a judgment dismissing as to all the defendants but Reed this action to enforce payment of two promissory notes and to foreclose a chattel mortgage given to secure the notes. The judgment was rendered in response to a motion for summary judgment by defendant Cairns and a motion for dismissal by defendants Arvidson and Carroll. It followed an order which declared that it appeared from the affidavits of the parties that the "debt sued upon has been satisfied by a judgment (§ 726, C.C.P.), and that there are no triable issues presented by the pleadings."

The notes in suit bear date June 14, 1950, and were signed as makers by all the defendants (Glen E. Reed, Robert M. Cairns, Kenneth W. Arvidson, and Thomas F. J. Carroll) in favor of plaintiff as payee. Each note bears interest at 5%. One is in the principal sum of $30,000, due in sixty days; the other, in the sum of $10,000 due December 14, 1950.

The defendants failed to pay the $30,000 when it became due. Thereafter and on October 12, 1950, plaintiff entered into an agreement with defendant Reed and his wife concerning these notes and their payment. That agreement referred to the $30,000 and the $10,000 notes and the chattel mortgage given to secure them, and then provided as follows: (1) "* * * Williams does hereby agree to accept the sum of Thirty Five Thousand Dollars ($35,000.00) plus interest on Thirty Thousand Dollars ($30,000.00) at the rate of five percent (5%) per annum from the 14th day of June, 1950, until paid, in full settlement of both Promissory Notes hereinabove described, said sum to be paid to him in full on or before the 28th day of October, 1950."

(2) Williams further agrees: "* * * to withhold any action to enforce the collection of said note and/or the foreclosure of said Chattel Mortgage to and including the 28th day of October, 1950."

"*3.* Upon receipt of said payment in full, W. E. Williams will execute any and all documents required to evidence full satisfaction of said obligation. Glen E. Reed * * * does hereby agree and covenant * * * in full discharge of his obligation to pay to W. E. Williams in full on or before the 28th day of October, 1950, the sum of Thirty Five Thousand Dollars ($35,000.00) plus interest at the rate of five per cent (5%) per annum on Thirty Thousand Dollars ($30,000.00) commencing the 14th day of June, 1950, until paid."

(4) Reed and wife each for himself or herself agree that if the entire sum of $35,000 plus interest is not paid to Williams on or before October 28, 1950:

> "*A.* That W. E. Williams shall have judgment for Thirty Five Thousand Dollars ($35,000.00) plus interest as provided herein against Glen E. Reed, who shall be adjudged liable therefor together with any costs and disbursements incurred by the said W. E. Williams in effecting said Judgment and the collection of same, including reasonable attorneys fees;
>
> "*B.* The said Glen E. Reed * * * does * * * hereby waive any and all legal and/or equitable defenses, of whatever kind or nature, to the claim of the sum of Thirty Five Thousand Dollars ($35,000.00) plus interest as herein provided, including, but not in limitation of the foregoing, any and all defenses, legal and/or equitable to either or both of the said Promissory Notes and/or to the said Chattel Mortgage;
>
> "*C.* That W. E. Williams may obtain said Judgment without service of any papers upon Glen E. Reed and/or Alice Marie Reed and without prior notice to either of them; that in fact by this Agreement the said Glen E. Reed * * * does hereby confess Judgment under the conditions and in the amounts herein contained;
>
> "*D.* That Glen E. Reed and Alice Marie Reed each for himself or herself jointly, do hereby waive now and forever any stay of execution upon such Judgment;
>
> "*E.* That Glen E. Reed and Alice Marie Reed each for himself or herself and jointly do hereby waive any and all rights to set aside said Judgment to move for new trial or to appeal from said Judgment;
>
> "*F.* That Glen E. Reed and Alice Marie Reed does hereby each for himself or herself and jointly declare that W. E. Williams, his agents, employees, servants and assigns may use any and all force reasonably necessary to execute upon any of the personal or real property of said debtors wherever located at any time of the day or night and the said debtors do hereby waive any and all rights or claims that they might have for wrongful taking or unlawful taking of said real and/or personal property by reason thereof and any and all claims and all defenses that they might assert by reason of the reasonable force used in taking of the real and/or personal property;
>
> "*G.* That Glen E. Reed and Alice Marie Reed each for himself or herself and for themselves jointly, do hereby agree that W. E. Williams, his agents, employees, servants or assigns may execute said Judgment upon all of the property, not in limitation of the last preceding paragraph, particularly described in that said Chattel Mortgage heretofore made and executed by Glen E. Reed to W. E. Williams as aforesaid."

Mrs. Reed expressly waived any objections to the chattel mortgage theretofore executed by her husband and waived any defenses she might have to the mortgage and agreed that the mortgage be deemed to have been executed by her as well as by her husband.

Defendant Reed covenanted and agreed that the interest of "Williams in and to the personal property described in the said Chattel Mortgage is the paramount lien interest in and to each and every item of property therein described and * * * covenants and agrees to hold the said W. E. Williams, his agents, employees, servants and assigns free and harmless upon any claim successfully made by any person or persons that such person or persons interest on all or any of said personal property is paramount and superior to that of W. E. Williams therein. In the event of any costs, including attorneys fees are incurred by the said W. E. Williams in defending his interests in the said property against the claim of any person or persons, such cost and reasonable attorneys fees shall be paid and it is hereby agreed that they shall be paid by the said Glen E. Reed * * *."

Soon after maturity of the October 12, 1950, obligation, plaintiff brought suit upon it against Reed, and on November 2, 1950, obtained judgment against him for $35,571.24, costs, and attorneys fees. No part of that judgment has been paid. Nor does it appear that plaintiff has taken any steps, by levy of execution or otherwise, to enforce that judgment.

April 3, 1951, the present action was filed against the four makers of the original $30,000 and $10,000 notes.

[1, 2] These are the significant facts concerning which the parties are in agreement.[1] Do these facts demonstrate that plaintiff is without right to maintain the present action?[2]

Defendants Cairns, Arvidson, and Carroll say this question should be answered in the affirmative. They claim that (1) the October 12, 1950, agreement between plaintiff and the Reeds was a novation and released the cosigners of the notes, (2) the reduction of the October, 1950, obligation of Reed to judgment was an election which estops plaintiff from proceeding herein, and (3) plaintiff has waived the security of the chattel mortgage to the prejudice of the rights of Reed's cosigners and thereby lost his right to proceed against them.

[3] (1) *Did the October, 1950, agreement between the plaintiff and the Reeds operate as a novation and thereby release Reed's comakers from their obligation on the original notes?* "Novation is the substitution of a new obligation for an existing one." Civ.Code, § 1530. "Novation is made: 1. By the substitution of a new obligation between the same parties, *with intent to extinguish the old obligation;* 2. By the substitution of a new debtor in place of the old one, *with intent to release the latter;* or, 3. By the substitution of a new creditor in place of the old one, *with intent to transfer the rights of the latter to the former.*" Civ.Code, § 1531, emphasis added. Novation is a question of fact, and the burden of proving it is upon the party asserting it. Alexander v. Angel, 37 Cal.2d 856, 860–861, 236 P.2d 561, and cases cited.

[4] If the mere execution of the October 12, 1950, agreement is to meet the requirements of subdivision 1 of section 1531, we must find expressed in the agreement an "intent to extinguish the old obligation". If it is to meet the requirements of subdivision 2, we must find an "intent to release" the old debtors. Where is any

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[1] Reed's cosigners make some claim to having been mere accommodation makers but that presents, at most, a triable issue of fact. Williams claims, by his affidavit and that of Reed, that the co-signatures were given for a consideration, not merely a lending of their credit to Reed. See Civ.Code, § 3110; Gardiner v. Holcomb, 82 Cal.App. 342, 351–353, 255 P. 523; Brown v. Volz, 90 Cal.App.2d 793, 798–799, 204 P.2d 110.

[2] Upon notice of motion supported by affidavit, for summary judgment against a plaintiff, the complaint may be dismissed unless the plaintiff by affidavit shows such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. The affidavit in support of the motion "must contain facts sufficient to entitle * * * defendant to a judgment in the action". The affidavits in opposition "shall set forth facts showing that * * * a good cause of action exists upon the merits." Code of Civ.Proc. § 437c, Stats. 1939, ch. 331, p. 1671. The inquiry is limited to ascertaining if there is an issue of fact to be tried, not to determine that issue itself. Arnold v. Hibernia S. & L. Soc., 23 Cal.2d 741, 146 P.2d 684; Walsh v. Walsh, 18 Cal.2d 439, 441, 116 P.2d 62; Gardenswartz v. Equitable etc. Soc., 23 Cal.App.Supp.2d 745, 752, 68 P.2d 322.

such intent manifest in this agreement? We find none.

Plaintiff agreed to accept, in settlement of the old notes, a certain sum of money, with interest, that sum to be paid in full by October 28, 1950. That does not indicate an intent to substitute the new obligation for the old, unless and until the new obligation has been performed. Of like import was plaintiff's promise "upon receipt of payment in full" to execute documents evidencing satisfaction of the old obligation. His agreement that he would withhold until October 28, 1950, "any action to enforce the collection of said note" (the old obligation) or "the foreclosure of said chattel mortgage" indicates an intent to keep the old obligation alive, not to extinguish it nor to release Reed or any of his cosigners, nor to release the mortgage security. Of similar import are Reed's agreement that plaintiff's interest in the personal property described in the chattel mortgage is the paramount lien interest in and to every item of that property, and Mrs. Reed's waiver of any objections or defenses she might otherwise have to the chattel mortgage which her husband had executed without her signature. Nor do we derive any different intent from the confession of judgment features of the October, 1950, agreement. Those features merely implement that agreement. Of themselves they do not evince an intent presently to substitute the new obligation for the old, nor to substitute Reed as sole obligor in lieu of Reed and his comakers of the original notes.

[5] Reed's comakers rely heavily upon Alexander v. Angel, supra, 37 Cal.2d 856, 236 P.2d 561, but that case does not support them. It was not a summary judgment case. It had gone to trial upon the merits. The trial court found that Angel purchased a fountain lunch and restaurant from Alexander, giving the latter a mortgage on the business fixtures and that Angel later sold to Haws. Haws then made an agreement with Alexander whereby Haws undertook to pay a sum of money equal in amount to Angel's obligation, in amounts and at times different from those specified in the old obligation. The trial court further found it was the intention of the parties to the new agreement to substitute the new agreement and the new debtor for the old agreement and the old debtor, and that such intention was evidenced by the language and actions of the parties subsequent to the execution of the new agreement. The reviewing court found sufficient evidence in the record to support those findings, applying " 'the time honored rule that all substantial conflicts must be resolved in favor of the respondent, and *all legitimate and reasonable inferences indulged in to uphold the findings if possible.*' " 37 Cal.2d at page 858, 236 P.2d at page 562. In the instant case, in contrast, we have for consideration only the writing signed by plaintiff and the Reeds, and from it alone we cannot derive an intent to substitute the new obligation for the old or a new debtor for the original four debtors.[3]

[6–10] Even if Reed's October, 1950, agreement with plaintiff were in substitution and release of Reed's obligation on the original notes, it would not necessarily follow that plaintiff thereby released Reed's comakers. That, it would appear, was the rule at common law and in California prior to the enactment of section 1543 of the Civil Code. See Armstrong v. Hayward, 6 Cal. 183, 186, limiting the former rule to a technical release under seal; People v. Buster, 11 Cal. 215, a release of one surety released his co-sureties as to future acts of the principal; and Spencer v. Houghton, 68 Cal. 82, 89–91, 8 P. 679. Section 1543 of the Civil Code provides that "A release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him." This section "provides in effect that the joint debtor who accepts a release shall be held to have consented that the liability of his joint debtor should be continued together with his own liability to contribution." North. Ins. Co. v. Potter, 63 Cal. 157, 158. This section applies to persons jointly and severally obligated as comakers of a promissory note. Wristen v. Curtiss, 76 Cal. 6, 18 P. 81. The same is true in respect to the release of one of the comakers after their obligation has been reduced to judgment. Harrier v. Bassford, 145 Cal. 529, 532–533, 78 P. 1038. It applies to cosureties on the bond of an administrator, Elizalde v. Murphy, 146 Cal. 168, 170–171, 79 P. 866, and to joint guarantors of a promissory note. Brown v. Pacific Coast Agency, 53 Cal.App. 788, 791, 200 P. 977. See, also, French v. McCarthy, 125 Cal. 508, 512, 58 P. 154, and Uhl Estate Co. v. Commissioner of Internal Revenue, Cir., 116 F.2d 403, 405.

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[3] In this regard it might be noted that the execution of a new chattel mortgage covering the same property and the same debt as a prior chattel mortgage though providing for different payments, does not extinguish the lien of the prior mortgage in the absence of an express agreement so to do. Bowden v. Bank of America, 36 Cal.2d 406, 224 P.2d 713.

Respondents assert that the fact that the new agreement was executory in nature did not prevent it from operating as a discharge of the original notes, hence that Reed's nonperformance of the new agreement did not prevent or avoid such a discharge taking place, nor did it revive the notes. It is true, of course, that a creditor and a debtor may substitute a new executory contract for an old one. But that is not, upon the record before us, what the plaintiff and Reed did in October of 1950. Nonperformance of that agreement could not very well effect a discharge which the signing of that agreement did not effect.

[11] (2) *Was the reduction of Reed's October, 1950, obligation to judgment an election which estops plaintiff from maintaining the present action?* If the October, 1950, agreement was not a novation and did not release Reed's comakers on the original notes, it is difficult to see how the mere reduction of Reed's October obligation to judgment (a judgment not yet satisfied in whole or in part) could give that obligation a different effect. In October Reed promised to pay plaintiff a certain sum of money. In November the court found that Reed for a valuable consideration promised to pay plaintiff that sum of money, and decreed that plaintiff have judgment against Reed for that amount of money. That judgment does not import any new factor into the situation. It affords plaintiff a better muniment of title to Reed's October promise to pay. It does not modify plaintiff's promise to accept that amount of money, and nothing but money (no mere added muniment of title to Reed's promise) in satisfaction of the original notes of June, 1950.

[12] The parties agree that upon the basis of the record before us the obligations of the defendants as comakers of the original notes were joint and several. Each note was in the form of a promise made in the singular number and executed by each of the defendants. In such a case there is a presumption that the promise is joint and several. Civ.Code, § 1660 and subd. (7) of § 3098.

[13, 14] Reed's comakers claim that in such a case the bringing of an action against one of the makers (Reed) without joining the others, and obtaining judgment against him alone, bars the plaintiff from later suing any of the others in respect to that obligation. They cite cases from other jurisdictions, none from California. Those cases are not applicable. Three of them involved joint, not joint and several, obligations: Fleming v. Ross, 1906, 225 Ill. 149, 80 N. E. 92, 8 Ann.Cas. 314; Morgan v. Edgar, 1929, 107 W.Va. 536, 149 S.E. 606; and Fedderson v. Goode, Colo., 1944, 145 P.2d 981. The remaining case, Taylor v. Sartorious, 1908, 130 Mo.App. 23, 108 S.W. 1089, involved a joint and several obligation. The court recognized that joint and several obligors may be sued separately but held that those later sued get the benefit of a judgment favorable to the obligor first sued, to the extent that he successfully defended. It is true in most jurisdictions, including California, that *joint* obligors upon the same contract are indispensable parties. They may not be sued separately, Farmers' Exchange Bank v. Morse, 129 Cal. 239, 243, 61 P. 1088; Woods v. Berry, 111 Cal.App. 675, 680, 296 P. 332. If judgment is obtained in a separate action against one, it bars an action against the others. Brady v. Reynolds, 13 Cal. 31, 32–33. When the obligation is *joint and several* it is not nonjoinder to sue one alone, Goff v. Ladd, 161 Cal. 257, 260, 118 P. 792; Jones v. Wilton, 10 Cal.2d 493, 496–497, 75 P.2d 593; More-

ing v. Weber, 3 Cal.App. 14, 22, 84 P. 220; Ward v. Massachusetts B. & I. Co., 57 Cal. App. 623, 628, 208 P. 188; Webb v. Casassa, 82 Cal.App. 307, 312, 255 P. 541. The same is true of an action against one or more and less than all of a number of persons jointly and severally obligated as tort-feasors. In such a case the judgment obtained against one is not a bar to an action against the remaining joint and several obligors. "Nothing short of satisfaction in some form constitutes a bar * * *." Grundel v. Union Iron Works, 127 Cal. 438, 442, 59 P. 826, 827, 47 L.R.A. 467. See, also, Heath v. Manson, 147 Cal. 694, 701, 82 P. 331; Cole v. Roebling Construction Co., 156 Cal. 443, 449, 105 P. 255; Black v. Bringhurst, 7 Cal. App.2d 711, 714, 46 P.2d 993. That being so in respect to joint and several tort obligors, the same should be true of joint and several obligors under a contract. That seems to be the general rule. 39 Am.Jur. 908, Parties § 39, note 1; and 4 Corbin on Contracts, 1951, 774–775, § 937, note 35. Accordingly, but for the possible effect of section 726 of the Code of Civil Procedure, a mere judgment against Reed in a separate action against him upon the original notes would not preclude plaintiff from bringing subsequent actions against Reed's comakers.

But plaintiff's former action was not brought upon the original notes. It was brought against Reed upon his separate agreement of October, 1950, to which none of the other note makers was a party.

(3) *Has the plaintiff waived the security of the chattel mortgage to the prejudice of the rights of Reed's cosigners and thereby lost his right to proceed against them?* Reed's cosigners direct attention to section 726 of the Code of Civil Procedure which declares that "[t]here can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter", and prescribes the circumstances under which a deficiency judgment may be obtained and the manner and method of determining the amount of such judgment. They then claim that plaintiff has disabled himself from resorting to the security of the chattel mortgage and has thereby prevented himself from getting a deficiency or personal judgment against them.

[15] This came about, they say, because the October, 1950, agreement with Reed operated as a novation which cancelled the original notes and as a necessary consequence extinguished the chattel mortgage. This argument lacks merit for the reason, as we have seen, no novation occurred by the mere execution of the October, 1950, agreement.

They further contend that "even if no novation had been entered into, and the plaintiff had brought his action * * * against Reed alone on the notes and recovered judgment, the plaintiff would have been only an unsecured judgment creditor, and the lien of the mortgage would have been lost." Whether or not such a suit by plaintiff reduced to judgment would have lost him the mortgage seems immaterial. He did not bring an action on the "notes." He brought an action on the October, 1950, agreement.

[16] Moreover, plaintiff's former action against Reed was upon an agreement susceptible to the interpretation that Reed confessed judgment while waiving as to himself the benefit of prior resort to the mortgage security and yet keeping the mortgage alive and available for the benefit of plaintiff and Reed's cosigners. The prohibition against Reed's making any such waiver at the time of or in connection with the making of the loan and the execution of the mortgage, Civil Code, § 2953, signifies authority in Reed later to waive the rights or privileges conferred upon him by section 726 of the Code of Civil Procedure. See Salter v. Ulrich, 22 Cal.2d 263, 266–267, 138 P.2d 7, 146 A.L.R. 1344. If after obtaining judgment against Reed in the former action, plaintiff had levied execution against the mortgaged property, bought that property upon the execution sale, and were now relying upon the title thus acquired (as was done by the secured creditor in the Salter case) plaintiff might find that he had destroyed the mortgage security or had estopped himself from claiming any mortgage interest in that property and thereby be precluded from obtaining a deficiency judgment against Reed's cosigners. But plaintiff has not done that. There is nothing in the record before us to indicate that he has even taken out a writ of execution to enforce the judgment in the former action.

There is some indication that respondents contend that the $10,000 was usurious and wholly or partially void. We will not discuss this contention as it is not an issue before us on the present record.

[17] Lest we be misunderstood in this matter, it should not be inferred that plaintiff should have judgment on the issues framed by the pleadings. We have discussed and decided the issues as framed on the appeal from the judgment entered upon the granting of the motion for summary judgment and the motions to dismiss. We do not intend to foreclose the determination of any issue of fact (including novation) upon evidence presented at the trial of this action.

The judgment is reversed and the cause remanded for trial.

PETERS, P. J., and BRAY, J., concur.

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113 Cal.App.2d 277

PEOPLE v. SONIER.

Cr. 2824.

District Court of Appeal, First District, Division 2, California.

Sept. 26, 1952.

Defendant was convicted in the Superior Court, City and County of San Francisco, Herman A. Van Der Zee, J., of assault with a deadly weapon, and he appealed. The District Court of Appeal, Dooling, J., held that the exclusion of defendant's testimony that he was afraid of prosecuting witness was prejudicial error, since such testimony related to issue of self-defense.

Reversed and remanded for new trial.

1. Assault and Battery 🔑67

The justification of self-defense requires that defendant was actually in fear of his life or serious bodily injury and that conduct of other party was such as to produce that state of mind in a reasonable person.

2. Criminal Law 🔑390
Homicide 🔑194

Where state of mind of party is in issue, it is always competent for a party to testify to his own state of mind, and therefore where self-defense is relied on, after prima facie proof of facts which would support finding of reasonable cause to apprehend death or great bodily harm, defendant is entitled to testify to his own mental reaction.

3. Criminal Law 🔑783½

In prosecution for assault with deadly weapon wherein defendant contended he acted in self-defense, although court did not in terms strike out defendant's testimony that he was afraid of prosecuting witness, sustaining of objection to question which elicited such testimony and instructing jury not to consider any offer of evidence that had been rejected by the court gave jury impression that they should not consider such testimony. Pen.Code, § 245.

4. Assault and Battery 🔑86
Criminal Law 🔑1170(1)

In prosecution for assault with deadly weapon wherein defendant contended that he acted in self-defense, exclusion of his testimony that he was afraid of prosecuting witness was prejudicial error. Pen.Code, § 245.

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Terry A. Francois, San Francisco, J. Maxwell Peyser, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Defendant was convicted by a jury of a violation of Penal Code sec. 245, assault with a deadly weapon. The defendant inflicted cuts on the complaining witness with a knife and at the trial relied upon self-defense as a justification. The evidence is in conflict as to which party was the aggressor but according to the evidence favorable to defendant the complaining witness attacked defendant with a metal footrest from a bootblack's stand and defendant then drew his knife from his pocket and inflicted the wounds.

The trial judge sustained objections to all questions directed to defendant as to his state of mind when attacked by the complaining witness. The culminating question is illustrative of these rulings:

> "Q. Mr. Sonier, were you in fear that you would receive serious bodily injury from the shoe rest if you did not take some action against the complaining witness?
>
> "Mr. Berman: The same objection as before.
>
> * * * * * *
>
> "The Court: Objection sustained."

[1] The justification of self-defense requires a double showing: that defendant was actually in fear of his life or serious bodily injury and that the conduct of the other party was such as to produce that state of mind in a reasonable person. (13 Cal.Jur. 638–639.)

[2] It is too well settled to require extensive citation that where the state of mind of a party is in issue it is always competent for the party to testify to his own state of mind (10 Cal.Jur. 832; 8 Cal.Jur. 33) and so it has been uniformly held whenever the question has arisen that where self-defense is relied on, after prima facie proof of facts which would support a finding of reasonable cause to apprehend death or great bodily harm, the defendant is entitled to testify to his own mental reaction, and it is error not to allow him to do so. State v. Mark Len, 108 N.J.L. 439, 158 A. 749; Commonwealth v. Woodward, 102 Mass. 155, 161–162; Duncan v. State, 84 Ind. 204, 208; State v. Sterling, Mo.Sup., 72 S.W.2d 70, 73; State v. Robinson, 181 N.C. 552, 107 S.E. 131; People v. Biella, 374 Ill. 87, 28 N.E.2d 111, 112; Starr v. Commonwealth, 97 Ky. 193, 30 S.W. 397, 399; State v. Jones, 249 Mo. 80, 155 S.W. 33, 38; 1 Wharton's Criminal Evidence, 11th Ed., sec. 329, p. 455. In Commonwealth v. Wooley, 259 Pa. 249, 102 A. 947, a criminal assault case, the Pennsylvania Supreme Court said of the defendant:

> "He alone, of all the witnesses called by him, could testify as to whether he really thought he was in peril of his life or great bodily harm, and no testimony could have been more competent than his own as to his belief that he was in such danger."

It is argued for the people that some evidence of defendant's state of mind in the face of the complainant's conduct was admitted. An examination of the record does not bear this out. The transcript does show the following:

> "Q. Were you afraid of him? A. I was.
>
> "Mr. Berman: The same objection as before, a self-serving declaration.
>
> * * * * * *
>
> "Mr. Francois: I submit, your Honor, that is the most important part of the case, to determine whether the man was attacking the other man or acting in self-defense. Fear is important.
>
> "The Court: Precisely Counsel, but that is a question for the jury to decide, not for the witness to volunteer. Objection sustained."

[3] The court did not in terms strike out the witness' answer but the jury must have understood the court's ruling to have that effect and later the court specifically instructed the jury: "As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same."

[4] The evidence was in sharp conflict and we cannot hold that the exclusion of this evidence was not prejudicial.

The judgment is reversed and the case remanded for a new trial.

NOURSE, P. J., and GOODELL, J., concur.

LOS ANGELES COUNTY v. CONTINENTAL CORP.

LOS ANGELES COUNTY v. CONTINENTAL DEVELOPMENT CORP.

Civ. 19058, 19060, 19059.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1952.

Rehearing Denied Oct. 16, 1952.

Hearing Denied Nov. 20, 1952.

The County of Los Angeles brought actions against the Continental Corp., a corporation, and against the Continental Development Corporation, sometimes known as the Continental Development Co., a corporation, to recover taxes levied and assessed against rights of defendants under contract with the Los Angeles County Flood Control District whereunder defendants were given right to drill for oil and gas on realty of district. The Superior Court of Los Angeles County, Julius V. Patrosso, J., entered judgments for plaintiff and defendants appealed. The District Court of Appeal, McComb, J., held that the contract constituted an oil and gas lease or at least vested in defendants an incorporeal hereditament or a prendre taxable under the Revenue and Taxation Code.

Judgments affirmed.

1. Limitation of Actions ⚿34(7)

Actions by county against corporations to recover taxes levied and assessed against rights of corporations under contract with Flood Control District whereunder corporations were given right to drill for oil and gas on realty of district, were governed by three year limitation statute applicable to action on a liability created by statute, other than a penalty or forfeiture, and not by four year limitation statute relating to actions on book accounts. Revenue and Taxation Code, § 107; Code Civ.Proc. §§ 337, subd. 2, 338, subd. 1.

2. Limitation of Actions ⚿43

Generally, a statute of limitation does not commence to run until a cause of action accrues, which is ordinarily when the liability matures, so that suit may be based thereon.

3. Limitation of Actions ⚿58(6)

Three year limitation statute began running as to causes of action by county against corporations to recover taxes levied and assessed against rights of corporations under contract with Flood Control District whereunder corporations were given right to drill for oil and gas on realty of district from dates of delinquency of taxes. Revenue and Taxation Code, §§ 107, 2605, 2606, 2617, 2618, 2901, 2922; Code Civ.Proc. § 338, subd. 1.

4. Limitation of Actions ⚿58(6)

In actions by county against corporations to recover taxes levied and assessed against rights of corporations under contract with Flood Control District whereunder corporations were given right to drill for oil and gas on realty of district, recovery of taxes which had become delinquent more than three years before actions were instituted was barred by three year limitation, but recovery of taxes which became delinquent less than three years before actions were instituted was not barred. Revenue and Taxation Code, §§ 107, 2605, 2606, 2617, 2618, 2901, 2922; Code Civ.Proc. § 338, subd. 1.

5. Judgment ⚿634

In determining validity of plea of res judicata, three questions are presented, namely, whether issue decided in prior adjudication was identical with the one presented in action in question, whether there was a final judgment on the merits, and whether party against whom plea is asserted was a party or in privity with a party to prior adjudication.

6. Judgment ⚿739

A judgment or final order in an action or proceeding is not evidence, conclusive or otherwise, of matters which were not involved in the proceeding and were not determined.

7. Judgment ⚿735

Matters not in issue in a previous action are not res judicata in a subsequent action.

8. Judgment ⚿720

Whether pleaded as a bar or merely as an estoppel, a previous adjudication is conclusive only as to those matters which were directly in issue and in fact determined.

9. Judgment ⚷735

First prior judgment determining that city ordinances dealing wth the drilling of oil wells were not applicable to Flood Control District and second prior judgment involving same ordinances were not res judicata in subsequent actions by county against corporations to recover taxes levied and assessed against rights of corporation under contract with Flood Control District whereunder corporations were given right to drill for oil and gas on realty of district.

10. Judgment ⚷739

Where Flood Control District was not authorized either by the state or by the county to maintain a proceeding to secure an adjudication as to whether interests passing to corporations under contract of corporations with district whereunder corporations were given right to drill for oil and gas on realty of district, were subject to taxation, and even if district undertook to litigate that question in such suit, judgment was not res judicata in subsequent actions by county against corporations to recover taxes levied and assessed against rights of corporations under contract with district.

11. Judgment ⚷704

Parties to a judgment are not bound by it in a subsequent proceeding or controversy between them, unless they were adverse parties in the original action.

12. Counties ⚷190(1)

Where contract between corporations and Flood Control District whereunder corporations were given right to drill for oil and gas on realty of district, contained substantially all provisions usually found in form of oil and gas lease customarily employed in the area, it constituted an oil and gas lease or at least vested in corporations an incorporeal hereditament or profit a prendre taxable by county under section of Revenue and Taxation Code making such leasehold estates and hereditaments and profits a prendre taxable. Revenue and Taxation Code, § 107.

◆

George H. Emerson, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Gordon Boller, Deputy County Counsel, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff and against defendant in the above entitled actions which were tried before the court without a jury, the three actions having been consolidated for the purpose of trial, defendants appeal.

The Honorable Julius V. Patrosso, the trial judge, prepared and filed an exhaustive and splendid opinion which fully sets forth the facts, appellant's contentions and the law applicable thereto. Since we have reached the same conclusions as the learned trial judge, no useful purpose would be served by our rephrasing the opinion prepared by Judge Patrosso. Therefore we adopt the same with minor modifications as the opinion of this court. It reads as follows:

"By these actions, which have been consolidated for the purpose of hearing, plaintiff seeks to recover taxes levied and assessed, purportedly pursuant to Section 107 of the Revenue and Taxation Code, against the rights vested in the defendant under an agreement hereinafter to be described in greater detail, executed by and between the Los Angeles County Flood Control District and the defendant, whereunder the latter was granted the right to drill for and produce oil, gas, and other hydrocarbon substances upon and from the land and premises therein described belonging to the district. Pursuant to stipulation of counsel, the cases have been submitted for decision upon the pleadings, supplemented by an agreed statement of facts and the only questions presented are the validity of the three defenses pleaded by the defendant, namely, (1) the statute of limitations, (2) res judicata, and (3) that the rights under the agreement in question are not of such nature or character as to be subject to taxation.

"The Statute of Limitations

"The first question which presents itself is the plea of the statute of limitations which defendant has interposed to plaintiff's various causes of action. In this connection it is to be noted at the outset that all of the complaints herein, as well as the various amendments thereto, were filed within three years of the date upon which the taxes sought to be recovered became delinquent, with the following exceptions:

"The second amended complaint in action No. 463871 whereby recovery was, for the first time, sought for taxes levied and assessed for the years 1943 to 1947, inclusive, was filed more than three years after the taxes for the fiscal years 1943 and 1944 became delinquent. In action No. 484748 the amended complaint seeking recovery for taxes levied and assessed for the fiscal years 1943 and 1944 was filed more than three years after such taxes became delinquent.

"Counsel are not only in disagreement as to the applicable period of limitation but also as to when a cause of action for the recovery of taxes accrues; plaintiff asserting that the applicable period of limitation is the 4-year period prescribed by subdivision (2) of Section 337 relating to actions upon a book account, in which instance the time begins to run from the date of the last item or entry in the account; while counsel for the defendant contends (1) that the applicable statute is the 3-year period prescribed by subdivision (1) of Section 338, and (2) that the action thereunder accrues not later than July 1 of the year for which the taxes sought to be recovered were levied. Additionally, however, counsel for plaintiff asserts that, if subdivision (2) of Section 338 is here applicable, the period of limitation does not commence to run until the date when the taxes sought to be recovered become delinquent.

"While counsel for plaintiff frankly acknowledges that it has uniformly been held in this state 'that a personal action for the recovery of taxes is based upon a liability created by statute within the meaning of Section 338, C.C.P.' (16 Cal.Jur. p. 475, section 77 and cases there cited), he nonetheless urges that in none of the cases so declaring did the Court have occasion to consider the precise question here presented.

"The term 'book account' has been defined, generally, as 'a detailed statement, kept in a book, in the nature of debit and credit, *arising out of contract or some fiduciary relation.*' (Wright v. Loaiza, 177 Cal. 605, 606 [171 P. 311].) While the books containing the assessment roll of the County of Los Angeles may be said to constitute a detailed statement in the nature of the debit and credit, an assessment of taxes cannot be said to arise either out of contract or a fiduciary relation. The obligation to pay taxes is clearly a liability created by statute, for in the absence of a statute authorizing the levy of a tax, no liability therefor exists. Thus in State v. Poulterer, 16 Cal. 514, 529, it was held that, in the absence of an express provision imposing personal liability for the tax or authorizing the filing of suit to recover the same, no action may be maintained therefor. Nor is the nature of the liability altered by the mere fact that evidence of the assessment of the tax is to be found in the assessment roll which in turn is included within a book or books. If counsel's position is correct, then the period of limitation prescribed for enforcing a liability created by statute might, in every instance, be extended for an additional period of one year merely by the mechanical act of entering the same in a book. The Court does not believe that the Legislature contemplated such a result.

"A similar question, in principle, was presented in the case of People v. [California] Safe Deposit [& Trust] Co., 41 Cal. App. 727 [183 P. 289]. There the intervenor Smith sought to recover accrued installments upon a written contract, and in order to avoid the bar of the statute of limitations undertook to predicate his claim upon a book account rather than upon the written agreement. In answer to this contention the Court said ([41 Cal.App. at page] 732 [183 P. at page 291]):

> " 'Appellant further contends that his cause of action is based upon a book account, in which the last entry was made on July, 7, 1917, and, therefore, his cause of action is not barred. The alleged book account was a memorandum kept by appellant, in which he

charged the amounts accruing under the contract and credited the several payments made, including that collected by him as the result of the judgment in the former suit above referred to. Appellant's alleged cause of action is based upon his contract and not upon this account. The writing is a mere memorandum of debts accruing from an entirely independent source. In Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 253 [146 P. 692], a number of definitions of a book account, as applied to the statute of limitations, are given among which is the following: "In 1 Ruling Case Law, p. 207, it is said: 'The expression "outstanding and open account" has a well-defined and well-understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to further settlement and adjustment. It is usually disclosed by the account books of the owner of the demand, and does not include express contracts or obligations which have been reduced to writing, such as bonds, bills of exchange, or promissory notes.'"'

"So here, plaintiff's cause of action is based upon the liability, created by statute, arising upon the assessment of the tax, and not upon the entry of the assessment thereof on the assessment roll, it being held that a cause of action to recover taxes accrues upon the assessment thereof, or upon the date payment becomes delinquent, and the running of the statute of limitations with respect to an action to recover the same is not tolled until the entry of the tax upon the assessment roll. (County of Los Angeles v. L. A. Junk Co., 8 Cal.App.2d 136 [47 P.2d 309].)

[1] "Not only for the reasons stated, but in the absence of any authority in California or elsewhere supporting the contention of counsel for plaintiff, and in view of the previous decisions of our courts declaring that actions to enforce the payment of taxes are controlled by the 3-year period prescribed by subdivision (1) of Section 338, the Court concludes that this section is applicable here.

[2] "Thus we are brought to a consideration of the question as to when a cause of action to recover taxes accrues. As a general rule, subject to exceptions not here deemed applicable, the statute of limitations does not commence to run until a cause of action accrues, which is ordinarily when the liability matures, so that suit may be based thereon. (16 Cal.Jur. p. 488, sec. 91.) In order to determine when suit may be commenced to enforce payment of taxes, we turn to the provisions of the Revenue and Taxation Code.

"Preliminarily, it is to be noted that, prior to 1943, taxes assessed against possessory interests in real property were not secured by a lien and were entered upon the unsecured roll, but by an amendment effective that year it was provided:

> "'Leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits *a prendre,* are sufficient security for the payment of taxes levied thereon. Such estates and rights shall not be classified as possessory interests, but shall be placed on the secured roll.' (Revenue and Taxation Code, 107.)

"Consequently, from and after the effective date of said amendment taxes on interests of the character therein described were entered upon the secured roll.

"With respect to taxes on the unsecured roll, Section 2901 Revenue and Taxation Code, provides that they are due on the lien date (the first Monday in March), and become delinquent on September 1 (Revenue and Taxation Code, 2922).

"Taxes on the secured roll are due, as to personal property and one-half of the real property tax, on November 1, and as to the second half of the taxes on real property on January 20 (Revenue and Taxation Code 2605–6), and become delinquent, as to the November 1 installment, on December 5, and, as to the second installment, on April 20. (Revenue and Taxation Code, 2617–2618.)

"With respect to the time when suit may be instituted to recover taxes assessed against the interests described in Section 107 (quoted above), that section provides that 'suit may be brought against an assessee of such taxes *in the event of delinquency in the payment thereof;*' while Section 3003 Revenue and Taxation Code provides:

> " 'Where delinquent taxes or assessments are not a lien on real property sufficient, in the judgment of the assessor, or the board of supervisors, to secure the payment of taxes or assessments, the county may sue in its own name for the recovery of the *delinquent* taxes or assessments, with penalties and costs.' (Emphasis supplied.)

"In Town of Dixon v. Mayes, 72 Cal. 166, 170 [13 P. 471], it was held that an action for the recovery of taxes could not be maintained until the payment of the same became delinquent, and it has likewise been held that where a statute prescribes the conditions upon which actions may be brought to enforce the payment of such taxes, a compliance therewith is essential. (People v. Ballerino, 99 Cal. 598, 600 [34 P. 330].)

[3] "As we have seen, both sections 107 and 3003 of the Revenue and Taxation Code, authorizing the institution of suit to enforce the payment of taxes, provide that suit may be instituted 'in the *event of delinquency*' or with respect to 'delinquent' taxes. It would therefore appear that no action to enforce payment of such taxes could be maintained under either section prior to the date when they became delinquent. From this it necessarily follows that the statute of limitations would not commence to run until the date of delinquency, when, for the first time, action to enforce payment thereof may be maintained.

"In the foregoing discussion the Court has not overlooked the decision in County of Los Angeles v. L. A. Junk Co., 8 Cal.App. 2d 136 [47 P.2d 309], upon which reliance is placed by counsel for defendant, and wherein appears the following language:

> " 'The cause of action must be held to have accrued not later than the first Monday in July, 1930 and was delinquent not later than December 5, 1930. (Political Code, Section 3746.)'

"It would appear obvious, however, that the use of the words 'cause of action' in the passage from the opinion last above quoted was inadvertent. To say that a cause of action becomes 'delinquent' upon a stated date is certainly an unusual expression in legal parlance, and that it was not used as an equivalent for the word 'barred' is readily apparent, for under no possibility could it rightly be said that a cause of action to recover taxes which accrued on the first Monday in July of a given year would be barred on December 5 of the same year. What the Court undoubtedly meant to say was that *liability* for the payment of the taxes there sought to be recovered accrued not later than 'the first Monday in July' and that *payment* thereof 'was delinquent not later than December 5, 1930'. Moreover, the Court's ultimate determination that the action was barred was in no wise dependent upon whether it accrued on the first Monday in July, 1930 or on December 5, 1930, for more than three years intervened between either date and the filing of suit.

[4] "From the foregoing it follows that as to actions Nos. 463871 and 484748 the plea of the statute of limitations must be sustained only in so far as the same seek recovery for the taxes for the fiscal years 1943 and 1944. As to all other causes of action therein as well as to action No. 574345, the plea of the statute of limitations is not sustained.

"Res Judicata

"The plea of res judicata interposed by the defendant is predicated upon the judgments rendered in two previous actions in this court. The first, No. 434964, in which the defendant herein and Los Angeles County Flood Control District were petitioners and Roger W. Jessup, as chairman of the Board of Supervisors of Los Angeles County Flood Control District, was respondent (hereinafter sometimes referred to as the mandate proceeding), was one wherein the petitioners sought to compel the execution by the respondent of the contract here involved between the Flood Control District and the defendant, and under which the alleged rights sought to be taxed were granted to or conferred upon the defendant. The petition alleged that the execution of the agreement had been duly authorized by the Board of Supervisors of the Flood Control District, which by resolution had directed and instructed the respondent as chairman to execute the same on its behalf, and that the respondent failed and refused to do so.

"In answer to the petition the defendant interposed an answer admitting substantially all of the allegations of the petition, but alleging as a defense thereto that his refusal to so execute the agreement was based upon the ground that the same 'constitutes a lease of the property of the Los Angeles County Flood Control District; that the Board of Supervisors of the Los Angeles County Flood Control District failed, refused and neglected to comply with any of the provisions mentioned in Section 4041–M of the Political Code of California, as incorporated by Section 3 in the Flood Control Act, relating to the leasing of property of said District.' (Answer, p. 5, lines 17–25.) Other defenses were interposed by the answer but they are deemed immaterial here.

"By its findings in that proceeding the trial court found 'that all of the allegations of respondent's fifth, separate, affirmative defense (that quoted above) are untrue, except that it is true that the Board of Supervisors of the Los Angeles County Flood Control District did not, prior to the approval of said agreement referred to in the petition herein and the order of the chairman to execute the same, comply with any of the provisions of Section 4041–M of the Political Code, the Court expressly finding that Section 3 of the Los Angeles County Flood Control Act, relating to the powers and duties of the Board of Supervisors of said District, does not incorporate or make applicable by reference, or otherwise, any portion of the Political Code of the State of California, the Court further finding that the said agreement constitutes a drilling agreement between the respective parties thereto for the drilling, developing and operating for the production, extraction, removal and disposal of oil, gas, and other hydrocarbon substances from the said property of the Los Angeles County Flood Control District, as referred to in the said drilling agreement and in the petition herein.' (Findings, par. X, pp. 2–3.)

"The second judgment relied upon was that rendered in action No. 442081, wherein the defendant herein and Los Angeles County Flood Control District were plaintiffs and the City of Long Beach and various of its officers were defendants, and which will hereinafter be referred to as the Long Beach action. By that proceeding the plaintiffs sought an injunction to restrain the enforcement of certain ordinances of the City of Long Beach regulating the drilling of oil wells within the corporate limits thereof, as well as others imposing license fees in connection with oil drilling operations, in so far as the same were sought to be enforced against the plaintiffs therein with respect to operations upon the real property which is the subject of the contract with which we are here involved and which was likewise the subject of the previous mandate proceeding.

"Briefly stated, the complaint alleged that certain of the ordinances therein referred to, as applied to the plaintiffs and the real property in question, were unreasonable, arbitrary, discriminatory and invalid, and as to others plaintiffs were excluded from the terms thereof. By its findings in that proceeding the trial court found that, by virtue of certain proceedings taken by the City of Long Beach in the mandate proceeding, previously referred to, that judgment constituted a final, binding and conclusive adjudication upon all of the parties to the Long Beach proceeding; that the ordinances therein referred to, in so far as they prohibited the drilling of oil wells upon any portion of the land of the plaintiffs, were discriminatory and invalid; and that certain ordinances imposing the fees for drilling operations were not applicable to the Los Angeles

County Flood Control District, which, by necessary implication, was exempted from the operation thereof.

"Among the conclusions of law the Court found that the provisions of certain ordinances requiring the execution, filing and maintaining of indemnity bonds in connection with drilling operations, excluded from their application, by necessary implication, the Los Angeles County Flood Control District 'and its agent', Continental Corporation, the defendant in the instant proceedings.

"Do either or both of these prior judgments constitute an adjudication that the agreement executed between the Flood Control District and the defendant herein did not constitute an oil and gas lease or one which granted to or conferred upon the defendant a 'possessory interest' in real property, and therefore subject to taxation under the Constitution and laws of this state, and, if so, are the same binding upon the County of Los Angeles in the instant proceedings?

> "Section 1908 C.C.P. reads in part as follows:
>
> " 'The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: * * *
>
> " '2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.'

[5] "In Bernhard v. Bank of America, [Nat. Trust Savings Ass'n], 19 Cal.2d 807 [122 P.2d 892], our Supreme Court tersely set forth the tests to be applied in determining the validity of a plea of res judicata as follows [19 Cal.2d at page] 813 [122 P.2d at page 895]):

> " 'In determining the validity of a plea of res judicata three questions are presented: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?'

"Inasmuch as no appeal was taken from either judgment, and each case was determined upon its merits, the second question or test suggested by the court need not concern us here.

"Turning our attention to the first, namely, identity of issue, it would appear reasonably clear that the issue presented in the instant cases was neither presented nor decided in either of the judgments relied upon. The issue here is whether or not the agreement executed between the Los Angeles County Flood Control District and the defendant herein constitutes an oil or gas lease or vests in the defendant a possessory interest in real property subject to taxation. From what has been said, it is apparent that no such issue was involved or determined in the mandate proceeding. The issue there presented was whether it was within the power of the Los Angeles County Flood Control District to enter into the contract in question without prior compliance with the procedure prescribed by Section 4041–M of the Political Code, and the only determination made by the Court in that proceeding was that the provisions of this section were not binding upon or applicable to the Los Angeles County Flood Control District. True, in its findings, the trial court in that proceeding characterized the document as 'a drilling agreement'. But no attempt was made by the Court to determine the legal effect of the document or the nature of the rights or interests thereby conferred upon and vested in the defendant. To say that a document constitutes 'a drilling agreement' is not tantamount to saying that it is not an oil or gas lease, or that the effect thereof is not to vest in the operator an estate in real property or a possessory interest therein which is subject to taxation.

"The issue involved in the Long Beach proceeding is even further removed from that tendered here. Whether or not the ordinances of the City of Long Beach therein involved were constitutional or were applicable to the Los Angeles County Flood Control District or the defendant did not necessarily involve a determination of the taxable aspect of the rights conferred upon the defendant by the agreement in question, nor does the characterization of the defendant in the conclusions of law as 'the agent' of the Flood Control District operate as a determination that no possessory rights in the real property mentioned and described in the agreement were vested in the defendant.

[6–9] "The judgment or final order in an action or proceeding is not evidence, conclusive or otherwise, of matters which were not involved in the proceeding and not determined. Matters not in issue in the previous action are not res judicata. (15 Cal.Jur., Sec. 188, p. 134, and cases there cited.) And, whether pleaded as a bar or merely as an estoppel, a previous adjudication is conclusive only as to those matters which were directly in issue and in fact determined. (St. John v. Consolidated Construction Co., 182 Cal. 25 [189 P. 276]; Koehler v. Holt Mfg. Co., 146 Cal. 335 [80 P. 73].) We conclude that in neither of the prior judgments relied upon was the issue here in question either presented or determined.

"Were it otherwise, however, it is clear that the same result must follow if we apply the third test mentioned in the Bernhard case, namely, identity of parties. Inasmuch as the County of Los Angeles was not a party to either of the prior proceedings, it would appear, upon their face, that they are not binding upon the plaintiff in these actions. Counsel for defendant, however, contends that the County of Los Angeles must nonetheless be considered as a party to the prior proceedings by reason of the fact that the Board of Supervisors of the County of Los Angeles constitute, ex officio, the Board of Directors of the Flood Control District which authorized the filing of both prior actions. The fact remains, however, that the Los Angeles County Flood Control Act expressly declares the District to be a body corporate and politic, vested with the powers and duties therein set forth. It is thus a distinct legal entity, notwithstanding the fact that it comprehends a greater portion of the territory embraced within the County of Los Angeles, and is governed by a board which comprises the same individuals which constitute the Board of Supervisors of Los Angeles County. The latter is a mere fortuitous circumstance. If the Flood Control Act provided for a governing body composed of persons other than the members of the Board of Supervisors, no one would have the hardihood to suggest that it did not constitute a separate and distinct entity from the County of Los Angeles, and it does not cease to be such merely because the Legislature saw fit to provide that the governing board thereof should consist of the same persons who constitute the Board of Supervisors of Los Angeles County.

"In People v. Richards, 86 Cal.App. 86 [260 P. 582], it was held that the board and officers of the Los Angeles County Flood Control District 'are state boards and officers' within the meaning of Section 72 of the Penal Code, denouncing as a crime the presentation, with intent to defraud, of a claim 'to any state board or officer, or to any county, town, city, district, ward or village board or officer.' Thus, the Board of Supervisors of the Los Angeles County Flood Control District, when acting as such, are not county officers, but state officers, and any action taken by such board is not action by the Board of Supervisors of the County of Los Angeles, as such, or of the County of Los Angeles.

"Counsel for defendant advances the further claim that even though it be held that the County was not a party to the previous proceedings, the judgments rendered therein are nonetheless binding upon it, upon the principle announced in People [ex rel. Bryant] v. Holladay, 93 Cal. 241 [29 P. 54], and other decisions of similar import. The contention, however, is untenable, and the principle adverted to is inapplicable here. This is readily made apparent by a brief consideration of the Holladay case.

"That was an action instituted by the Attorney General on behalf of the State of California upon the relation of one Bryant, in which it was alleged that the land therein described, located in the City of San Francisco, was lawfully dedicated to public use as a public square, and that defendants had erected buildings and fences thereon, obstructing its use by the public as such square. In defense of the action the defendant pleaded that in a prior proceeding, wherein he was plaintiff and the City and County of San Francisco was defendant, a decree had been rendered adjudging that the City of San Francisco had no right, title or interest in the land in question, and that this constituted a bar to the maintenance of the present proceeding. The Supreme Court sustained the plea, but the reasons therefor are clearly set forth in the opinion, as follows:

> "'*We entertain no doubt that the city and county of San Francisco has the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares, or land claimed as such, within its limits, and that in such action it is authorized to put in issue the alleged rights of the people to such easement, and that the state itself is bound by the result of such litigation, if the same is not collusive.* And we see no reason why these same rights might not also be tried and determined in an appropriate action in which the municipality might be a defendant—as, for instance, ejectment, where it had ousted the claimant from the possession; or by injunction, where it threatened to remove his buildings or trees or a portion of the soil from the land claimed by it as a public square—and the public would be bound by the final judgment therein if the action was conducted in good faith on the part of the city. The rule that the citizen shall not be twice vexed for the same cause of action is as binding upon the state as upon other litigants; *and the legislature, in conferring upon the city power to maintain and defend in the courts the rights of the state to streets and squares within its limits, must be presumed to have done so with reference to this well known maxim, and to have intended that the state should be bound by the result of such litigation.* And that an action by the adverse claimant against the city, to quiet his title, where the city claims to hold the legal title in trust for the use of the people, as a public square, is an appropriate action to determine such claim, is the effect of the decisions of this court in [City and County of] San Francisco v. Holli[a]day, 76 Cal. 18 [17 P. 942], and San Francisco v. Itsell, 80 Cal. 57 [22 P. 74].
>
> "'In [City and County of] San Francisco v. Holli[a]day, 76 Cal. 18 [17 P. 942], the action was ejectment by the city and county of San Francisco, for the purpose of recovering the land in controversy in this action, *the plaintiff claiming that it held the legal title to the land in trust for the people of the state*, and that the same had been dedicated to the use of the public, and that the defendants were intruders thereon. The action was therefore substantially one for the use and benefit of the people of the state, and as the plaintiff therein was authorized by law to bring the action for the purpose of preserving the alleged rights of the people, it could only be defeated by showing that the people of the state were not entitled to maintain such action; and the court, in holding that the right of the city and county of San Francisco to recover possession of the land in controversy for the use of the general public was barred by the judgment in Holli[a]day v. City and County of San Francisco, which is pleaded in bar of this action, in effect decided that the rights of the people of the state were also barred by that judgment.' (Emphasis supplied.)

[10] "The reading of the foregoing quotation from the opinion makes evident the basis of and limitations upon the doc-

trine therein announced and that it is wholly without application here. Here there can be no pretext that the Flood Control District was authorized either by the State or the County of Los Angeles to maintain a proceeding having for its purpose the securing of an adjudication as to whether the interests passing to the defendant under the contract in question were such as to be taxable under the Constitution and statutes of this state, and hence even though the District had undertaken to litigate this question with the defendant, any decision thereon would not be binding upon the plaintiff herein.

[11] "In this connection, one final question requires consideration. Counsel for defendant contends, in effect, that, if it be conceded that neither of the prior judgments constitutes a bar to the maintenance of this action *in toto*, they nonetheless operate to estop the plaintiff County from enforcing collection of so much of the tax herein sought to be recovered as represents the portion thereof levied for flood control purposes. The contention, too, is wholly without merit, not only because, as we have seen, no issue as to the right of the County to tax the interests acquired by the defendant under the terms of the agreement in question was presented in the prior proceedings, but for the additional reason that in neither proceeding did the District and the defendant occupy the position of adversaries therein. 'It is also a general principle in the field of *res judicata* that parties to a judgment are not bound by it in a subsequent proceeding or controversy between them, unless they were adverse parties in the original action.' (Standard Oil Co. v. J[ohn] P. Mills Organization, 3 Cal.2d 128, 139 [43 P.2d 797].

"For all of the foregoing reasons, the Court concludes that the plaintiff is not bound by the judgments in question, and that the same neither operate as a bar to nor estop the plaintiff from maintaining the actions.

"The Nature and Legal Effect of the Agreement in Question

"Finally we come to the vital question here presented for determination, namely, the nature and legal effect of the agreement executed between the Los Angeles County Flood Control District and the defendant.

"The agreement in question is a lengthy one and a detailed analysis of each of its many provisions would unduly extend this memorandum. However, it may fairly be said that, although there are variations as will hereafter appear, it contains substantially all of the provisions usually found in the form of oil and gas lease customarily employed in this area. Thus it vests in the defendant (in the agreement and hereinafter referred to as contractor) *the exclusive right, for a term of twenty years and so long thereafter as oil, gas or other hydrocarbon substances is or are produced therefrom, to drill for, produce, extract and remove oil and gas and other hydrocarbon substances in and from, and store the same upon the lands in question*; contractor is granted the *exclusive right* to enter upon said lands at all times and to construct, use, maintain, erect, repair and replace thereon and therein all pipe lines, telephone, power and telegraph lines, tanks, machinery, building and other structures which contractor may require in carrying on its operations, together with rights of way for passage over and upon and ingress to and egress from the said lands for all of said purposes. Contractor agrees to drill a minimum of eight wells, the first to be spudded within ninety days from the effective date of the agreement 'at such location as may be selected by contractor' and thereafter to be drilled diligently to completion or until abandonment; contractor shall keep one string of tools in continuous operation at locations to be selected by it, allowing thirty days between the completion or abandonment of each well and the commencement of operations preparatory to drilling the next well, until the minimum number of wells is reached; 'contractor agreeing to drill such additional wells as it shall seem most likely to effect an adequate and proper drainage of the lands.' The cost of drilling, development and operation shall be paid by the contractor, the District not being obligated therefor save and except that the cost of such drillings and operation, within the limitations prescribed by the agreement, shall be reimbursed to the contractor from and only from the proceeds of the products produced from the land. Contractor is granted the *exclusive right* to and agrees to purchase all of the oil, gas, casinghead gasoline and other hydrocarbon substances produced and saved from said lands, less such amounts as may be necessary for fuel purposes; title to all such products remaining in the District until contractor shall pay the agreed market value therefor, which is defined to mean the highest market price, including any premium or bonus, obtainable from responsible purchasers for the products on the date of purchase. Contractor, at its option, may cease from any further drilling upon the lands, provided, however, that if at the time of such cessation all of the wells required to be drilled shall not have been drilled, or in the event contractor does not commence and complete the first well required by the agreement, all of contractor's rights under the agreement shall be forfeited as to any part of said lands not so drilled, *but as to each then producing or drilling well, and any plant or plants of contractor, so much of said lands surrounding same as may necessarily be required by contractor in maintaining and carrying on his operations on the retained well or wells, and at the plant or plants and area or areas shall remain in contractor, together with all rights of way for pipeline, pole lines and equipment upon all of the lands described in the agreement,* as well as the right of ingress to and egress from such retained wells, plants and areas as may be necessary in connection with contractor's operations thereon; contractor also reserving and being granted the right to operate, maintain, perforate, redrill, deepen and/or perform all other operations necessary or expedient to operate or maintain any well or wells located on the retained areas. Contractor is further obligated to drill offset wells to the extent in the agreement provided. While the District reserves the right to drill for, produce and extract hydrocarbon substances from those portions of the lands as to which the agreement shall have been terminated, the District engages that in so doing it will interfere as little as possible with contractor's operations in or upon those portions of said lands as to which its rights have not been terminated, and any wells drilled by the District shall be drilled with care and caution as to properly protect any zone or zones from which contractor at that time may be producing, and District shall drill no well closer than 250 feet to any drilling or producing well retained by contractor. Contractor is granted the right to erect and maintain a plant or plants for the extraction of natural gasoline from wet gas produced and saved from said lands as well as wet gas belonging to other parties, with a right to commingle such wet gas with that produced and saved from the District's lands. District reserves the right to occupy the lands in question and to use the same for any proper purpose other than the production of oil, gas or hydrocarbon substances.

"Upon expiration of the term of the agreement or a sooner termination thereof, pursuant to its provisions, 'contractor shall quietly and peacefully surrender to District all the rights and privileges created thereby, and all portions of said land occupied by contractor hereunder * * * and on demand of District contractor shall execute and deliver to District good and sufficient instruments of release necessary or convenient to surrender to District any and all rights, privileges and interest which contractor may have under or by virtue of this agreement, at the time of the expiration or termination thereof, and to that end contractor shall execute and deliver to District any and all necessary written instruments reasonably required by any reputable title company for the purpose of eliminating of record such rights, privileges and interest.' Upon breach by contract of any of the terms or conditions of the agreement and its failure to remedy the same within thirty days after written notice from District so to do, then at the option of the District, the agreement and all rights thereunder shall immediately cease and terminate 'as to such well or wells so in default', but the termination of the agreement as to any well or wells shall not be deemed to and shall have no effect upon, and shall effect no reduction in the computation of costs and expenses of contractor, as in this agreement otherwise defined and provided.

"In addition to the drilling and operating obligations imposed upon the contractor, the latter agrees to pay to the District, monthly, a sum computed by subtracting from the market price of the products produced and saved from the land the applicable expenditures chargeable thereto as defined in the agreement, and applying to the result so obtained percentages, varying from 30 to 65 per cent, depending upon the daily production per well and the gravity of the oil produced. Finally, the agreement provides that it shall inure to the benefit of and be binding upon the successors and assigns of the parties.

"Does this instrument constitute a 'leasehold estate for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth' or grant to defendant 'other rights relating to such substances which constitute incorporeal hereditaments or profits *a prendre*' as these words are used in Section 107, Revenue and Taxation Code?

[12] "The nature and legal characteristics of an oil and gas lease were considered at considerable length by our Supreme Court in Callahan v. Martin, 3 Cal. 2d 110 [43 P.2d 788, 101 A.L.R. 871].

* * * * * *

"* * * it would appear fairly obvious that the agreement which has been summarized above, if it does not constitute an oil and gas lease, at least vests in the defendant an incorporeal hereditament or profit *a prendre* which is taxable under Section 107, Revenue and Taxation Code. While denominated by the parties as a 'drilling and operating agreement' rather than as a lease, this is of no particular significance, for it is elementary that the designation which the parties to an agreement see fit to affix to it, is not controlling as to its legal effect. (Hammond Lumber Co. v. County of Los Angeles, 104 Cal.App. 235, 240 [285 P. 896].) Disregarding mere form, certain it is that it vests in the defendant the exclusive right, for a term of years, 'to drill for and produce oil and other substances' from beneath the surface of the land therein described. In this aspect at least it differs in no respect from the usual oil and gas lease and the Court concludes that it is substantially the equivalent thereof.

"In support of his contention that the agreement does not constitute an oil and gas lease or vest in the defendant an incorporeal hereditament or profit *a prendre*, counsel for the defendant points to the fact (1) that while the defendant must, in the first instance, bear the cost of drilling, development and operation, it is to be reimbursed therefor, in whole or in part, from the proceeds of the hydrocarbon substances produced by it; (2) that the title to the products produced remain in the district until paid for by the defendant, and (3) that (so it is said) the rights of the defendant thereunder are not assignable by it.

"While perhaps in some or all of these particulars the instrument differs from the customary form of oil and gas lease in common use in this area, none of the alleged points of difference operate to destroy its character as an oil and gas lease, or as an incorporeal hereditament. The fact that the defendant is entitled to reimbursement for some or all of the cost of his operations upon the premises out of the proceeds derived from the products produced therefrom, is of no particular significance, for this is a mere matter of contract or agreement between the parties, which does not affect the legal nature of the rights vested in the defendant. There is no apparent reason why the lessee, when executing an oil and gas lease, may not exact as a condition that he be reimbursed, in whole or in part, for all drilling and operating costs, before any royalty shall become payable to the lessor. While it may be true that the usual provision is that the lessor's royalty shall be computed upon the gross production rather than upon the net, the fact that the latter method is selected by the parties does not alter the nature and legal effect of the instrument as a lease.

"Nor is it of any consequence that here the agreement undertakes to provide that title to the products produced by the defendant shall remain in the District until paid for by it. When considered in the light of the provision that the defendant alone may purchase such products and it is obligated so to do, this provision, upon which counsel for the defendant so much relies, would seem to be nothing more than a method or device designed to secure payment to the District of the royalty or rental herein reserved to it. If, instead of the provision in question, the agreement had provided that title to the products produced should vest in the defendant but the District should have a lien thereon to secure the payment of the royalty therein reserved to it, no one, we believe, would have the hardihood to contend that, by reason of such a provision, the instrument would cease to be an oil and gas lease or that the rights of the defendant thereunder would be, in legal effect, different from what they would have been if the instrument provided that title to the products should vest in it immediately when produced and severed from the land.

"Finally, if it be assumed, as contended by counsel, that defendant's rights under the agreement are not assignable, this would not operate to destroy its essential character as an oil and gas lease. Such a provision is not an unusual one in leasing agreements, and the Court's attention has not been directed to any authority supporting the proposition that the inclusion of such a clause operates to destroy an instrument's character as a lease. Indeed, the very contrary seems to be well established. (Kaiser Co. v. Reid, 30 Cal.2d 610, 620 [184 P.2d 879].) Contrary to the assumption of counsel, however, the interest of the defendant under the agreement would seem to be assignable in the absence of any provision restricting the right of assignment and the inclusion of the provision that the agreement 'shall inure to the benefit of and be binding upon the successors and assigns of the parties.'

"Nor are the views above expressed in any wise contrary to those to be found in the authorities cited by counsel for the defendant, as will readily appear.

"Jameson [Petroleum Co.] v. State, 11 Cal.App.2d 677 [54 P.2d 776], merely holds that an oil and gas lease is real property. In Roehn[m] v. Orange County, 32 Cal.2d 280 [196 P.2d 550], the question presented was the taxability by a county of a liquor license issued by the State Board of Equalization, and it was held that such a license was not taxable because not listed as an intangible in either the Constitution or the statutes. Stone v. City of Los Angeles, 114 Cal.App. 192 [299 P. 838], involved the right of the City of Los Angeles to lease certain tidelands and overflow lands for the purpose of drilling for oil and gas thereon, and the holding there was merely to the effect that an oil and gas lease, by its very nature, differs from an ordinary lease and hence was not comprehended by the language of a statute which authorized the city to lease certain tidelands granted to it by the Legislature. Richfield [Oil Co.] v. Hercules Gasoline Co., 112 Cal.App. 431 [297 P. 73], far from supporting defendant's position, is confirmatory of the views previously expressed herein. In speaking of the nature of a profit *a prendre*, the Court [112 Cal.App.] at page 434 [297 P. at page 75] says: 'A "profit *a prendre*" is considered an interest or an estate in the land itself and this is the principal feature which distinguishes it from a pure easement, which is a right or interest without profit. *It is the right to take something out of the soil of another*, as a right of common, and also some minor rights, as a right to fish, hunt, and hawk, or to mine metals, dig for oil; take oil from the land. * * * Thus the common oil and gas lease under which the lessee is entitled to enter upon the land of the lessor and develop and remove oil or gas is a "profit *a prendre*"'. (Emphasis ours.)

"In Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140 [99 P. 483, 20 L.R.A., N.S., 211], is was held that the estate of a lessee in lands overlying oil bearing strata who has the right under his lease to bore for, extract and convert to his own use oil therefrom, upon paying a royalty to the lessor, without any right to the ordinary usufruct of the soil, may be separately assessed for purposes of taxation to the lessee. It is difficult to see wherein this case affords any comfort to the defendant.

"Counsel places principal reliance upon In re Okahara, 191 Cal. 353 [216 P. 614], which was a proceeding in habeas corpus seeking to test the sufficiency of a criminal complaint charging violation of the alien land law, the gravamen of the offense being that the petitioner, in furtherance of an unlawful conspiracy, executed an agreement and contract with one Vicencio, whereby the latter transferred to petitioner for a term of five years *an interest* in a certain parcel of agricultural land containing 20 acres. Vicencio, who was a tenant of the real property in question, executed an agreement with the petitioner whereby the latter agreed to clear the land and make it ready for plowing and planting within a period of two years; the petitioner agreeing to plant the whole of said property to orchard within that period with trees to be furnished by Vicencio. In addition, the petitioner was to plant other crops and agreed to gather, pick and pack all of the fruit and vegetables grown by him; he further agreeing to furnish all labor, machinery, tools and equipment. The agreement further provided that the products were to be sold by Vicencio upon such terms and conditions as he deemed best and the petitioner was to receive as his compensation, in addition to an allowance of $50.00 for clearing the land, 50% of the net proceeds derived from the sale of the products. The agreement expressly provided that the petitioner was to be deemed an independent contractor and was to have 'no interest, right, or claim in or to any part of the said corpus but his sole right shall be to the compensation paid by the employer (Vicencio) as herein provided,' and further that 'the employer shall have no control over the said contractor and his employees and equipment.' In addition, it was provided that if at any time the employer was dissatisfied with the work done by the contractor, he might immediately terminate the contract on payment to the contractor of compensation as provided in the contract. While the Supreme Court held that the agreement did not constitute a lease and was nothing more than a 'cropping contract', it is at once apparent that the agreement there bears no resemblance to that involved in the instant case. As previously pointed out here, the defendant is vested with the exclusive right to go upon the lands in question and extract therefrom oil and other hydrocarbon substances which are a very part of the land itself, with the exclusive right to acquire the ownership of all of such products, rights which have universally been recognized as an interest in the land itself.

The last case to which counsel refers is that of Dabney v. Edwards, 5 Cal.2d 1 [53 P.2d 962, 103 A.L.R. 822], wherein it was held that an ordinary gas lease, *for a definite term of years*, did not constitute real property and that a contract of employment with a real estate broker to sell such a lease was not within the statute of frauds. The decision, however, does not purport to declare that such a lease is not an interest in real property which may be separately assessed and taxed to the lessee. Moreover, the case directly stands for the proposition that an oil and gas lease which, as is the case of the contract here involved, is to endure for a period of years and '*thereafter as long as oil and gas are found, discovered, obtained, or produced,*' constitutes a freehold estate in the nature of a qualified or determinable fee and must be deemed to be real property. This last determination would seem to be completely destructive of the claim advanced by the defendant herein.

"In conclusion it may be said that the Court is not oblivious to the fact that, for reasons not too difficult to discern, the parties to the agreement in question sought to give it the appearance of something other and different from an oil and gas lease, but when regard is had to substance rather than form, the true nature and legal effect of the instrument is made unmistakably plain. Despite the efforts of the parties, and whatever the reasons underlying the same may have been, however, the Court is satisfied that the interests vested in the defendant thereunder are clearly comprehended by Section 107 of the Revenue and Taxation Code and are properly taxable thereunder."

The judgments are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

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113 Cal.App.2d 295

BASSETT v. CRISP.

Civ. 8133.

District Court of Appeal, Third District, California.

Sept. 26, 1952.

Action by Luther D. Bassett against Charles B. Crisp, for injuries to Bassett while guest in automobile driven by defendant. The Superior Court, Merced County, Milo Popovich, J., entered judgment on verdict for plaintiff, and denied defendant's motion from judgment notwithstanding verdict, and defendant appealed. The District Court of Appeal, held that when defendant was shown, by evidence as construed most favorably to verdict, to have driven through several red lights immediately preceding collision at intersection at which he had entered against red light at speed of 30 miles per hour, and to have been warned concerning red lights, defendant was guilty of wilful misconduct rendering him liable for injuries to guest.

Judgment and orders affirmed.

1. Appeal and Error 🔑931(1)

On appeal, all conflicts in evidence must be resolved in favor of respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible.

2. Appeal and Error 🔑989

The power of the appellate court on a question of sufficiency of evidence to uphold verdict begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

3. Appeal and Error 🔑996

On appeal on ground of insufficiency of evidence, if two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of jury or trial court.

4. Automobiles 🔑244(4)

In action by guest for injuries resulting from automobile collision, evidence on issue of wilfull misconduct of driver, when construed by appellate court most favorably to verdict for guest, disclosed that collision occurred on dark night when traffic was heavy, and that immediately preceding collision defendant had driven through at least four red lights, that he had been warned, and that at rate of speed of 30 miles per hour he had driven into intersection at which collision occurred against red light without looking for traffic approaching intersection with green light.

5. Automobiles 🔑181(1)

"Willful misconduct" which will render operator of automobile liable for injuries to guest, is the intentionally doing something in operation of vehicle which should not be done or intentionally failing to do something that should be done under circumstances disclosing knowledge, express or implied, that injury to guest will be a probable result.

See publication Words and Phrases, for other judicial constructions and definitions of "Willful Misconduct".

6. Automobiles 🔑181(1)

Where, on dark night when traffic was heavy, defendant had, despite several warnings, driven through at least four red traffic lights, when he thereafter drove into intersection at which collision occurred, against red light at about 30 miles per hour, without looking for traffic, defendant was guilty of willful misconduct rendering him liable for injuries to guest.

7. Damages 🔑185(3)

In action by guest for injuries resulting from automobile collision when defendant drove through red light, evidence sustained finding that guest's paralyzed condition had resulted from injuries received in collision.

8. Witnesses ⚷380(5)

A party may impeach his own witnesses by the use of prior inconsistent statements where he has been surprised and damaged by the witnesses' testimony.

9. Witnesses ⚷380(5)

Where witness for guest in action against driver of automobile for injuries arising out of collision had stated in deposition that driver had gone through red lights prior to reaching intersection at which he went through red light and collision occurred, testimony of such witness at trial which tended to show that driver had not gone through series of red lights, and that lights, if red, were not plainly visible, and that same were not seen by guests in automobile, and that driver had not been warned about red light at scene of accident, constituted surprise which was prejudicial to guest, and such testimony might be impeached by showing prior inconsistent statements.

10. Appeal and Error ⚷1170(7)

In action by guest for injuries resulting from automobile collision when defendant allegedly drove through red light, wherein guest impeached his own witness by showing prior inconsistent statements concerning whether defendant had previously driven through red lights, and whether he had been warned of red light at intersection at which collision occurred, and it appeared that all other occupants of automobile had been called and testified concerning such facts, record established that, even if admission of such impeaching evidence was erroneous, it had not resulted in a miscarriage of justice. Const. art. 6, § 4½.

11. Trial ⚷295(1)

Instructions to a jury must be considered as a whole.

12. Automobiles ⚷246(3)

In action by guest for injuries resulting from automobile collision when defendant allegedly drove through red light, instructions on subject of willful misconduct by defendant in operation of automobile were not erroneous.

13. Automobiles ⚷245(87)

Question whether guest in automobile has assumed the risk incident to riding in vehicle under circumstances existing or whether he has been contributorily negligent because he did not warn driver, are ordinarily questions of fact for jury.

14. Automobiles ⚷244(56)

In action by guest for injuries which resulted from automobile collision which occurred when defendant drove through red light, wherein it appeared that defendant had, immediately preceding collision, driven through other red lights, and that he had been warned by occupants of automobile, evidence sustained implied findings of jury adverse to defendant on issues of assumption of risk and contributory negligence on part of guest.

◆

Vernon F. Gant, Modesto, D. Oliver Germino, Los Banos, for appellant.

C. Ray Robinson by R. A. McCormick and Wm. B. Boone, Merced, for respondent.

PER CURIAM.

Plaintiff, a guest in an automobile driven by defendant Charles B. Crisp, claimed injury resulting from the alleged misconduct of defendant. Upon trial the jury rendered a verdict in favor of plaintiff and against defendant in the sum of $45,000, and defendant has appealed from the judgment entered upon said verdict. Defendant has also appealed from the order denying his motion for judgment notwithstanding the verdict.

[1–3] The first and principal contention of appellant is that the evidence is wholly insufficient to sustain a finding of wilful misconduct. Before proceeding to discuss this contention we shall quote the well settled rule so aptly expressed in Juchert v. California Water Service Co., 16 Cal.2d

500, at page 503, 106 P.2d 886, 888 as follows:

> "As is always true on such appeals, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible. It is elementary that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. And when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury or trial court. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183; Treadwell v. Nichel, [Nickel] 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483."

Bearing this familiar rule in mind we shall summarize briefly the factual situation as disclosed by the record.

The accident occurred on January 12, 1950, at about 6:00 or 6:30 p. m., at the intersection of East Charter Way and South San Joaquin Streets in Stockton. It involved the 1941 Cadillac sedan owned and operated by defendant-appellant, Charles B. Crisp, and a 1941 Ford coupe operated by Mrs. Gladys Curry. Respondent Bassett was an admitted guest in appellant's car, riding on the right side of the rear seat. Other guests in appellant's vehicle were Dr. Jeremiah J. Wolohan in the middle of the front seat, Bobby J. Vander Griff on the right side of the front seat, and one Arthur Pierce on the left side of the rear seat. The intersection is controlled by the standard three color electric signal, one such traffic light being posted at each of the four corners of the intersection. Appellant concedes that he drove into the intersection through the red light. Mrs. Curry, who was driving in a northerly direction on South San Joaquin Street, testified that as she was about one-half block away from the intersection, the lights facing her turned green and were still green when she drove into the intersection; her Ford struck the right side of appellant's Cadillac, which was proceeding in an easterly direction on East Charter Way.

Earlier that day the group went to Stockton to ride in a boat owned by Dr. Wolohan, and kept by him in the Stockton harbor. Dr. Wolohan drove his own car to respondent's residence in Winton and the two proceeded in the Wolohan car to defendant's home in Delhi. Then all three went in defendant's Cadillac to Livingston where they picked up Mr. Pierce, and then they went to Modesto where Mr. Vander Griff joined them. Appellant Crisp then drove the group to Stockton in his vehicle, arriving at about 2:00 or 3:00 p. m. After several hours in the boat, the group started home some time between 5:00 and 6:00 p. m. in Crisp's automobile, with Crisp driving. They were seated as previously described, with plaintiff on the side which was struck.

Respondent testified that at one red light he said to appellant as he was driving through the intersection, "Charlie, you got a red one there." There was testimony that at another red light, Dr. Wolohan warned appellant, "we don't want any more red lights." Mr. Pierce testified, by deposition, that he remembered that someone in the car had warned appellant about going through a red light just prior to the accident. Mrs. Curry testified that after the accident she rode to the hospital in an ambulance with Dr. Wolohan and appellant, and that during the trip the doctor said to appellant, "I saw that light was red and I warned you," and that appellant responded, "I didn't see it in time." Respondent also testified that just before the collision he saw the traffic signal and said, "My God, another red light." There is also testimony by Dr. Wolohan and appellant, estimating that at the time of the collision appellant was traveling about 30 miles per hour; respondent's testimony was that "we was traveling pretty fast." Plaintiff testified that the force of the collision knocked him all over the car, and that when he stopped bouncing he was on one knee with his toe in the seat and his arm on the back of the front seat.

[4] Appellant in his briefs quotes testimony which may be deemed to contradict some of the material parts of the foregoing summary of the evidence, but we are not here concerned with the matter of weighing conflicts in testimony. Taking all of the evidence into consideration, together with every inference and presumption favorable to respondent which may reasonably be deduced therefrom, and disregarding all evidence in conflict therewith, the evidence is fairly susceptible of the construction that on a city street, on a night that was dark, and when the traffic was heavy, the appellant drove through at least four red traffic lights within the last 10 or 12 blocks immediately preceding the collision, that he was warned about it several times, that his rate of speed was about 30 miles per hour and that he drove into the intersection at which the collision occurred against the red light without looking for traffic approaching the intersection with the green light.

[5] In the case of Allen v. Robinson, 85 Cal.App.2d 617, 193 P.2d 498, this court held that in an action for injuries received by plaintiffs in an automobile collision while riding as guests of defendant, the evidence supported a verdict attributing plaintiffs' injuries to defendant's wilful misconduct, where it appeared that defendant drove across town at a high rate of speed, ignored repeated admonitions to slow down, and entered an intersection at about 35 miles per hour in disregard of a plainly visible stop sign. We there said, 85 Cal.App.2d at pages 620–622, 193 P.2d at page 500:

> "A definition of 'wilful misconduct,' followed and approved in many later cases, is contained in Turner v. Standard Oil Co., 134 Cal.App. 622, 626, 25 P.2d 988, 990, as follows:
>
> "' "Wilful misconduct," within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something that should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result.'
>
> "This court adopted the same definition in Hagglund v. Nelson, 23 Cal.App.2d 348, 352, 73 P.2d 265, and a hearing in the Supreme Court was denied. In that case Norton v. Puter, 138 Cal.App. 253, 258, 32 P.2d 172, 174, in which the Supreme Court denied a hearing, was quoted as follows:
>
> "'Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or *wanton conduct* in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom.' (Italics added.)
>
> "In Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 105 P.2d 984, failure to stop at a stop sign was held to constitute wilful misconduct. Also, a disregard of stop signs and speed were deemed to constitute 'wilful misconduct' in Gibson v. Easley, 138 Cal.App. 303, 32 P.2d 983, where, as here, the driver was earnestly admonished by his guest to drive more slowly. Speed and disregard of stop signs were also held 'wilful misconduct' in Browne v. Fernandez, 140 Cal.App. 689, at page 697, 36 P.2d 122, 126, in which Justice Spence in his concurring opinion (hearing in Supreme Court denied by a divided court) said:
>
> "'Disregarding conflicts, there was evidence in this case to show that despite the admonition of his guests, appellant Mabie disregarded the stop sign, proceeded into the intersection at a speed of approximately 25 miles per hour, and then speeded up his car in an effort to beat the two on-coming cars which were traveling along the highway. Conceding the case to be a close one, I believe that the jury could properly infer from the evidence presented that there was the requisite intent and that there was the requisite knowledge of probability of injury to his guests to constitute willful misconduct.'
>
> "Speed under the circumstances of time and conditions of the highway was also held to constitute 'wilful miscon-

duct' in Van Fleet v. Heyler, 51 Cal. App.2d 719, 125 P.2d 586; and in De Loss v. Lewis, 78 Cal.App.2d 223, 225, 177 P.2d 589, 590, the court said:

"'"Therefore," as said in Hastings v. Serleto, 61 Cal.App.2d 672, 682, 143 P.2d 956, 961, "the question of whether the defendant driver herein intentionally drove his automobile with a wanton and reckless disregard of the possible result of such driving or whether he intentionally drove his automobile with a knowledge, express or implied, that serious injury would be a probable (as distinguished from a possible) result thereof, is essentially one of fact for determination by the fact finder."'

"In Rawlins v. Lory, 44 Cal.App.2d 20, 23, 111 P.2d 973, the course of conduct of the driver of the car involved in an accident was held properly considered in arriving at a determination as to whether he was chargeable with wilful misconduct, such conduct being designated as 'skylarking.'"

See, also, Hollingum v. Moore, 102 Cal. App.2d 509, 227 P.2d 845, where it was held that in an action for injuries sustained by a guest in defendant's automobile, the court could reasonably draw the inference that defendant was guilty of wilful misconduct from evidence that he ignored a stop sign in driving onto a heavily traveled highway, and, against the repeated protests of plaintiff, drove at such a high rate of speed in a direction opposite from the agreed destination that, being unable properly to maneuver through traffic, he swung to the right off the traveled portion of the highway and struck a concrete pole in broad daylight with such force that plaintiff was thrown through the windshield.

[6] Applying these well-settled principles of law to the facts of the instant case we are satisfied that the record amply supports the implied finding of the jury that the appellant was guilty of wilful misconduct.

[7] Appellant next contends that the evidence wholly fails to establish that the plaintiff received any injury while riding in the defendant's automobile other than the slight laceration of the face and, on the contrary, shows definitely that there is no known or established connection between the plaintiff's condition as it later developed and existed at the time of the trial and any injury received by him while riding in defendant's vehicle.

Appellant's argument upon this point is in effect an argument as to the weight of conflicting evidence, and is one which could be, and doubtless was, urged in the trial court, but having failed to convince the trial court it is of little weight in an appellate tribunal.

The record shows that prior to the accident respondent was in normal good health. Subsequent thereto, his legs began to weaken and over a period of several months gradually became paralyzed, his arms weakened to the point where they were almost useless, and for a while he could not move anything except his head. Plaintiff was under fairly constant medical care, and was hospitalized at various times. During the several months prior to trial, respondent noticed some improvement in the upper part of his legs, but he could not stand without leg braces unless he used his crutches for balance. These effects resulted from damage to respondent's spine. Several weeks after the accident, while respondent still had power of locomotion, he either fell or suffered a sprain while working on Dr. Wolohan's boat. Appellant urges that respondent's condition stems entirely from this incident rather than from any trauma sustained in the automobile accident. However, there is evidence in the record that respondent started complaining of a stinging and burning sensation in his legs within a day or two after the accident, and that he started having medical care about a week after the accident. There is competent medical testimony in the record connecting respondent's condition with the injury sustained in the accident of January 12, 1950, and respondent's disability has also been diagnosed as permanent.

Appellant next contends that the court committed prejudicial error in permitting respondent's counsel to cross-examine Dr. Wolohan, called as a witness by respondent, by directing his attention to certain questions and answers given in a deposition taken several months before the trial. Appellant argues that it is not permissible for a party to interrogate his own witness concerning previous inconsistent statements where a witness merely fails to testify to a material fact as expected, and that it is necessary in order to authorize such examination that the witness shall have given testimony hurtful to the party calling him, citing Estate of Dolbeer, 153 Cal. 652, 96 P. 266; Worley v. Spreckels Bros. Commercial Co., 163 Cal. 60, 124 P. 697; People v. Kawasaki, 23 Cal.App. 92, 137 P. 287; Agalianos v. American Central Ins. Co., 62 Cal.App. 349, 217 P. 107; People v. Deckert, 77 Cal. App. 146, 246 P. 157; and People v. Newson, 37 Cal.2d 34, 230 P.2d 618.

The following appears in the record:

"Q. [by Mr. McCormick] Now Doctor, at any time prior to reaching the intersection of South San Joaquin and East Charter Way, did you observe Mr. Crisp go through any red lights? A. I did not observe it myself, no, sir.

"Q. Do you recall anything being said to Mr. Crisp at any time prior to reaching the intersection at which the accident occurred by anyone in the car with reference to going through a red light? A. The intersection before, somebody in the rear seat said something, going through the light, going through the intersection, rather.

"Q. Said something to the effect that, you had gone through a red light? A. Something of the sort.

"Q. Yes. Insofar as the intersection where the accident occurred, you observed the red light, did you, as you entered the intersection? A. Yes.

"Q. And was it red? A. It was.

"Q. Well, as a matter of fact, Doctor, you knew that he had gone through the red light prior to reaching the intersection at which the accident happened, hadn't you?

"Mr. Gant: We object to his cross-examination of his own witness.

"The Court: Sustained.

"Mr. McCormick: I claim surprise and request permission to cross-examine the witness.

"The Court: Well, at this stage of the examination I deny your request.

* * * * * *

"Mr. McCormick: I asked you, Doctor—let me see if I can put it this way. Prior to entering the intersection, you stated that about 50 feet back you saw a red light, is that right? A. No, sir, I don't believe so, sir. I believe that I said that when we entered the intersection I saw the other car coming and I think about that time I saw the red light.

"Mr. McCormick: Well your Honor, I want to claim surprise and I want to ask leave of the Court to question this man about page nine, line 23 of his deposition, to where his testimony is entirely contrary to what it is now.

"Mr. McCormick: Q. And you are a good friend of Mr. Crisp's, are you not, Doctor? A. I am, sir.

"Mr. Gant: Now just a minute, if your Honor please—

"The Court: I will not allow that request at this time.

* * * * * *

"Mr. McCormick: Q. Directing your attention to the intersection of East Charter Way and South San Joaquin, did you at any time prior to reaching that intersection, observe the light was red? A. It is hard for me to remember that far back, but I don't believe that I did.

"Q. Do you recall at any time prior to reaching that intersection saying anything to Mr. Crisp about the red light? A. No, sir.

"Mr. McCormick: Well, I would like to take the matter up—

"The Court: That is the basis of your request now?

"Mr. McCormick: Yes."

After the matter was discussed by counsel and court outside of the presence of the jury, the court permitted counsel for respondent to use the deposition in asking leading questions of Dr. Wolohan.

[8] It is well settled that a party may impeach his own witness by the use of prior

inconsistent statements where he has been surprised and damaged by the witness' testimony. See Code Civ.Proc., secs. 2049, 2052; Rystinki v. Central California T. Co., 175 Cal. 336, 342, 165 P. 952. There can be no doubt as to respondent's surprise at the testimony of the witness, and the question to be determined is whether Dr. Wolohan's testimony prejudiced respondent's case and warranted his impeachment.

Appellant relies heavily on People v. Newson, 37 Cal.2d 34, 230 P.2d 618. In that case defendant was charged with murder and a witness for the prosecution was asked on direct examination if at the time of the crime she had seen anyone in a building where the killing occurred. She replied, "No, I didn't." Over objection the district attorney was permitted to impeach the witness by showing her prior extra-judicial statements that she had seen defendant in the building at that time. The admission of her prior inconsistent statements was held to be error on the ground that her testimony "was purely of a negative character * * neither favorable to one side or the other" and was in no way damaging to the prosecution's case.

However, in the very recent case of People v. LeBeau, 39 Cal.2d 146, at page 149, 245 P.2d 302, at page 303, the Supreme Court, speaking through Chief Justice Gibson, said,

> "The Newson case did not, of course, purport to lay down a rule that all negative answers are harmless, and it is necessary to determine on the facts of each case whether the testimony of the witness sought to be impeached has actually damaged the party calling him. Here we are satisfied that the witness' answer was more than a harmless refusal to testify as expected and that it prejudiced the People's case. Mrs. McDowell was placed on the stand by the prosecution for the purpose of impeaching defendant's credibility and rebutting his testimony that he did not use narcotics. Her denial that defendant had ever told her that he used cocaine was likely to make it appear to the jury that the district attorney was harassing defendant and attempting to discredit him without any basis in fact by asking him on cross-examination if he had not told Mrs. McDowell that he used the drug. This impression might well have been aggravated in the jurors' minds by the fact that the subject of defendant's use of narcotics was brought into the case by defendant himself. Under the circumstances the prosecution was entitled to correct this damaging impression by cross-examining its own witness and by impeaching her with proof of her prior inconsistent statements."

[9] Appellant urges that the witness here had merely failed to testify to a material fact as expected and so respondent had no basis for impeaching his own witness. However, the testimony must be held adverse and hostile, because it tended to show that appellant did not drive through a series of red lights, that the lights, if red, were not plainly visible, that the lights were not seen by the guests in defendant's car, and that defendant had not been warned about the red light at the scene of the accident. The situation thus falls within the rule that a party may impeach his own witness by the use of prior inconsistent statements where he has been surprised and damaged by the witness' testimony. People v. LeBeau, supra.

[10] Furthermore, the record shows that the witness was thoroughly cross-examined on the same points and upon all of the incidents leading up to and surrounding the accident, and that all of the other occupants of appellant's automobile were called and testified, and we are convinced after an examination of the entire record that, even if the admission of such evidence was erroneous, it did not result in a miscarriage of justice. Const. art. VI, sec. 4½.

[11, 12] Appellant lists four instructions requested by respondent and given by the court, and contends that they are erroneous. No authority is cited to support appellant's contention. Instructions to a jury must be considered as a whole, and we have read all of the instructions given, and are satisfied that the jury was fully, fairly and correctly instructed as to all phases of the law

applicable to the case. Appellant offered numerous instructions and all but three were given by the court. On the subject of wilful misconduct alone eight separate instructions were offered by appellant and given by the court. The first two instructions questioned read as follows:

> "If you find from the evidence that the defendant Charles Crisp intentionally did something or failed to do something in the operation of his automobile, and you further find from the evidence that such intentional act or omission, if any, is sufficient to disclose implied knowledge of probability of injury to either the plaintiff, Luther Bassett, or other guests in the car, the defendant, Charles Crisp, is charged with knowledge of the probable consequences of his conduct, such consequences being apparent to any person of ordinary prudence of which you ladies and gentlemen of the jury are exclusive judges."
>
> "If you find from the evidence that the defendant Charles Crisp intentionally disobeyed a traffic signal and went against a red light, then you must determine whether or not he should have known under the circumstances, as a reasonably prudent man, that injury to the plaintiff, Luther Bassett, or other guests in his automobile, would probably result. If he should have so known, then he would be guilty of wilful misconduct."

These two instructions were given immediately following an instruction offered by appellant reading:

> "If you find that the defendant Crisp did, on one or more occasions enter an intersection against a red light that this his act in so doing was accidental or inadvertent or due to oversight or lack of care then I instruct you that the defendant is not liable to the plaintiff for any injury suffered by plaintiff as a result thereof. Before you can find for the plaintiff you must find from a preponderance of the evidence that the defendant was guilty of wilful misconduct as those words are defined for you in these instructions. If it is claimed that the defendant's wilful misconduct consisted of entering an intersection or intersections against a red light before he can recover damages from the defendant, plaintiff must prove by a preponderance of the evidence that the act of the defendant in so doing was wilful, deliberate and intentional and was done under such circumstances as to indicate knowledge on the part of defendant that injury to the plaintiff would probably result or with a wanton and reckless disregard for the probable consequences."

There was no error in giving any of the instructions questioned by appellant.

Appellant's final contention is that respondent made no objection to the manner in which the automobile was operated by appellant, and having made no requests to be permitted to leave the vehicle was guilty of contributory negligence for assumption of the risk incident to riding in the vehicle under the circumstances existing.

[13, 14] What we said in Allen v. Robinson, supra, 85 Cal.App.2d at page 622, 193 P.2d at page 501 is quite applicable here:

> "As for appellants' contention that plaintiffs assumed the risk of injury by riding with appellant, this, again, was a question for the jury; and appellants so recognized it in one of their requested instructions which was given by the trial court. See Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 507, 55 P.2d 870; Shields v. King, 207 Cal. 275, 277 P. 1043; Van Fleet v. Heyler, supra, 51 Cal.App.2d [719] at pages 733, 734, 125 P.2d 586.
>
> "Regarding the third argument, that plaintiffs were guilty of contributory negligence because they did not warn the driver of the existence of the stop sign, that, also, presented a question for the jury. Shields v. King, supra; Cate v. Fresno Traction Co., 213 Cal. 190, 201, 2 P.2d 364; Meyers v. Southern Pacific Co., 63 Cal.App. 164, 168, 218 P. 284; Tice v. Pacific Electric Ry. Co., 36 Cal.App.2d 66, 71, 96 P.2d 1022, 97 P.2d 844."

And as stated in Van Fleet v. Heyler, 51 Cal.App.2d 719, at page 733, 125 P.2d at page 594:

> "* * * The true rule on this point is not that a guest must, where he knows the driver's conduct is improper, leave the car merely if he has reasonable opportunity to do so, but that he must leave it, a reasonable opportunity being afforded, if a person in the exercise of ordinary care would do so under the circumstances."

Appellant's recognition of the factual nature of this issue is apparent from his request for instructions on assumption of risk and contributory negligence, both of which the court gave. One of them concludes:

> "Thus, it will be seen that failure of a guest to protest if there was such failure is merely one fact to be considered with all the other circumstances in determining whether a guest assented to his host's wrongdoing and voluntarily assumed the risk."

We conclude that the implied findings of the jury against appellant upon the issues of assumption of risk and contributory negligence are fully supported by the record.

The judgment and orders are affirmed.

In re ARBULICH'S ESTATE.

ARBULICH v. ARBULICH.*

Civ. 14639.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1952.

Rehearing Denied Oct. 24, 1952.

Hearing Granted Nov. 20, 1952.

Proceeding in the matter of the estate of Charles J. Arbulich, deceased, wherein John Arbulich, Jr., and Thomas S. Arbulich each filed a petition to determine heirship. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., rendered judgment determining that John Arbulich, Jr., being a citizen and resident of Yugoslavia, was not eligible to take real or personal property in California under decedent's will because United States citizens did not have a reciprocal right to take property in Yugoslavia and John Arbulich, Jr., appealed. The District Court of Appeal, Peters, P. J., held that the judgment must be reversed and a new trial had, because the record disclosed that finding of lack of reciprocity was based partially upon inadmissible evidence, factors irrelevant to the issues, and laws, regulations, and decrees passed after decedent's death.

Judgment reversed.

1. Aliens 🔑10, 14

Probate Code provision declaring right of nonresident aliens to take property in state by succession or testamentary disposition to be dependent upon existence of reciprocal right of United States citizens to take property in countries of which such aliens are residents is part of the substantive law of succession and not merely a procedural statute and hence statute as it read at time of death of testator desiring to leave property to an alien governs. Probate Code, § 259, as amended by St.1945, p. 2208.

2. Trial 🔑136(4)

Interpretation of foreign statutes and treaties, when they alone are before the court, is a question of law, but the question of how such statutes and treaties have been interpreted and applied by foreign country is a question of fact.

3. Descent and Distribution 🔑71(7)
Wills 🔑386

A finding as to existence or nonexistence of reciprocal right of United States citizens to take property by succession or testamentary disposition in a foreign country will not be disturbed on appeal if such finding is supported by a presumption or is based on conflicting evidence, even though as to the same country, one trial court has found that such reciprocity exists and another court that it does not. Probate Code, § 259, as amended by St.1945, p. 2208.

4. Aliens 🔑10, 14

Limited nationalization or socialization of property and industry in a foreign country or its communistic nature and domination by Russia do not compel a finding of nonexistence of reciprocal right of United States citizens to take property in such country by succession or testamentary disposition. Probate Code, § 259, as amended by St.1945, p. 2208.

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* Subsequent opinion 257 P.2d 433.

5. Evidence ⚷**67(4)**

Proof of existence of a foreign statute enacted prior to death of testator granting or denying to United States citizens reciprocal right to take property in such country by succession or testamentary disposition raises a presumption that such statute continues to exist and that terms of such statute have been carried out. Code Civ.Proc. § 1963, subds. 15, 32, 33; Probate Code, § 259, as amended by St. 1945, p. 2208.

6. Aliens ⚷**10, 14**

Inability, due to war or foreign exchange regulations, to immediately transfer to United States property inherited by United States citizen in a foreign country is not relevant on issue of existence of reciprocal right of United States citizens to take property in such country by succession or testamentary disposition. Probate Code, § 259, as amended by St.1945, p. 2208.

7. Evidence ⚷**81**

In proceeding by citizen and resident of Yugoslavia to establish right to take real and personal property in California under will of a United States citizen who died on March 21, 1947, petitioner was entitled to rebuttable presumption that United States citizens had a reciprocal right to take property in Yugoslavia by succession or testamentary disposition. Probate Code, § 259, as amended by St.1945, p. 2208.

8. Evidence ⚷**318(2), 378(1)**

In proceeding by citizen and resident of Yugoslavia to establish right to take real and personal property in California under will of United States citizen, letters written by United States ambassador to Yugoslavia to attorney general of California and by American Consul at Belgrade to attorney for respondent, purporting to discuss laws and regulations of Yugoslavia and give opinions as to how they were enforced were inadmissible over objections that they were hearsay and that no proper foundation had been laid for their introduction, in absence of showing that writers of such letters were experts on Yugoslav law. Probate Code, § 259, as amended by St.1945, p. 2208.

9. Aliens ⚷**10, 14**

In determining whether United States citizens have a reciprocal right to take property in another country by succession or testamentary disposition within meaning of Probate Code provision making existence of such reciprocal right a prerequisite to right of citizens and residence of such country to take property in California, the law in effect in such foreign country at time of death is controlling. Probate Code, § 259, as amended by St.1945, p. 2208.

10. Evidence ⚷**313**

Declarations of ambassador to the United States for Yugoslavia concerning the law and practices in his country are entitled to great weight.

11. Wills ⚷**386**

Judgment that a citizen and resident of Yugoslavia was ineligible to take real or personal property in California under will of a United States citizen who died on March 21, 1947, because United States citizens did not have reciprocal right to take property in Yugoslavia by succession or testamentary disposition must be reversed and a new trial had, notwithstanding evidence to support finding of nonreciprocity as to realty, where record disclosed that finding of lack of reciprocity was based partially upon inadmissible evidence, irrelevant factors, such as communistic nature of Yugoslavian government, foreign exchange restrictions and doubt as to whether Yugoslav distributee would ever receive and be permitted to enjoy legacy in Yugoslavia, and upon laws, regulations and decrees passed after death of testator. Treaty between United States and Serbia, Oct. 14, 1881, 22 Stat. 963; Probate Code, § 259, as amended by St. 1945, p. 2208.

12. Ambassadors and consuls ⚷**5**

Under consular convention with Serbia giving consular representatives right to appear in all proceedings on behalf of absent or minor heirs, construed in the light of applicable principles of international law, consul general of Yugoslavia had the right to appear in California court in proceeding to determine heirship as attorney in fact for a citizen and resident of Yugoslavia named as beneficiary in will and to appoint counsel to represent such beneficiary. Consular Convention with Serbia, Oct. 14, 1881, art. 11, 22 Stat. 970.

13. Treaties ⚿8

Consular convention with Serbia giving consular representatives right to appear in all proceedings on behalf of absent or minor heirs must be considered together with applicable principles of international law. Consular Convention with Serbia, Oct. 14, 1881, art. 11, 22 Stat. 970.

14. Ambassadors and consuls ⚿5

Consular representatives are deemed to be international attorneys in fact for their nationals without reference to any treaty.

15. Treaties ⚿7

In arriving at meaning of a treaty between the United States and another country, court must consider that treaty is the supreme law of the land, that its words are to be taken liberally in light of evident purposes, and that, since the pact was done in counter part, one in each language, little use can be made of local technical definitions of words.

16. Treaties ⚿7

When two constructions of a treaty are admissible, one restrictive of the right that may be claimed under it, and the other liberal, the latter is to be preferred.

17. Ambassadors and consuls ⚿5

Under general principles of international law, consuls have the power to represent their nonresident nationals in the courts of the country to which such consul is accredited.

◆

Haas & Schwabe, Portland, Or., Hubbard & Hubbard, Emmet B. Hayes, San Francisco, for appellant.

Frank J. O'Brien, San Francisco, for respondent.

PETERS, Presiding Justice.

Charles J. Arbulich, the decedent, was born in the country now known as Yugoslavia, came to the United States, became an American citizen, died in San Francisco on March 21, 1947, and left an estate consisting of real and personal property. By his will he disinherited his American citizen brother, the respondent Thomas S. Arbulich, and left his entire estate to his father, if he should survive the testator, and if not then to his brother, the appellant, John Arbulich, Jr., a Yugoslav citizen and resident. The father predeceased Charles. Both Thomas and John (John through the Consul General of Yugoslavia) filed petitions to determine heirship, it being contended by Thomas that John was ineligible to take under the will for the reason that Yugoslavia, so it is claimed, does not grant reciprocal rights of inheritance to American citizens inheriting from citizens of Yugoslavia within the meaning of section 259 of the Probate Code. John claimed such reciprocal rights existed. A petition by one claiming to be the widow of Charles was also filed, but the issues presented by that proceeding have been settled and are not here involved.

After a trial which spread over many months because of numerous continuances granted to permit the parties to secure and to present evidence on the basic issue of reciprocity, the trial court determined that reciprocity did not exist, that John was therefore ineligible to take under the will, and that the entire estate should be distributed to Thomas as the sole remaining heir at law. John, through the Consul General, appeals.

[1] Before discussing the evidence which, except for the testimony of the Yugoslav ambassador to the United States, is almost entirely documentary in character, some reference should be made to the general law governing such proceedings. It should be pointed out that section 259 of the Probate Code is not merely a procedural statute, but is part of the substan-

tive law of succession. That being so, the statute as it read at the time of the death of the testator desiring to leave property to an alien governs. In re Estate of Giordano, 85 Cal.App.2d 588, 193 P.2d 771. Charles died March 21, 1947.

Section 259 as it read in March of 1947, Stats. of 1945, p. 2208, chap. 1160, and until its amendment in September of that year, then provided: "The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code."

Thus, as the section then read, there was a statutory rebuttable presumption that reciprocity existed, and the one contending there was a lack of reciprocity had the burden of proving that fact.

[2, 3] The cases have also established the law to be that while the interpretation of foreign statutes and of treaties, when they alone are before the court, is a question of law, the question of how such statutes and treaties have been interpreted and applied by a foreign country is a question of fact. The appellate courts will not disturb a finding of reciprocity or of non-reciprocity that is supported by a presumption or is based on conflicting evidence. In re Estate of Schluttig, 36 Cal.2d 416, 224 P.2d 695—finding of non-reciprocity with Germany on April 3, 1945, affirmed; In re Estate of Miller, 104 Cal.App.2d 1, 230 P.2d 667, finding of reciprocity with Germany as of April 22, 1942, affirmed; In re Estate of Blak, 65 Cal.App.2d 232, 150 P.2d 567, a finding of reciprocity with the Netherlands, date of death not disclosed, but prior to 1942 and during German occupation of Holland, affirmed; In re Estate of Giordano, 85 Cal.App.2d 588, 193 P.2d 771, a finding of non-reciprocity with Italy as of January 17, 1945, affirmed; In re Estate of Reihs, 102 Cal.App.2d 260, 227 P.2d 564, a finding of reciprocity with Germany as of November 24, 1946, affirmed; In re Estate of Kennedy, 106 Cal.App.2d 621, 235 P.2d 837, a finding of reciprocity with Romania as of March 15, 1949, affirmed. In all of these cases it was held that where the finding of reciprocity or non-reciprocity was based on conflicting evidence or supported by a rebuttable presumption it would not be disturbed by an appellate court, even where, as to the same country, one trial court had found reciprocity to the exist and another that it did not. Compare the Schluttig, Miller and Reihs cases, cited supra.

[4, 5] The case of In re Estate of Kennedy, 106 Cal.App.2d 621, 235 P.2d 837, sets forth several other rules that are here applicable. It held that the facts that a limited nationalization or socialization of property and industry had taken place in

Romania, or that that country was communistic in nature and dominated by Russia, did not compel a finding of non-reciprocity. It also held that once a statute enacted prior to the death of the testator involved is proved to exist, a presumption that such statute continued to exist arises under the provisions of section 1963, subd. 32, of the Code of Civil Procedure, and that once such a statute is proved to exist, it will be presumed that the terms of such statute have been carried out under the provisions of section 1963, subds. 15 and 33, of the Code of Civil Procedure.

[6] The cases of In re Estate of Miller, 104 Cal.App.2d 1, 230 P.2d 667, and In re Estate of Blak, 65 Cal.App.2d 232, 150 P.2d 567, held that the fact that the property inherited in a foreign country could not be immediately transferred to the United States, due to the war or to foreign exchange regulations, was not relevant on the issue of reciprocity.

[7] Thus, in the instant case, appellant was entitled, in the trial court, to the rebuttable presumption that reciprocity existed. If he could prove the existence of a treaty or statute of Yugoslavia enacted prior to March 21, 1947, granting reciprocity, he was then entitled to the rebuttable presumptions that that law continued to exist, and that such law was and would be enforced according to its terms. Since the trial court has found against these presumptions and against reciprocity, the question is whether, keeping in mind the burden of proof and these presumptions, there is any substantial evidence or reasonable inferences therefrom to support the finding.

Although the burden was on respondent to prove non-reciprocity, the appellant agreed to present his evidence that reciprocity existed before respondent offered his evidence.

The appellant first introduced a treaty of 1881 between Serbia and the United States, 22 Stat. 963, and the certificate of then Secretary of State George C. Marshall dated May 21, 1948, duly authenticated, certifying that such treaty is still in force and effect between Yugoslavia and the United States. That certificate traces the history of the Kingdom of Serbia into the Kingdom of the Serbs, Croats and Slovenes, into the Kingdom of Yugoslavia, and finally, in November of 1945, into the Federal People's Republic of Yugoslavia, and certifies that by agreement between the two countries the Serbian treaty of 1881 was still in full force and effect. The final clause of the certificate states "that the said treaty remains in full force and effect between the United States of America and Yugoslavia."

Article II of that treaty reads as follows:

> "In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.
>
> "Within these limits, and under the same conditions as the subjects of the most favored nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favored state.
>
> "They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subjected to pay any other or higher duties than those payable under similar circumstances by natives or by the subjects of the most favored state."

There was next introduced the certificate of Sava N. Kosanovic, Ambassador to the United States for Yugoslavia, duly authenticated by our State Department, and dated May 15, 1948, concerning the law of Yugoslavia with respect to the estates of decedents. The certificate contains the categorical assertion that reciprocity exists within the meaning of section 259 of the Probate Code. The certificate states that the Ambassador knows of his own knowledge that the Constitution and laws of Yugoslavia "accord to citizens of the United States of America, including citizens of the State of California, though not residing in * * * Yugoslavia, the reciprocal rights of inheritance prescribed and referred to in Sections 259 * * * of the Probate Code of the State of California. The Constitution and laws of the Federal Peoples Republic of Yugoslavia permit and grant to citizens of the United States of America, including citizens of the State of California, though not resident in * * * Yugoslavia rights equal to those accorded to Yugoslav citizens residing in * * * Yugoslavia to take by will or succession any and all property located within * * * Yugoslavia," subject to the Nationalization Law of December 5, 1946, as amended April 28, 1948. The certificate then states that this Nationalization Law as amended provides for "the nationalization of real property owned by foreigners, except immovable property of farmers tilling their own land, buildings serving in the main as the homes of the owners thereof," but, under the provisions of that Act "all the owners of nationalized property, are entitled to full compensation for such property."

The certificate then goes on to state that by agreement with the United States "all treaties previously concluded with the former Kingdom of Serbia * * * are in full force and effect" between the United States and Yugoslavia. The certificate then quotes Article II of the United States and Serbia treaty of 1881, above quoted, and then certifies that the government of Yugoslavia "has at all times construed and does now construe and respect said treaty as providing for and guaranteeing complete reciprocal rights of inheritance between the United States of America and * * * Yugoslavia so that citizens of the United States of America, including citizens of the State of California, residing in the United States or wherever they may reside have the full and unabridged right to inherit and to receive and have paid to them all inheritances, by last will and testament or by succession, all money and property, real and personal, bequeathed, devised or due to them by the laws of the succession situated in the Federal Peoples Republic of Yugoslavia from the estates of deceased citizens" of Yugoslavia, subject only to the Nationalization Law as amended.

A supplemental certificate of the Ambassador, duly authenticated and dated October 14, 1948, was also introduced. The Ambassador there certifies that the rights of foreigners to inherit property in Yugoslavia as set forth in the original certificate has been the law since 1918 and up to the present time, and that there has been no change in such laws and none is contemplated. It is certified that "it has always been the fixed policy of my Government and its predecessors to fully protect, preserve and assure the rights of all foreigners and residents outside of Yugoslavia to enjoy, take and receive full rights of inheritance of property, real, personal, or mixed, without discrimination, in the same manner and to the same extent as residents and nationals of Yugoslavia" subject only to the Nationalization Laws. It is further certified, when moneys are due and payable to Yugoslav residents from United States decedents as a result of inheritance, that the recipients in Yugoslavia receive such moneys in Yugoslavia at the official rate of exchange free of any imposts, levies or taxes, "and they have free and unabridged use and enjoyment thereof" subject only to such limitations as are imposed on Yugoslav nationals for the protection of the state. This supplemental certificate also notes that on July 19, 1948, the United States and Yugoslavia negotiated a claims agreement by the terms of which the Yugoslav government engages to authorize Yugoslav nationals indebted to anyone in the United States "to meet such indebtedness on maturity." By the terms of that agreement Yugoslavia agreed to pay $17,000,000 to the United States for American property nationalized in Yugoslavia, to be distributed by the United States among the rightful claimants.

In addition to these two certificates, Ambassador Kosanovic was called as a witness by appellant. He testified that he was not only the Yugoslav ambassador to the United States, but also a minister in the cabinet and a member of the Presidium, the highest authority in his country. He presented a copy of the Constitution of Yugoslavia adopted in 1946 which, according to his testimony and supported by an examination of the document, makes no discrimination, so far as the right to enjoy and inherit property is concerned, between Yugoslav citizens and foreigners. The Constitution provides that the "inheritance of private property is guaranteed. The right of inheritance is regulated by law." In addition, the Ambassador testified that there was no discrimination as against foreigners in connection with the right of inheritance, and that if inheritance taxes are paid in the United States on a bequest to a Yugoslav citizen, that person will receive the inheritance without further tax. He several times reiterated his statement that there were no laws or rules or regulations in any way restricting the right of an American to receive and to enjoy his inheritance in Yugoslavia. On cross-examination he testified that his country had exchange controls, and that under Yugoslav law anyone in the country receiving foreign exchange could be compelled to sell it to the state bank at regular exchange rates. He testified that there were no big estates in Yugoslavia, that the land formerly owned by big landowners had been nationalized, and that the maximum ownership of one individual is twenty-five hectares,[1] but that former owners, including foreigners, were compensated. He also testified that money received by inheritance by Yugoslav citizens could be fully owned and enjoyed by such citizens.

Appellant, then, over the objection that it was incompetent, irrelevant and immaterial, introduced as an official document an official communication between the Yugoslav Ministry of Justice and the Yugoslav Ministry of Labor dealing with the reciprocity question. This document states that under Yugoslav law "the courts extend protection to all individuals in the exercise of their [inheritance] rights, regardless of whether they be Yugoslav nationals or foreign nationals." It also states that under the 1881 treaty, which Yugoslavia recognizes, American citizens inheriting from Yugoslav nationals enjoy exactly the same rights and privileges over such property as do Yugoslav nationals. It is also asserted that the Ministry of Justice has always informed Yugoslav courts that reciprocity of inheritance exists between Yugoslavia and the United States. Attached is a copy of a decree of a Belgrade court distributing a portion of an estate in Yugoslavia to a United States citizen.

Another official communication between the Yugoslav Ministry of Finance and the Ministry of Labor, over objection, was introduced in which it is stated that the Ministry of Finance has never issued any regulation limiting the right of inheritance of estates of Yugoslav citizens by American citizens. The document states that, due to the shortage of foreign exchange, it has not always been possible to transfer funds from Yugoslavia to the United States, but that it is the intention of the government to allow such transfers as soon as conditions permit.

This was appellant's case. It is obvious that such evidence, independent of the presumption of reciprocity, would fully support a finding of such reciprocity. But the trial court found that reciprocity did not exist. The question is whether there is any substantial evidence to support that finding.

[8] Respondent first offered two letters, one from C. W. Cannon, United States Ambassador to Yugoslavia, dated August 14, 1947, and addressed to the then Attorney General of California, and the other from A. G. Heltberg, American Consul at Belgrade, dated November 4, 1948, and addressed to Frank O'Brien, respondent's attorney. Neither of the letters to which these two letters were responses was offered. Both letters introduced purport to discuss certain laws and regulations of Yugoslavia and purport to give opinions as to how they are enforced. Appellant ob-

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[1] (A hectare is 2.471 acres.)

jected to the introduction of these letters on the grounds that they were incompetent, irrelevant, and immaterial, were hearsay and that no proper foundation had been laid for their introduction. The objections were good. The letters should not have been admitted. There was no showing that Cannon or Heltberg were experts on Yugoslav law. In fact, the Heltberg letter states that "this office can not assume responsibility for statements made in respect to the laws of Yugoslavia." The letters were merely informal documents, and certainly were not official documents. The important question of whether a sovereign state abides by its laws and treaties should not be made to depend upon informal offhand opinions of officials who may or may not be experts. Without a further showing, the letters should not have been admitted.

It must not be assumed that these two letters support the finding of non-reciprocity. They do not. Both relate primarily to the foreign exchange controls limiting the transfer of funds from Yugoslavia to this country, a factor which, under the cases already cited, is not relevant on the issue of reciprocity. Cannon's letter was apparently in response to a letter from the attorney general telling Cannon that several Yugoslav residents and citizens had applied to recover funds on deposit in California banks, and inquiring if American citizens with money on deposit in Yugoslavia could withdraw such money, and requesting information about any currency regulations that might exist. Cannon replied that there were stringent regulations in force "with regard to the export of foreign exchange and the transfer of property abroad." Reference is made to pertinent provisions of the Foreign Exchange Law putting all foreign exchange transactions under government control, and requiring a permit for such transactions. The following paragraph of the letter is particularly relied upon by respondent:

> "According to the Embassy's information, the Yugoslav authorities have, so far, not only granted no foreign exchange permits to American claimants to the proceeds of property in Yugoslavia, but have, with minor exceptions, made it impossible for American citizens to establish their claims. In only one known instance has an American citizen actually been able to bring his claim to the point where his attorney could apply for a foreign exchange permit, and that application has been refused. This case involved a legacy."

The letter then refers to the confiscation and nationalization of many American properties. This letter was written before the claims settlement agreement, already referred to, was entered into between the two countries.

The letter of Heltberg to O'Brien also deals primarily with the foreign exchange law, a copy of which was enclosed. The letter states that the "law provides for a tight control of all foreign currencies held by Yugoslavia, and it is the opinion of the Embassy that American heirs ordinarily would not be able to transfer their inherited monies [sic] into American currency." Attention is then called to the fact that the Embassy has records of but one case of such a transfer since the end of the war, and to a communication from the Yugoslav government informing the Embassy that "it would grant transfers of funds derived from legally inherited properties within the limits of available foreign exchange stocks. However, because of lack of foreign exchange, the amounts for the time being would have to be deposited with the National Bank of the Federative People's Republic of Yugoslavia in Yugoslav currency as property of foreign successors."

The letter goes on to mention the fact that the Yugoslav decree of March 20, 1948 "permits acquisition of real estate in Yugoslavia by foreigners but only on the basis of legal inheritance or for official use. All other real estate owned by foreigners would be nationalized. The American heir, however, would have little control over his inherited properties. He would have to have the approval and consent of the competent state authorities before he could sell, transfer or dispose of the property. He would not be able to sell, transfer or dispose of the property to a non-Yugoslav citizen. The amount of income derived from the property and the use of the property would be determined by local housing authorities. Furthermore, to complicate matters, the Yugoslav Government does not recognize the right of their citizens to be nationalized as American citizens. The Embassy believes it possible that a person possessing Yugoslav nationality under Yugoslav law and American citizenship under American law could inherit Yugoslav real estate in the same manner as other purely Yugoslav citizens. When such a dual national is subsequently divested of his Yugoslav nationality, his previously inherited properties in Yugoslavia would presumably be seized without right of indemnity."

There was next introduced into evidence by respondent, without objection from appellant, a letter with six enclosures to lawyer O'Brien dated December 24, 1948, from Francis E. Flaherty, Acting Assistant Chief, Division of Protective Services, Department of State, Washington, D. C. The letter calls attention to the decree of March 20, 1948, passed a year after the death of the decedent here involved, which contains the following sentence: "Foreign citizens may not acquire right of property on real estate on the territory of the Federative People's Republic of Yugoslavia, except on the basis of legal inheritance." The letter then states that it had been thought that the Nationalization Law, which provides: "On the day this law becomes effective, all real estate owned by foreigners * * * will be nationalized," nullified the right of aliens to inherit at all, but by a decree of June 23, 1948, the right of foreigners to gain ownership of real property "on the basis of legal inheritance" was reaffirmed. The letter then sets forth the same restrictions on such ownership as were set forth in Heltberg's letter above quoted, and then states that the Nationalization Law and the June decree "are presently interpreted by Yugoslav officials so as to permit alien heirs to inherit or succeed to property only when, under Yugoslav law, they are also natural heirs of the deceased."

The enclosures are translations of various laws and decrees and of a note from the Yugoslav Ministry of Foreign Affairs to the United States dated October 9, 1948. Several of the enclosed laws and decrees relate to the foreign exchange controls that have already been mentioned. One of the enclosures is a decree dated March 20, 1948, relating to the "Control of Real Estate Transactions." This decree was not in effect when decedent died. It provides that all transfers of real property are "subject to prior approval by the competent state authorities," and provides that such authorities shall deny such approval when the transfer is made for speculative purposes, or when such transfer will produce a larger income than needed for livelihood, or would exceed the maximum area allowed for agricultural ownership. This decree also prohibits a foreign citizen from owning land "except on the basis of legal inheritance." Attached to this decree is an "Obligatory Interpretation" by the Praesidium, the highest authority in Yugoslavia, to the effect that a Yugoslav who acquires another citizenship forfeits his real estate to the state without compensation.

The official note above referred to from the Ministry of Foreign Affairs of Yugoslavia to this country stated that the "Yugoslav Courts strictly apply all Yugoslav provisions, laws and international agreements clearly regulating the rights of foreign citizens to acquire or inherit to [sic] real or personal property situated in Yugoslavia, within the limits of the existing provisions and without any discrimination i. e. under the same conditions as citizens of the most favoured nation." Reference is then made to the decree of March 20, 1948, limiting foreign real estate holdings to those acquired as "heirs at law," and then it is argued that such provision is consistent with treaty obligations because all foreigners are treated alike. It is then stated that as to transfers abroad of legally inherited properties the Yugoslav government "will grant such transfers within the limits of available foreign exchange stocks," and when such stocks are not available the sum in question can be temporarily deposited in the national bank, in Yugoslav currency, as property of foreign successors.

Without objection, appellant next introduced a Yugoslav decree dated July 16, 1946, relating to the acquisition of real property by foreigners. It provides that foreigners may acquire real property in Yugoslavia "either by legal business among the living or by legacy (in case of death) only by previous approval of the competent government agency." A lease to a foreigner for over five years likewise requires a permit, but neither of these limitations applies "to acquisitions of real estate by legal inheritance." Agencies are designated with permit issuing powers and the right of appeal granted from their decisions.

Also without objection a copy of the Nationalization Law was introduced. In court counsel for respondent read into the record an amendment to that Act adopted April 28, 1948, more than a year after the death of the decedent here involved. By the amendment, most real estate, as of the effective date of the amendment, owned by foreigners, was nationalized, except real estate operated by peasant farmers or used by the owner as living quarters. The amendment also provided that Yugoslav citizens who became foreign citizens lose the right of ownership of real estate.

Also without objection there was introduced another letter from Heltberg, American Consul in Yugoslavia, addressed to the California State Controller and dated January 19, 1949. Most of the material in this letter is cumulative of material already introduced. It refers to the decree of March 20, 1948, limiting the right of foreigners to acquire real estate except "on the basis of legal inheritance," and then points out that such clause has been informally interpreted by the Yugoslav officials "to mean that foreign citizens may inherit property if they, under Yugoslav law, are considered to be the natural heirs of the deceased. If property is willed to some other person than the natural heir that person may not succeed to the property in question." It is also pointed out that Americans succeeding to property in Yugoslavia would be faced with various restrictions and controls. The letter then discusses the penalties of dual citizenship, and then continues: "Since 1945, the Embassy has no record of any case where American citizens have been heirs in Yugoslav estates. It is generally believed that the political affiliations of the American heir would not affect his right to inherit unless he was a dual national and his property liable to confiscation for crimes against Yugoslavia."

The only other exhibits introduced by respondent were two booklets of speeches by Yugoslav leaders which add nothing to the other evidence already mentioned.

[9] On this evidence the trial court found that reciprocity as to both real and personal property did not exist. The estate here involved consisted, at the time of death, of both real and personal property, the real property having been sold during the course of administration. There can be no doubt at all that the weight of the evidence indicates that reciprocity exists. Certainly that is true as to the personal property. However, we cannot say, as a matter of law, that reciprocity exists as to the real property. It is probably true that there is evidence or inferences therefrom that support the finding of non-reciprocity as to real property. The evidence of the laws, decrees and interpretations to the effect that foreigners can succeed to Yugoslav real estate only if they are heirs at law, that a Yugoslav who acquires American citizenship forfeits his rights in real property in Yugoslavia, etc., probably support the finding of non-reciprocity as to the real property. But even as to this issue the evidence is not satisfactory because most of these laws, decrees and interpretations were passed or made after the death of the decedent here involved. It is the law in effect at the time of such death in which we are here interested. It is by no means clear that such laws, decrees and interpretations are construed to be retroactive. That may be cleared up on a new trial.

Even though it be assumed that there is some evidence, or inferences therefrom, that support the finding of non-reciprocity as to the real estate, there are other factors disclosed by the record that require a reversal and the granting of a new trial.

The record discloses that the trial court considered and gave great weight to evidence not relevant to the issue of reciprocity, and that the finding of non-reciprocity was partially based on this non-relevant evidence. That this is so is conclusively demonstrated by an examination of the transcript, of the memorandum opinion of the trial court, and of the findings.

On numerous occasions during the trial the court expressed great distrust of the form of government existing in Yugoslavia, and expressed great interest in what would happen to the bequest here involved when delivered in Yugoslavia. Great interest was shown in the foreign exchange regulations that would constitute a restraint on an American citizen transferring Yugoslav funds inherited there to this country. For example, the trial court stated at R.T. p. 221: "We know that Yugoslavia today is dominated by a Communistic government. They are in power today. Now, this Court, the stand that I have taken is that I would have to have pretty good evidence before I would distribute to anyone, or to any government back there that is dominated by the Communists. [What became of the presumption that reciprocity exists?] Having this case in mind, I met people who have been there, lived there, even when I was on a little vacation in Arizona, and I met a woman who lived there, and they took all of her property. They confiscated all of the business of her husband and herself." At pages 135, 150, 160, 223 and 243 appear other comments by the trial judge indicating how strongly he was motivated by the fact that the government of Yugoslavia was socialistic or communistic.

The theory upon which the trial court proceeded is also disclosed in the memorandum opinion. It is there stated: "Furthermore, it has not been established to the satisfaction of the Court that the said John Arbulich, Jr. [the Yugoslav heir] would receive the benefit of any distribution to him of the balance of the estate, consisting of cash in excess of $30,000.00. It was established at the hearings by the testimony of the Yugoslav Ambassador Kosanovich that the present government of Yugoslavia is Communistic and that the property rights of individuals are completely ignored. Under the circumstances the Court cannot in good conscience order $30,000.00 or more distributed to the claimant in Yugoslavia or to any representative of that country without any assurance whatever that the distributee would ever receive any part of such funds."

Thus the trial judge not only indicated that he would not consider the presumptions already mentioned in favor of reciprocity, but also indicated that he had forgotten or would not consider the documentary and oral testimony to the effect that the Yugoslav heir would be permitted in Yugoslavia to enjoy the full benefits of the bequest.

The weight given by the trial court to these factors is also disclosed in the formal findings. Finding X reads as follows: "That at the time of death of said decedent the Government of Yugoslavia was Communistic and has been ever since, and that the property rights of individuals are ignored, and that, under the circumstances, the Court could not, in good conscience, order distribution to the claimant in Yugoslavia. That under the laws and regulations of Yugoslavia, John Arbulich, Jr. does not have any rights of ownership or control of his property, and if distribution were ordered to John Arbulich, Jr. it would, in fact, be distribution to the Communistic Government of Yugoslavia. Such distribution would be against public policy and contrary to provisions of Section 27 of the California Probate Code."

[10] There is no evidence at all that the Yugoslav claimant would not be permitted to enjoy his legacy in Yugoslavia. The evidence is all the other way. The solemn declaration of the Ambassador from Yugoslavia that the Yugoslav claimant would receive the money free of any tax and that he would enjoy "free and unabridged use and enjoyment thereof" could not thus lightly be disregarded. The Ambassador is the highest diplomatic official of the country he represents, and his declarations about the law and practices in his country are entitled to great weight.

The fact that the court disapproved of the form of the government of Yugoslavia was not relevant at all on the issue of reciprocity. Yugoslavia is a sovereign state and is recognized as such by the government of the United States. As long as some right of inheritance is recognized in that state, and the evidence here without conflict discloses that it is, the fact that such right differs from the right of inheritance in this country, or that as an individual a judge may disapprove of the form of government, are factors which are not relevant and should not be considered on the issue of reciprocity. This was clearly pointed out in the Estate of Kennedy, 106 Cal.App.2d 621, 235 P.2d 837, involving Romania, a country that is not only communistic, but within the sphere of influence of Russia, which Yugoslavia certainly is not. Some degree of socialization and nationalization has taken place in most European countries, a policy we as individuals may or may not approve, but as judges passing on the issue of reciprocity, the form of such governments is a false factor, and a matter for each sovereign country to determine for itself.

The fact that an American claimant of an estate in Yugoslavia would be subject to foreign exchange controls and could not immediately receive his legacy in this country is also an irrelevant factor. Practically every country in the world has some limitation on the export of wealth from the country. Such factor has nothing to do with the issue of reciprocity. It was so held in Re Estate of Miller, 104 Cal. App.2d 1, 230 P.2d 667, and In re Estate of Blak, 65 Cal.App.2d 232, 150 P.2d 567.

Much is said in the briefs about the proper interpretation of the treaty of 1881 and about how such treaty should be interpreted in view of the case of Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L. Ed. 1633. The question is not how that treaty should be interpreted as a matter of law, but how the contracting parties have interpreted it. The Ambassador testified that it had been interpreted to grant reciprocity to all American nationals. While there is no evidence directly contrary to this, there may be inferences that would support a finding to the contrary. Any gaps in the evidence on this point can be supplied on the new trial.

[11] Enough has been said to indicate that the finding of lack of reciprocity was based partially upon inadmissible evidence, upon factors irrelevant to the issues, and upon laws and regulations and decrees passed after the death of decedent. This being so, the judgment cannot stand. A new trial should be had at which only admissible evidence and relevant factors are considered.

There is one other point that must be considered. Respondent contends, and the trial court found, that appellant was not properly represented in the proceeding. For that reason, it is urged, this judgment must be affirmed. It should be pointed out that, in spite of this finding, the trial court also disposed of the case on its merits. Such disposition is, of course, inconsistent with a finding that the appellant had made no proper appearance in the action.

The contention that appellant was not properly represented is based upon the fact that the lawyer appearing on behalf of appellant was appointed by the Consul General of Yugoslavia to represent appellant. The lawyer had no power of attorney from appellant nor any other direct authority to represent him. Throughout the trial, counsel for respondent objected on this ground, and the trial judge, on many occasions, observed that he thought a personal power of attorney was indispensable. As already pointed out, an express finding was made on this issue.

[12] The petition of John Arbulich, Jr. alleges that it is filed by the Consul General of Yugoslavia as attorney in fact for John. It is further averred that under the power and authority vested in the Consul General by the United States and by the laws and treaties between the United States and Yugoslavia, he, as Consul General, has the power and authority to act as attorney in fact for his nationals who inherit American property. The recognition by the United States of the Consul General with power "to exercise and enjoy such func-

tions, powers and privileges as are allowed to the Consuls General of the most favoured Nations in the United States" was duly proved. The question is, can the Consul General appear in our courts as attorney in fact for his nationals in a probate proceeding? Can a Consul appoint counsel to represent such nationals? The answer is clear that he may.

The parties discuss the proper interpretation of an article in the Consular Convention between the United States and Serbia concluded in 1881, 22 Stat. 968 contemporaneous with the other Serbian treaty already mentioned in this opinion, and, like it, recognized by both the United States and Yugoslavia as being still binding. Art. XI provides:

> "In the case of the death of any citizen of the United States in Serbia, or of a Serbian subject in the United States, without having any known heirs or testamentary executors by him appointed, the competent local authorities shall give information of the circumstance to the consuls or consular agents of the nation to which the deceased belongs, in order that the necessary information may be immediately forwarded to the parties interested.
>
> "Consuls-general, consuls, vice-consuls and consular agents shall have the right to appear, personally or by delegate, in all proceedings on behalf of the absent or minor heirs or creditors until they are duly represented."

[13, 14] The parties argue over the proper interpretation of this treaty. Appellant argues that the second paragraph should be read independently of the first so as to give the Consul General the power alleged to exist. Respondent argues that the first paragraph limits the operation of the second paragraph to nationals dying abroad in the other country, and does not include the right to represent in the other country nationals residing at home. If the document alone be considered, either interpretation is reasonable. But the treaty provision must be considered together with applicable principles of international law. Without reference to any treaty provision, it is a well settled principle of international law that consular representatives are deemed to be international attorneys in fact for their nationals. One of the earliest cases so holding, and a leading case on the subject, is The Bello Corrunes, 6 Wheat. 152, 5 L.Ed. 229. In that case the United States Supreme Court held that a vice consul of Spain was entitled to make a claim by way of libel on behalf of Spanish owners of a Spanish ship resident in Spain and whose identities were unknown to the consul. In that case the following frequently quoted statement appears, 6 Wheat. at page 168, 5 L.Ed. 229: "On the first point made by the attorney-general, this court feels no difficulty in deciding, that a vice-consul, duly recognized by our government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in courts only, it would be a mockery, to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States, has sanctioned the exercise of this right, and it is impossible, that any evil or inconvenience can flow from it. Whether the powers of the vice-consul shall, in any instance, extend to the right to receive, in his national character, the proceeds of property libelled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed. And this view of the subject will be found to reconcile the difficulties supposed to have been presented by the authorities quoted on this point."

In the case of In re Tartaglio's Estate, 12 Misc. 245, 33 N.Y.S. 1121, it was held, both as a result of an interpretation of a treaty with Italy and by general international law, that the Italian Consul General could properly apply and receipt for the distributive shares of personal property on behalf of the Italian heirs.

In the case of Buxhoeveden v. Estonian State Bank, 181 Misc. 155, 41 N.Y.S.2d 752, there is a good collection of case and text authorities. There, both by treaty and on general principles, the Estonian Consul General was permitted to appear and set aside a default judgment, and to defend a suit against the Estonian State Bank, treated in the opinion as a private person.

The case of In re Zalewski's Estate, 292 N.Y. 332, 55 N.E.2d 184, 157 A.L.R. 87, is another good case on the subject, and collects and comments on many relevant authorities. There it was held by the New York Court of Appeals that either by treaty or by general principles of international law, a consular representative could even exercise on behalf of one of its nationals resident in the home country the personal right of a widow to elect not to take under a will. While three justices dissented in that case, they did so only on the ground that the power of the consul did not extend to the exercise of such a personal right—they did not disagree with the majority holding that a consul has the right to appear and to represent his nationals.

[15, 16] In interpreting the treaty provision here involved, the following principles stated in In re Zalewski's Estate, 292 N.Y. 332, 55 N.E.2d 184, 186, 157 A.L.R. 87, amply supported by authority, are applicable: "In arriving at the meaning of the treaty we are bound to remember that it is the supreme law of the land * * *, that its words are to be taken liberally in the light of evident purposes * * * and that, since the pact is done in counterparts, one in each language little use can be made of local technical definitions of words. * * * When two constructions of a treaty are admissible, one restrictive of the rights that may be claimed under it and the other liberal, the latter is always to be preferred. * * * 'This court would not readily lean to favor a restricted construction of language, as applied to the provisions of a treaty, which always combines the characteristics of a contract, as well as a law'. The Bello Corrunes, 6 Wheat. 152, 171, 5 L.Ed. 229."

With these well settled principles in mind we have no reasonable doubt but that the treaty here involved should be interpreted so as to confer a treaty right on the consuls of the contracting countries to appear on behalf of their nationals not otherwise represented and to represent them in the courts of the other country.

This conclusion would be almost inevitable were it not for the case of In re Estate of Clausen, 202 Cal. 267, 259 P. 1094. There it was held that the Danish Consul did not have the right to receive distribution of and receipt for the interests of Danish nationals under the then treaty with Denmark. The treaty there involved was one entered into in 1826 and related solely to problems of navigation and commerce existing between the two countries. It contained a clause that for the protection of navigation and commerce each country would agree to receive and admit consuls from the other who should enjoy all the privileges and powers of consuls conferred by either on the consuls of the most favored nation. Nearly a hundred years after this treaty was entered into, United States entered into a much broader treaty with Germany which expressly conferred upon consuls of either country the power on behalf of non-resident nationals to receive and to receipt for distributive shares of estates to which such non-resident nationals were entitled. The Supreme Court of California ruled, purely as a matter of interpretation of the treaty, and without reference to general principles of international law, that the treaty between Denmark and the United States related solely to problems of navigation and commerce, and that the powers conferred by that treaty on consuls related solely and exclusively to such problems. Thus the treaty with Germany did not operate under the most favored nation clause to confer any rights on Danish consuls except in connection with navigation and commerce. The court did not discuss the right of the Danish Consul to appear and represent his national residing in Denmark in the probate proceeding under the general principles of international law above discussed. It simply decided that such consul, under the treaty, had no power to have distributed to himself and to receipt for the share of the estate to which the Danish national was entitled. See, also, Petersen v. Lyders, 139 Cal.App. 303, 33 P.2d 1030, and Lyders v. Petersen, 9 Cir., 88 F.2d 9.

The present case differs from the Clausen case in several particulars. The present case does not involve the right of the Yugoslav Consul General to have distributed to him and to receipt for the property bequeathed to appellant. The proceeding on appeal is not for distribution, but to determine heirship. Several times during the trial counsel appointed by the Consul General stated that he was not contending that the estate should be distributed and receipted for by the Consul General. He agreed that the court could order the estate distributed directly to appellant, and, in that event, offered to see that the estate was distributed to appellant and receipted for by him. This is important, not only because it serves to distinguish the instant case from the Clausen case, but because it also meets the doubts expressed in the case of The Bello Corrunes, 6 Wheaton 152, 5 L.Ed. 229. In the quotation from that case above set forth the United States Supreme Court expressed doubt that, under general principles of international law, a consular representative could have the proceeds of the pending action distributed to himself, but had no doubts about the power of such representative to appear and to represent his absent national.

In the second place, the Clausen case limited its decision to an interpretation of the treaty involved. It did not discuss the power of a consul, independent of treaty, to appear and to represent his non-resident nationals in lawsuits in the country to which such consul was accredited.

[17] In the third place, the instant case is distinguishable from the Clausen case because unlike the treaty involved in the Clausen case, the treaty here, properly interpreted, confers the very power involved. Moreover, under general principles of international law, consuls possess the power to appear for and to represent their nonresident nationals in the courts of the country to which such consul is accredited.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

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113 Cal.App.2d 356

CRABBE v. WHITE et al.

Civ. 15014.

District Court of Appeal, First District, Division 2, California.

Sept. 29, 1952.

Rehearing Denied Oct. 29, 1952.

Hearing Denied Nov. 25, 1952.

Action by John H. Crabbe against W. T. White and another for cancellation and annulment of a satisfaction of a judgment for plaintiff against Ira O. Rhoades, since deceased, and an order directing issuance of execution on the judgment. From a judgment entered in the Superior Court, City and County of San Francisco, Preston Devine, J., on sustaining a demurrer to an amended second and supplemental complaint, without leave to amend, plaintiff appealed. The District Court of Appeal, Goodell, J., held that the complaint was vulnerable to the demurrer, based on the three year statute of limitations applicable to fraud actions, as showing that abundant means of knowledge of facts constituting alleged fraud in procuring the satisfaction were available to plaintiff about five years before commencement of the action.

Judgment affirmed.

1. Limitation of Actions 🔑179(2)

The complaint in fraud action, filed after expiration of three years from time when fraud was committed, must affirmatively show that plaintiff did not discover facts constituting fraud until a time within three years before commencement of action to withstand demurrer based on statute of limitations. Code Civ.Proc. § 338, subd. 4.

2. Limitation of Actions ⟹195(5)

In fraud action, filed over three years after commission of fraud, plaintiff must show times and circumstances under which facts constituting fraud were brought to his knowledge so that court may determine whether such facts were discovered by plaintiff within three-year limitation period before commencement of action, and if plaintiff appears to have had notice or information of circumstances putting him on inquiry which, if followed, would have led to knowledge of fraud, or facts showing fraud were presumptively within his knowledge, within such time, he will be deemed to have had actual knowlege of such facts; means of knowledge being equivalent to knowledge.

3. Limitation of Actions ⟹100(10)

A judgment creditor learning of proceedings for probate of debtor's recorded will about five years before commencing suit to cancel satisfaction of judgment for debtor's alleged fraud in representing that he owned nothing, was immediately put on inquiry as to everything disclosed in such proceedings, including debtor's ownership of valuable securities declared in will to be his separate property acquired before his marriage prior to entry of satisfaction, so that complaint alleging such facts was vulnerable to demurrer based on three-year statute of limitations. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

4. Records ⟹19

Means of knowledge is deemed in law to be knowledge, especially where it consists of public records.

5. Limitation of Actions ⟹179(2)

A mere averment of party's ignorance of fact which he might have discovered with reasonable diligence is insufficient to postpone running of statute of limitations.

6. Limitation of Actions ⟹180(4)

An allegation of complaint that plaintiff exercised due diligence in pursuing his remedies in commencing action to cancel satisfaction of judgment for fraud under circumstances and conditions prevailing during war was mere conclusion insufficient to render complaint invulnerable to demurrer based on three-year statute of limitations. Code Civ.Proc. § 338, subd. 4.

7. Limitation of Actions ⟹179(2)

In action to cancel satisfaction of judgment for debtor's fraud in falsely representing that he owned nothing, allegations of complaint that plaintiff, almost immediately after learning that deceased debtor's estate was valued at substantial amount, communicated with debtor's associate, who said that debtor obtained valuable securities in estate after date of satisfaction, and that plaintiff had no reason to believe otherwise until he examined debtor's will, declaring his whole estate his separate property acquired before his marriage to defendant prior to such date, were insufficient to withstand demurrer based on three-year statute of limitations, where knowledge of such declaration was available to plaintiff as matter of public record about five years before commencement of action.

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Crabbe & Streiff, San Francisco, for appellant.

Charles D. Sooy, San Francisco, for respondent W. T. White.

Charles D. Sooy, San Francisco, Maurice Thorner, Los Angeles, for respondent Rhoades.

GOODELL, Justice.

This appeal is from a judgment entered on the sustaining of a demurrer to an amended second and supplemental complaint without leave to amend. The action was commenced on November 20, 1946 to cancel and annul for alleged fraud a satisfaction of judgment executed on October 24, 1933, and to obtain an order directing execution to issue on the judgment.

On June 20, 1925 Mary R. Crabbe, the wife of appellant (but since deceased) was injured in an automobile accident and appellant on behalf of both spouses sued Ira O. Rhoades (in action No. 163,526) for damages. They were awarded a verdict for $35,000 and Rhoades appealed. On

October 28, 1929 the judgment was affirmed. Crabbe v. Rhoades, 101 Cal.App. 503, 282 P. 10. Thereafter they were paid $10,000 by an insurance company which was applied on their judgment, and $600 was recovered on executions. On October 24, 1933 a settlement was reached between Rhoades and appellant, acting for himself and his wife, for $3500, which was paid. The satisfaction of judgment then entered is now sought to be set aside.

On August 10, 1941 Rhoades died testate, leaving as his legatees and devisees his widow, the respondent Elizabeth S. Rhoades, and his daughter Winnie R. White. The decree of distribution in his estate was entered on June 24, 1942 by the Superior Court in Los Angeles County, vesting approximately one-half the estate in Mrs. Rhoades and one-half in Mrs. White. Respondent W. T. White was joined herein as a defendant because on his wife's death in 1942 he succeeded to her share in the Rhoades estate.

The basis of this action is the alleged fraud of Rhoades in procuring the satisfaction of judgment, in that he is alleged to have then owned all the securities later distributed in his estate, worth approximately $80,000, but was represented at the time of the settlement as owning nothing. It is alleged that he turned over all his securities to others to defeat execution on the judgment, and had absented himself from the jurisdiction until a settlement of the judgment could be arranged by his associates, acting under the direction of his daughter.

There were numerous grounds of demurrer, with particular emphasis on the statute of limitations, sections 336(1), 337(1), 338(4), 339(1) and 343, Code Civ. Proc., and laches. The demurrer sets forth that no creditors' claim was filed in the estate of Rhoades and that plaintiff *in the pending action* seeks an execution on a judgment entered *in a different action* (No. 163,526). It also contains specifications of misjoinder and nonjoinder.

The complaint describes the securities distributed in the Rhoades estate and shows that plaintiff is seeking herein to follow those securities into the hands of the distributees and to subject them to an execution on the judgment in the first action if and when the satisfaction therein is set aside.

The satisfaction was executed over 13 years before this suit was filed but appellant alleges that the fraud was not discovered until long after 1933, and the principal question now presented for decision is whether the complaint is vulnerable to respondents' demurrer based on subd. 4 of sec. 338, Code Civ.Proc., which provides that in a fraud action the statute of limitations is three years after the discovery of the facts constituting the fraud.

[1, 2] The leading case of Lady Washington Consolidated Co. v. Wood, 113 Cal. 482, 45 P. 809, holds that the complaint in a fraud case filed after the expiration of three years from the time when the fraud was committed must affirmatively show that the plaintiff did not discover the facts constituting the fraud until within three years prior to commencing the action. This is an element of the plaintiff's right of action. The court in the Lady Washington case, 113 Cal. at page 487, 45 P. at page 810, says that the plantiff must show "the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged, and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts."

The complaint alleges that in his will Rhoades "declared that the whole of his estate was his sole and separate property acquired by him before his marriage" which was on August 7, 1930, more than 3 years before the settlement. Those declarations were of the utmost importance since they ran directly counter to the representations alleged to have been made that at the time of the settlement Rhoades had nothing and that his associates had arranged a loan of $3500 for him.

The complaint alleges that plaintiff learned of the death of Rhoades in "the latter part of the year 1941, when there appeared in the newspapers in San Francisco items concerning the death and estate of said Rhoades in * * * Los Angeles" and that "plaintiff did some time thereafter communicate with an attorney in the County of Los Angeles with a view to ascertaining the nature and value of said estate with a view to filing a claim * * * and was informed by said attorney that the said estate was of the value of approximately $80,000.00. * * *"

[3, 4] If plaintiff learned of the probate of Rhoades' estate in the latter part of 1941 and the estate was distributed on June 24, 1942, as alleged, then the will must have been filed for probate some time in the latter part of 1941. When so filed it became a matter of public record and plaintiff, having admittedly learned late in 1941 of the probate proceedings, was immediately put upon inquiry, sec. 19, Civ. Code, as to everything which they disclosed. Hecht v. Slaney, 72 Cal. 363, 366–7, 14 P. 88; Galvin v. Palmer, 113 Cal. 46, 52–3, 45 P. 172; Lady Washington Consolidated Co. v. Wood, supra, 113 Cal. 482, 488, 45 P. 809; Tynan v. Kerns, 119 Cal. 447, 450–1, 51 P. 693; Dennis v. Bint, 122 Cal. 39, 44, 54 P. 378; Tracy v. Muir, 151 Cal. 363, 370, 90 P. 832; Andreson Company v. Regenold, 166 Cal. 44, 49–50, 134 P. 999; Bradbury v. Higginson, 167 Cal. 553, 557–8, 140 P. 254. In Wheaton v. Nolan, 3 Cal.App.2d 401, 403, 39 P.2d 457, it is said: "Means of knowledge, especially where it consists of public records as is manifest in this case from the complaint itself, is deemed in law to be knowledge (citations)". See, also, Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268, and Hobart v. Hobart Estate Co., 26 Cal.2d 412, 436–439, 159 P.2d 958.

The complaint alleges that "on or about the 15th day of November, 1943 * * * plaintiff personally examined at length the last will and testament of said Ira O. Rhoades * * * in the County Clerk's office in Los Angeles" and "then and there saw that the testator * * * declared that the whole of his estate was his sole and separate property acquired by him before his marriage to said Elizabeth S. Rhoades" and further that the decree of distribution had so found.

[5] In Bradbury v. Higginson, supra, 167 Cal. 553, 558, 140 P. 254, 255, it was said that "a mere averment of ignorance of a fact which a party might with reasonable diligence have discovered is not enough to postpone the running of the statute (citations)". It is evident that if by an examination of the will on or about November 15, 1943 plaintiff learned for the first time, as alleged, of the testator's declarations therein—which, if true, demonstrated that the representations alleged to have been made in 1933 were false and fraudulent—he certainly could have learned of them in the latter part of 1941 when the will was filed and became a matter of public record. This he could have done by obtaining through his Los Angeles correspondent, or otherwise, a copy of the will, and thus he would have had this vital information two years earlier at small cost and by a simple, routine process in everyday use by lawyers. Admittedly plaintiff promptly learned from his Los Angeles correspondent that the estate was worth approximately $80,000 and this in itself was "sufficient to put a prudent man upon inquiry" (sec. 19 Civ.Code) and "excite his suspicion" (see Tarke v. Bingham, 123 Cal. 163, 166, 55 P. 759, 760), since Rhoades was "broke" in 1933, just 8 years earlier, according to the alleged representations.

[6] The complaint asserts that plaintiff "exercised due diligence in pursuing his remedies in commencing this action under the circumstances and conditions prevailing during World War II", but that of course is nothing but a conclusion of the pleader and a very general and indefinite one at that.

[7] The complaint also alleges that "almost immediately" after learning through his Los Angeles correspondent that the estate was valued at approximately $80,000, plaintiff communicated with one of

Rhoades' associates (naming him) "and stated that there were certain securities of great value in said estate" and that this associate "did then and there state to this plaintiff that the said securities had been obtained by said Rhoades in stock transactions after the date of said settlement on or about October 24, 1933; and that this plaintiff had no reason to believe otherwise until on or about November 15, 1943" when he personally examined "carefully and at length the last will of Rhoades". Whatever force this allegation had is entirely destroyed by the fact that Rhoades' own solemn, testamentary declaration directly to the contrary was available to plaintiff as a matter of public record in the latter part of 1941. The same may be said with respect to the allegation that plaintiff was not informed by his Los Angeles correspondent, or otherwise, that the will or decree of distribution declared that the whole estate was Rhoades' sole and separate property acquired prior to his marriage in 1930.

The allegation that plaintiff did not learn of Rhoades' testamentary declaration until "on or about the 15th day of November 1943" had been contained in his first amended complaint, and when the trial judge sustained the demurrer thereto he wrote to both sides pointing out that "In Cohn v. Wright, 89 Cal. 86, 26 P. 643, it was held that although the words 'on or about' are sufficient for some purposes they are not sufficient where the right of a person depends upon his doing a particular thing within a definite time". Nevertheless plaintiff repeated the same allegation in the last complaint, and despite the citation supplied by the court plaintiff makes no attempt in his brief to distinguish the Cohn case or to justify such an allegation in a case such as this or to cite authority holding that any days of grace whatever may be superadded to the three-year period. Plaintiff's "on or about" allegation is further weakened by another allegation, that about September 12, 1946 plaintiff read a decision of the appellate court which convinced him that he still had time to sue, and filed this suit *within 60 days thereafter.* It is not necessary to base this decision upon the "on or about" allegation since the complaint in its other allegations shows that there were available to plaintiff abundant means of knowledge in the latter part of 1941 approximately 5 years before this suit was commenced.

We see no reason to discuss any other points.

The court was clearly right in sustaining the demurrer without leave to amend.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

39 Cal.2d 592

HOLMBERG v. MARSDEN et al.

S. F. 18645.

Supreme Court of California, in Bank.
Oct. 7, 1952.

Action to recover money furnished by plaintiff for a one-third interest in a business enterprise. The Superior Court, Alameda County, O. D. Hamlin, Jr., J., rendered judgment for defendants, and plaintiff appealed. The Supreme Court, Schauer, J., held that the evidence sustained findings that plaintiff and defendants participated on an equal footing as entrepreneurs in organizing the business enterprise, which was incorporated, and that defendants did not sell or offer to sell to plaintiff a one-third stock interest in a corporation or collect money on stock subscription without obtaining permits required by statute.

Judgment affirmed.

Prior opinion, 242 P.2d 911.

1. Appeal and Error ⟹931(1), 989

Where findings of trial court are attacked as being unsupported by the evidence, the power of appellate court begins and ends with a determination of whether there is any substantial evidence which will support the findings, and all reasonable inferences must be indulged to uphold them.

2. Licenses ⟹39.24

In action to recover money furnished by plaintiff for a one-third interest in a business enterprise, evidence sustained findings that plaintiff and defendants participated in organizing the enterprise, which was incorporated, and stood on an equal footing as entrepreneurs, and that defendants did not sell or offer to sell to plaintiff a one-third stock interest in a corporation or collect money on stock subscription without obtaining permits required by statute. Corporations Code, §§ 25000 et seq., 25153.

3. Licenses ⟹39.7

Where three men, two of whom were engaged in lumber business as partners, furnished money and participated on an equal footing as entrepreneurs in organizing a new business enterprise which was incorporated, partners, though they made original proposal that third person join in the business, were not bound to reimburse him for money invested in business, though stock in corporation had not been issued and permits required by statute for issuance of stock and collection of money on subscriptions had not been obtained. Corporations Code, §§ 25000 et seq., 25153.

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Desmond N. Bonnington, Oakland, for appellant.

James W. Harvey and Dorothy E. Handy, San Francisco, for respondents.

SCHAUER, Justice.

Plaintiff seeks to recover from defendants $5,000 furnished by plaintiff for a one-third interest in a business enterprise. He claims that payment of his money into the business before a permit had been secured for issuance of his one-third share of stock in a corporation which all parties agreed was to be formed, constituted a sale by defendants of securities in violation of the Corporate Securities Act (see Corp.Code, § 25000 et seq.). Judgment was rendered in defendants' favor by the court, sitting without a jury, and plaintiff appeals. We have concluded that the evidence supports the trial court's finding that no such sale occurred, and that the judgment must be affirmed.

The evidence appears to be without substantial dispute. In 1948 defendants Robert G. Marsden and Robert W. Marsden, father and son, were as partners operating a lumber business in Emeryville, under the name of West Coast Export Materials. In November of that year they were negotiating for purchase of a kiln in Oakland for the drying of lumber, but lacked sufficient capital to handle the undertaking. On November 16, 1948, Robert W. telephoned to his friend, plaintiff, who then lived in Seattle, and proposed that plaintiff join in the venture with the two Marsdens by furnishing some $4,000 or $5,000 and also taking an active part in operating the business, which would belong to the three men in equal shares, and that plaintiff "come on down and look the thing over." Plaintiff testified that during the telephone conversation "I said * * * 'I am not interested in any partnership, Bob, because I have known too many people become—lost their friendship through partnership * * * If I did venture into any business, it would have to be on a corporate basis.' He said, 'Well, certainly, that is the way we feel. We would want it incorporated also.' I said, 'That is the only way for protection for everybody concerned.' He said, 'What we do is incorporate it, and we will all put up equal shares of money, each have a third of the business and have equal shares of stock.'" At plaintiff's suggestion Marsden wrote plaintiff a letter the same day, setting forth in some detail the anticipated income and expenses of the proposed venture, the amount of capital needed and the purposes (chiefly for advance rent and for down payment on equipment) for which it was needed. Also included was a statement that a purchase contract or order had been received for three carloads of lumber, that further orders were expected from the same source, and that "you will have an equal share of stock as we do (⅓ interest now). We have or want and must file corporation papers as soon as possible as it is all made out in Dads and my name now. In other words, we have gone ahead in fact have the first charge of lumber in the kiln now * * *"

A few days later plaintiff made a trip to Emeryville and personally investigated the project, and in conversations with the Marsdens it was agreed that if plaintiff "desired to come in" he need not resign from his Seattle job until the end of the year (1948) in order to protect "the bonus setup that I had with my company" (this was at plaintiff's request), and "that the corporation papers would be sent up to me * * * [and] would be sent back signed with the money that we agreed would be placed up by each party, which at that time was $5,000. * * * [T]he interest in the corporation * * * would be one-third interest, and equal shares to each." Plaintiff returned to Seattle; articles of incorporation using the corporate name of Cal Kiln & Lumber, Inc., and naming plaintiff as one of the incorporators, were prepared and mailed to plaintiff; and plaintiff signed the articles as an incorporator and returned them to defendants with plaintiff's check for $3,000 payable to the order of Cal Kiln & Lumber, Inc. The check was endorsed "Cal Kiln & Lumber Inc., R. G. Marsden, for deposit only," and the proceeds were used by defendants in part payment for the dry kiln being purchased. The articles of incorporation were submitted to the Secretary of State for filing, but were rejected because the proposed corporate name conflicted with that of an existing corporation. The name of M. & H. Kiln & Lumber, Inc. (the M. & H. stands for Marsden & Holmberg) was then agreed upon, new articles were prepared and filed in which an office employe of the business rather than plaintiff was named as the third incorporator inasmuch as plaintiff was still in Seattle, and a certificate of incorporation was issued. Plaintiff testified that he would not have contributed money to the venture "on any other basis" than "that a corporation would be formed."

On January 1, 1949, plaintff came to Emeryville to locally participate in the business, his name was substituted for that of the office employe as a director and he was also made secretary-treasurer of the corporation, and took "charge of practically all of the outside work in the yard, the supervising of the * * * three or four men * * * working out in the yard." He was authorized to sign checks for the business, and on two occasions signed with one of the Marsdens on promissory notes for money borrowed from the bank on behalf of the business. All three men worked at the yard "every working day of the week," and each day conferred together concerning problems of the business. Robert W. Marsden acted as sales manager and the elder Marsden as bookkeeper and office manager. It was agreed that each should receive a weekly salary of $100. Two "official" directors' meetings were also held. On February 16 or 18, 1949, plaintiff deposited $1,500 to the bank account of M. & H. Kiln & Lumber, Inc.; he also refrained from drawing salary for five weeks, thus making up the balance of his total contribution of $5,000.

When the first directors' meeting was held, in January, 1949, an accountant who was present advised the three men that it would be futile to apply for a permit to issue stock until the business had operated long enough to display an "acceptable" financial statement, and it was agreed "that we would just wait." No application for such a permit was ever made. Neither was application ever made "for a permit to take consideration in connection with pre-incorporation subscriptions." (See Corp.Code, § 25153.)

The conditional sales contract under which the dry kiln was being purchased was formally executed December 22, 1948, and named the two Marsdens as purchasers. The contract was never transferred to the corporation because the seller "would not permit it." Robert W. Marsden testified, however, that they were buying the equipment "for the interest of all three people that were going to be in this corporation * * * [and] always treated that as a part of the assets of this business," and that the Marsdens themselves put between $11,000 and $12,000 cash into the business "plus prospects and a going business which we had prior to this under West Coast Export Materials."

By May, 1949, the business was in bad financial straits and plaintiff demanded return from defendants of the $5,000 he had contributed, and thereafter instituted this action to recover it. At the time of trial (May, 1950) the Marsdens were still operating the business, had completed paying for the dry kiln, and were "trying to pull this thing out * * * [although] it is very much in the red."

The trial court found and concluded, contrary to allegations of plaintiff's complaint, that the Marsdens did not offer to sell plaintiff a one-third stock interest in a corporation, that no "payments of money were made to defendants on the representation by said defendants that plaintiff would be issued one-third of the stock" in the corporation which was formed, that defendants did not defraud plaintiff, that plaintiff has not been damaged "by reason of any representations or any acts or conduct of" defendants, and that defendants were not indebted to plaintiff. Judgment was entered in defendants' favor, and plaintiff appeals, contending that the evidence does not support the findings.

[1, 2] The power of an appellate court, in deciding such a contention, begins and ends with a determination as to whether there is any substantial evidence which will support the findings, and all reasonable inferences must be indulged to uphold them. (In re Estate of Bristol (1943), 23 Cal.2d 221, 223, 143 P.2d 689; Richter v. Walker (1951), 36 Cal.2d 634, 640, 226 P.2d 593.) It is apparent that the evidence amply supports the essential findings. Plaintiff's own testimony establishes that a corporate form of organization was not only first suggested by him, but that he insisted upon it and agreed to, and did participate in, the enterprise on that basis. This supports the factual conclusion that defendants did not sell or offer to sell to plaintiff a one-third stock interest in a corporation but, rather, participated with plaintiff in organizing the enterprise; the fact that defendants made the original proposal that the three parties join in the business venture does not compel a contrary finding. Consistently with the court's findings it appears that plaintiff was at all times kept fully informed of all matters in connection with the business and he was named in and he signed as an incorporator the first proposed articles of incorporation; omission of his name as an incorporator in the articles which were finally accepted for filing was only because, at his own request and to serve his own ends, he had remained at his Seattle job until the end of the year in order not to lose his bonus rights. After coming to Emeryville he participated fully and actively in conducting the business, as he had agreed to do from the start, and acquiesced and agreed "that we would just wait" until a sounder financial status had been reached before applying for a permit to issue stock to the three owners.

[3] Whether the three men, as among themselves, be termed partners, joint venturers, or co-promoters of a corporation

(see Morris v. Whittier Amusement Co. (1932), 123 Cal.App. 121, 123, 10 P.2d 1017; 6a Cal.Jur. 278; 13 Am.Jur. 265), it is obvious that the trial court was justified in concluding that they stood on an equal footing as entrepreneurs. It is significant that it was only after the financial outlook began to worsen that plaintiff sought to recover his contribution. There appears no more reason for defendants to reimburse plaintiff for his contribution to the venture than for plaintiff to reimburse defendants for theirs. At the time of trial defendants were still devoting their time and energies to operating the business for the benefit of all three owners, which included plaintiff.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

113 Cal.App.2d 613

Ex parte BERRY.

Cr. 2846.

District Court of Appeal, First District, Division 2, California.

Oct. 9, 1952.

Petitioner brought habeas corpus proceedings to secure relief from alleged cruel and unusual punishment imposed on him by the Adult Authority, which required petitioner to submit to a spinal fluid test to determine whether he had been cured of syphilis, as condition of Adult Authority fixing term to be served by petitioner in penitentiary. The District Court of Appeal, Dooling, J., held that Adult Authority did not act unreasonably.

Writ discharged.

Convicts ⚷2

Habeas Corpus ⚷25(1)

Adult Authority did not act unreasonably in insisting that prisoner submit to a spinal fluid test to determine whether he was still suffering from syphilis, as requested by doctor employed by Department of Corrections and practicing in San Quentin, before Adult Authority would fix term to be served by prisoner, though prisoner had been treated in prison for syphilis by another doctor and had been discharged as cured over two years before, and though a spinal fluid test results in severe head pains and illness for several days, and therefore prisoner was not entitled to relief by habeas corpus from alleged cruel and unusual punishment.

James Berry, in pro. per.

Edmund G. Brown, Atty. Gen. of California, Clarence A. Linn, Asst. Atty. Gen., Charles E. McClung, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Petitioner seeks relief by habeas corpus from what he contends is cruel and unusual punishment imposed upon him by the Adult Authority as a condition of that board fixing the term to be served by him. In this behalf petitioner alleges that at the time of his commitment he was suffering from a venereal disease (syphilis), that he was treated in prison for this disease by one Dr. Kulcher and discharged as cured over two years ago, that previous spinal tests have been negative, but that while Dr. Kulcher had declared that petitioner is not in need of further treatment and is cured one Dr. Schmidt, a doctor employed by the Department of Corrections and practicing in San Quentin, has insisted that petitioner submit to another spinal fluid test and the Adult Authority refuses to fix petitioner's term until he has done so. It is further alleged that this test is unnecessary and will result in severe head pains and illness for several days.

We have concluded that petitioner is entitled to no relief. The most that appears is a difference of medical opinion which the Adult Authority has resolved against petitioner. We cannot say that it is an unreasonable requirement for the Adult Authority to impose on a prisoner, who has suffered from a highly infectious disease like syphilis, that before fixing his term he shall be subjected to any standard test to determine definitely whether he still suffers from that disease.

The writ is discharged.

NOURSE, P. J., and GOODELL, J., concur.

113 Cal.App.2d 617

PEOPLE v. ALAMILLO.

Cr. 4776.

District Court of Appeal, Second District, Division 1, California.

Oct. 9, 1952.

Rehearing Denied Oct. 23, 1952.

Hearing Denied Nov. 6, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of the unlawful sale of heroin, and from the judgment of conviction and from order denying motion for new trial, defendant appealed. The District Court of Appeal, White, P. J., held that evidence was insufficient to entitle defendant to an instruction on entrapment.

Affirmed.

1. Criminal Law 🔑814(1)

Jury instructions in criminal cases must be responsive to issues raised by the evidence.

2. Criminal Law 🔑772(6)

In prosecution for unlawful sale of heroin, if there was any evidence deserving of any consideration whatever, on issue of entrapment, court should have instructed jury on doctrine applicable to that issue. Health and Safety Code, § 11500.

3. Criminal Law 🔑37

Where accused has a pre-existing criminal intent, fact that, when solicited by a decoy, accused commits a crime, raises no inference of unlawful entrapment.

4. Criminal Law 🔑37

The law does not frown on entrapment of a criminal, but condemns seduction of innocent people into a criminal career by its officers.

5. Criminal Law 🔑814(8)

In prosecution for unlawful sale of heroin, evidence was insufficient to entitle defendant to instruction on entrapment. Health and Safety Code, § 11500.

6. Poisons 🔑9

Evidence sustained conviction for unlawful sale of heroin. Health and Safety Code, § 11500.

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William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of the crime of violating section 11,500 of the Health and Safety Code of the State of California, a felony, in that he did on or about the 6th day of July, 1951, willfully, unlawfully, and feloniously sell, furnish, and give away a preparation of heroin.

Following the entry of a plea of not guilty, trial was had before a jury which returned a verdict finding defendant guilty of the offense charged against him. Motion for a new trial was denied and judgment pronounced.

From the judgment and order denying his motion for a new trial defendant prosecutes this appeal.

The factual background surrounding this prosecution may be summarized as follows: There was testimony on behalf of the prosecution that defendant operated a barbershop at 1816 East First Street in the city of Los Angeles. On July 6, 1951, at approximately 5:30 p. m. Deputy Sheriff Robert Ruskin accompanied by a confidential operator entered defendant's shop. Defendant testified that the name of the operator was Jack Rutherford; that he had known him for about three months, and had cut his hair a few times. Two other officers, Jack A. Jones and Thomas E. Farrell, remained in an automobile in a parking lot adjoining the barbershop.

When Officer Ruskin and Jack Rutherford entered the barbershop they sat down and waited approximately half an hour. After defendant had finished working on a customer, he walked by and asked Ruskin and Rutherford what they wanted. Officer Ruskin said he wanted to buy a cap of heroin. Defendant said, "Wait a minute," and went back to his chair and started to work on another customer. About twenty minutes later, after this customer had left, Officer Ruskin and Rutherford walked to the front of the barbershop, at which time the defendant again asked Ruskin what he wanted, and Ruskin said, "I would like one cap of heroin." Defendant told Ruskin to go back and sit down, which Ruskin and Rutherford did. Again defendant proceeded to work on a customer. After this customer had left, the defendant got a broom and started sweeping the shop. Ruskin and Rutherford walked up to defendant, and the latter said to Ruskin, "Put your $5.00 on the counter," which Ruskin did, whereupon defendant placed in Ruskin's hand one capsule containing white powder. Ruskin and Rutherford then walked away and were joined by Sergeant Jones and Detective Farrell. Ruskin, Jones and Farrell returned to the barbership and placed the defendant in custody and proceeded to search him. Out of his right-hand pants pocket the officers recovered the marked $5 bill. In a room at the rear of the shop Ruskin found an empty capsule on top of a box of pills and debris on a studio couch. Officer Farrell found a capsule containing residue under the couch. Defendant when questioned in this room said, "All right, you boys got me, I guess. I sold you the cap. I thought I was doing you a favor."

The capsule purchased by Ruskin admittedly contained a mixture of morphine and heroin and the other capsules contained traces of heroin and morphine.

Sworn as a witness in his own behalf defendant testified that Officer Ruskin came into his shop about 5 o'clock with a man by the name of Jack Rutherford; that at the time he was cutting hair and there were seven or eight other people in the shop; that after about forty minutes or an hour, Rutherford approached him and said, "I am very sick. I have been very sick and I haven't been able to get anything." The defendant said, "What do you mean get anything?" Rutherford said, "You know I am a hype." Defendant testified he told him, "I think you are in the wrong place—there are a lot of guys peddling. Why don't you go over there and see them?"; that Rutherford said, "Yes, but they don't want to sell me"; that after a while Rutherford again asked, "Why don't you try to help us? I am very sick"; that defendant then said, "I can't do anything for you." At that time, according to defendant's testimony, "a fellow passed and hollered at him (apparently meaning that defendant hollered), 'Here, come here, I want to talk to you.' I talked to him in Spanish and I told him that there was a fellow that was sick, that if he wanted to—you know, I know he was making money like that, and I told him and he said, 'Well, I will give it to you.'"

Defendant further testified that he later gave the capsule to the operator Jack Rutherford and that "He gave me $5 and I put it in my pocket. I got it from him. They gave me the $5 and then I gave him the cap. I put the $5 in my pocket."

Appellant first contends that the court erred in refusing to give a proffered instruction embodying the law of entrapment and in failing to give any instruction thereon.

[1,2] It is a settled rule, as urged by appellant, that jury instructions must be responsive to the issues, and that in criminal cases the issues are determined by the evidence. People v. Carmen, 36 Cal.2d 768, 772, 228 P.2d 281. In the instant case, if there was any evidence deserving of any consideration whatever, upon the issue of entrapment, the court should have instructed the jury upon the doctrine applicable to that issue.

[3–5] Taking the testimony of appellant at its face value, we are persuaded that it does not present a situation deserving of any consideration whatever that he was lured or led into trouble without any intent on his part to commit the offense charged against him. Appellant's own testimony establishes nothing more than a willing seller and a willing buyer of a narcotic. His admissions to the officers, the negotiations conducted between himself and the officers, the presence of the empty capsules in the rear of his barbershop, coupled with the admitted sale of the narcotic and his retention of the $5 paid therefor all belie the claim that the offense was conceived and planned by the officers and that they procured its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud on the part of officers of the law. Where an accused has a preexisting criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment. The law does not frown upon the entrapment of a criminal, but condemns and will not tolerate the seduction of innocent people into a criminal career by its officers. There is an utter lack of evidence in the case at bar that appellant was inveigled into the commission of the crime, or that the officers had been the procuring cause or instigators of the criminal intent. Nor is there any evidence that any persuasion or inducement was offered to appellant to make the sale in question outside of the ordinary conversation that would take place between a willing seller of narcotics and a willing buyer. It is true that according to appellant's testimony the operator appeared to be ill and in distress, but under the circumstances here present, that does not justify an inference of entrapment where the evidence of appellant's willingness to commit the offense and assume the chance of apprehension is abundantly established, not alone by surrounding facts and circumstances, admissions of appellant, but by his own testimony given at the trial. Therefore, no prejudicial error was committed by the court in refusing to instruct the jury on the law of entrapment. That issue was not sufficiently raised by the evidence. People v. Lindsey, 91 Cal.App.2d 914, 917, 205 P.2d 1114; People v. Rucker, 121 Cal.App. 361, 364, 8 P.2d 938; People v. Cherry, 39 Cal.App.2d 149, 151, 152, 102 P.2d 546; People v. Schwartz, 109 Cal.App.2d 450, 454, 455, 240 P.2d 1024.

[6] In urging that the verdict is contrary to the law and the evidence, appellant relies upon the same reasoning advanced in support of his first contention. From what we have herein stated it is manifest that the claim as to the verdict being against the evidence and contrary to law can not be sustained.

For the foregoing reasons the judgment and the order denying defendant's motion for a new trial are and each is affirmed.

DORAN and DRAPEAU, JJ., concur.

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113 Cal.App.2d 631

PEOPLE v. RAMOS.

Cr. 4826.

District Court of Appeal, Second District,
Division 1, California.

Oct. 10, 1952.

Rehearing Denied Oct. 23, 1952.

Hearing Denied Nov. 6, 1952.

Prosecution for allegedly assisting inmate of school for girls to escape. The Superior Court of Ventura County, Atwell Westwick, J., granted motion to set aside information, and the People appealed. The District Court of Appeal, Drapeau, J., held that evidence taken upon preliminary examination failed to establish offense with which defendant was charged.

Order affirmed.

Criminal Law 🔑238

In prosecution for assisting inmate of school for girls to escape, where defendant had nothing to do with escape of inmate, evidence taken on preliminary examination was insufficient to establish offense with which defendant was charged, and information was properly set aside. Pen. Code, §§ 109, 995; Welfare and Institutions Code, § 1152.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., Roy A. Gustafson, Dist. Atty. and Donald L. Benton, Deputy Dist. Atty., Ventura, for appellant.

M. Arthur Waite, Ventura, for respondent.

DRAPEAU, Justice.

For the second time defendant in this case, William Ramos, is before the Court, charged with assisting an inmate of the Ventura School for Girls to escape. The school is a correctional state institution.

In each case an information filed by the District Attorney of Ventura County was set aside by the Superior Court for the reason that the evidence taken on the preliminary examination was insufficient to show reasonable or probable cause that a public offense had been committed and that defendant was guilty thereof. See Penal Code Sec. 995.

The People appealed from the order in the first case and it was affirmed in People v. Ramos, 106 Cal.App.2d 709, 235 P.2d 864.

Then the District Attorney filed another information, after complaint and preliminary examination in the Justices Court. Defendant moved to set aside this information, which motion, as stated, was granted, and again the People appeal.

On the first appeal this court stated the facts as follows, 106 Cal.App.2d 709, 710, 235 P.2d 864, 865:

> "The only evidence taken before the committing magistrate was that of the Superintendent of the Ventura School for Girls, in which she testified relative to the history and commitment of Shirley Sylvester through the Youth Authority, and of Bill Ray Welch, who testified in substance that he and defendant met Shirley Sylvester in front of a garage in Ojai on December 23, 1950, approximately 13 miles from the Ventura School for Girls. His testimony further disclosed that they invited her to go for a ride with them which she accepted; that while riding she told them that she was from the Ventura Girl's School; also that he and defendant stayed all night with her at a ranch house in Ojai and saw her several times thereafter."

On the second preliminary examination the facts were about the same with the following additions:

Defendant and Bill Welch picked up two girls in front of the garage, rather than one. The boys took the girls for a ride around Ventura County, and then to a ranch house where they stayed all night. While riding around, the girls told the boys that they were from the state school. The boys and girls remained together around Ojai for several days. Part of the time was spent at the home of defendant's mother and father. Then they all went to San Francisco.

While in San Francisco the boys ran out of money, and defendant's car broke down. Defendant's folks sent him some money, on his promise to come home. With this money he had his car fixed, and took his girl to her home in Bakersfield, where he was arrested.

Apparently nothing was done about the other boy, for he testified at the preliminary examination.

Defendant's extra-judicial statement made in the District Attorney's office after his arrest was read into the record on the second preliminary examination. Passing its admissibility for lack of proof of the corpus delicti, it added nothing more to the facts than already recited.

The gravamen of the offense with which defendant was charged is to "wilfully assists any inmate of any public training school or reformatory to escape". Penal Code, Sec. 109.

In People v. Murphy, 130 Cal.App. 408, 409, 20 P.2d 63, 64, it is said:

> "The point is settled without dissent, in those few jurisdictions in which it has arisen, that one cannot be guilty of such a crime as that specified in section 109 of the Penal Code unless his effort *accompanies* an actual attempt upon the part of some one else to free himself

> from the confinement of prison walls or from the custody of some minion of the law." (Emphasis added.)

Concededly, in this case neither defendant nor his companion had anything to do with the escape of the two girls. So the record here presented, as in the former case, fails to establish the offense with which defendant is charged. People v. Ramos, supra; People v. Murphy, supra.

This conclusion is buttressed by the fact that Section 1152 of the Welfare and Institutions Code provides:

> "Any person who knowingly permits or aids any inmate of Preston School of Industry, Fred C. Nelles School for Boys, or Ventura School for Girls to escape therefrom, or conceals him with the intent of enabling him to elude pursuit, is guilty of a misdemeanor."

Appellant's argument that the latter section is a special law, and therefore unconstitutional, and that, therefore, Penal Code Section 109 is applicable to this case does violence to the principles of logic.

The order setting aside the information is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.

113 Cal.App.2d 531

BENNER v. BENNER.

Civ. 18837.

District Court of Appeal, Second District, Division 2, California.

Oct. 6, 1952.

Post-decretal proceedings in a divorce case, wherein the Superior Court, Los Angeles County, Mildred L. Lillie, J., granted visitation privileges to the natural grandmother of the child of the parties, and the child's father appealed. The District Court of Appeal, Fox, J., held that the court had had jurisdiction to grant the visitation privileges, even though the grandmother had not been a party to the divorce action.

Affirmed.

Divorce 🔑289

In post-decretal proceedings in divorce case, court had jurisdiction to make order which, from all facts, appeared to be for best interests and welfare of the child of the parties, without regard to personal feelings and desires of child's father, and had power to give visitation privileges to natural grandmother of child, in whose home child had lived for three years, notwithstanding fact that grandmother was not party to divorce proceedings.

Robert H. Green, Los Angeles, for appellant.

Hahn, Ross & Saunders, Los Angeles, for respondent.

FOX, Justice.

Following a decree of divorce, custody of the minor child of the parties was awarded to defendant, who, with the child, resided in the home of her mother. In October, 1949, defendant disappeared and her whereabouts are still unknown. Soon thereafter custody of the little child was awarded plaintiff. At a hearing on December 16, 1949, it was ordered, pursuant to stipulation, that Mrs. Spangler, the natural grandmother of the child, in whose home she had lived for three years, might have reasonable opportunities to visit with the child and that the court might fix the times and places of such visitations, which the court did.

Plaintiff has since moved to vacate the order of December 16, 1949, upon the ground that the court lacked jurisdiction to make it. From the order (entered August 7, 1951) denying the motion he appeals. He has also given notice of an appeal from certain other orders (entered August 20, 1951) charging him with contempt for alleged violations of the court's orders re Mrs. Spangler's visitation privileges with the child. As to these latter orders plaintiff is not aggrieved since his motion to dismiss the contempt citations was granted. Such purported appeal is therefore dismissed.

Plaintiff attacks the order of December 16, 1949, on the ground that since Mrs. Spangler, the natural grandmother, was not a party to the action the court had no jurisdiction to permit her to visit with the child in her own home one week-end per month from Saturday noon till 6:00 p. m. Sunday, and to visit with her in the plaintiff's home one Saturday in each month from 10:00 a. m. to 5:00 p. m. The simple answer to this attack is that the visitation privileges were granted pursuant to stipulation and for the best interest and welfare of the child. It was at this hearing that the court determined plaintiff was a fit and proper person to have the custody of the child, he having been awarded only the temporary, physical custody some two months previously. It is thus clear that the court had jurisdiction of the child and plaintiff and the responsibility of determining what was for the best interest of the child, taking into consideration the absence of her mother, her age of about 4½ years, that she had lived with her grandmother approximately three years, the father's remarriage and home situation and the other facts and circumstances that appear to have a bearing on the problem and its proper solution. Here the grandmother undoubtedly occupied an important place in the life of this young child in view of the absence of her mother, and the fact that she had lived with the grandmother for some three years. To have suddenly severed this close blood tie of love and affection and completely remove the child from its familiar surroundings might well have caused her considerable nervous and emotional disturbance. Hence the propriety of the order which permitted the child to go back to her former home once a month and spend a day and night there and to have the opportunity of spending an additional day each month in her new home with her grandmother. (During the course of the hearing plaintiff took the position that this order amounted to an award of custody of the child to the grandmother. Such a contention is contrary to the plain language of the order and its obvious intent.) Of course the court had the power, without the stipulation, to make an order which from all the facts appeared to be for the best interest and welfare of the child and without regard to the personal feelings and desires of the father. Smith v. Smith, 85 Cal.App.2d 428, 434, 193 P.2d 56.

Kentera v. Kentera, 66 Cal.App.2d 373, 152 P.2d 238, is similar to the case at bar in that it involved a consent order which provided visitation privileges beyond those of the parents. Both parents had remarried. The mother lived in Ukiah. The father and his second wife maintained a home in San Francisco although he was a member of the armed forces temporarily located in Utah. His mother also lived in San Francisco. The child was six years old and attending school. The order required the mother to bring the child to San Francisco for one week-end each month, for a two months' visit during the summer vacation, and for one week on alternate Easter, Thanksgiving and Christmas vacations. In the absence of the father the child was to be delivered to either his wife or to his mother. The order also permitted the grandmother to visit the child in the mother's home in Ukiah. It was considered that this arrangement was for the best interest of the child.

In concluding his brief plaintiff says this court "should reverse the order denying plaintiff's motion to strike her [Mrs. Spangler's] name from the files and records." It does not appear that such an order was made in the court below, nor that such relief was within the scope of plaintiff's notice of motion. There is therefore nothing in this respect for this court to pass upon.

The order entered August 7, 1951, denying plaintiff's motion to set aside and vacate the order of December 16, 1949, is affirmed.

MOORE, P. J., and McCOMB, J., concur.

DIAS v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.

Civ. 15254.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1952.

Rehearing Denied Oct. 30, 1952.

Hearing Denied Nov. 25, 1952.

Action by Louis B. Dias against the California Employment Stabilization Commission and another to recover payments made under the Unemployment Insurance Act pursuant to assessment made on the basis of his employees involved in his business of contract hay-baling. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., granted defendants' motion for judgment on the pleadings and entered judgment accordingly, and plaintiff appealed. The District Court of Appeal, Goodell, J., held that since, as a matter of law, contract hay-baling was not exempted from coverage of the Insurance Act as agricultural labor, judgment on the pleadings was properly granted.

Judgment affirmed.

1. Appeal and Error 🔑837(4)
Pleading 🔑350(1)

The filing of two affidavits in support of motion for judgment on the pleadings which introduced matters which went beyond the face of the complaint, was not permissible, and such extraneous matters could not be considered either on the hearing or on appeal.

2. Pleading 🔑350(3)

The sole question to be determined upon a motion for judgment on the pleadings is whether or not the complaint stated a cause of action.

3. Social Security and Public Welfare 🔑321

Exemption of contract hay-baling from coverage under the Unemployment Insurance Act as agricultural labor does not depend upon where the baling is done but depends rather upon the work being done by those in the employ of the owner or tenant of the farm on which the materials were produced. Gen.Laws, Act 8780d, §§ 1 et seq., 7.

4. Taxation 🔑111.22

That hay-baling under contract with the farmers who grow the hay is not part of the process of harvesting, and, therefore, is not exempted from coverage by Unemployment Insurance Act as agricultural labor is a matter of law declared and settled by the act, and is not a question of fact. Gen.Laws, Act 8780d, §§ 1 et seq., 7.

5. Social Security and Public Welfare 🔑321

Ruling by Internal Revenue Department to effect that an employee of a contract hay-baler is an agricultural laborer was not controlling under Unemployment Insurance Act in absence of exercise by the Unemployment Stabilization Commission of its power to amend the regulations pursuant to the Act to exempt such employment as agricultural labor and to conform the Act to the federal ruling. Gen. Laws, Act 8780d, § 90.

6. Taxation 🔑111.22

In proceeding for refund of payments made pursuant to Unemployment Insurance Act on ground that contract hay-baling was agricultural labor, 1914 decisions of Industrial Accident Commission holding contract hay-baling to be agricultural labor were not controlling in view of facts that agricultural labor had not been defined by rule pursuant to statutory authority and that Commission's orders were not opinions of a court of justice, and that existing rule under Insurance Act had been interpreted by Supreme Court and applied. Gen.Laws, Act 8780d, § 1 et seq.

7. Pleading 🔑345(1.4)
Taxation 🔑543(6)

Petition, in action against Employment Stabilization Commission to obtain refund of payments made under Unemployment Insurance Act, which alleged that such payments were assessed against plaintiff on basis of employees who worked for him in his business of contract hay-baling and that such employment was exempted from coverage of Act as agricultural labor, failed to state a cause of action, since contract hay-baling is a matter of law covered by Act, and defendant's motion for judgment on pleadings was properly granted. Gen.Laws, Act 8780d, § 1 et seq.

Norman A. Eisner, Haskell Titchell, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of California, Irving H. Perluss, Deputy Atty. Gen., William L. Shaw, Deputy Atty. Gen., for respondents.

GOODELL, Justice.

This appeal is from a judgment for defendants entered on their motion for judgment on the pleadings. Appellant filed an action to recover $2,062.20 paid under the Unemployment Insurance Act, Stats.1935, p. 1226 as amended, 3 Deering's General Laws 1944, Act 8780d, covering the period from September 30, 1946 to September 30, 1949. Of this sum $1,229.71 represents employer contributions, $455.44 wage-earner contributions, and the remainder penalties and interest. Before making payment appellant exhausted his administrative remedies by petitioning for a reassessment, which was denied. His exceptions thereto were then disallowed. After payment, his claim for refund was denied. Such claim, then treated as a petition for review by the Appeals Board, was denied. This litigation followed.

In addition to the foregoing matters the complaint alleges:

> "That said assessment, and the whole thereof, was illegally made and said claim for refund was illegally and erroneously denied, for the following reasons:
>
> "1. Plaintiff is, and was during the period involved, engaged in the business of hay baling and the employees involved, and whose compensation constitutes the basis of the assessment, performed labor in connection with said hay baling operations. The hay was baled by plaintiff under contract for farmers, who produced the crops, and in all instances was performed upon the farm upon which the crop was grown.
>
> "2. Agricultural labor is expressly exempted by Section 7 of said Act. The labor in which said employees were engaged was agricultural labor.
>
> "3. Section 43, Title 22, California Administrative Code defines agricultural labor as including services performed in connection with raising or harvesting of any agricultural or horticultural commodity. The baling of the hay is a part of the harvesting of the hay, and constitutes agricultural labor as defined in said section.
>
> "4. Labor performed in connection with the baling of hay is in its nature and in truth and in fact agricultural, and any regulation that would purport to exclude it from the benefits of the exemption contained in Section 7(a) of the Unemployment Insurance Act would be unauthorized, in conflict with the statute, illegal and void.
>
> "5. That plaintiff in good faith and upon reasonable grounds believed and still believes that labor engaged in hay baling is agricultural and exempt under said statute."

Shortly after the complaint was filed respondents, without filing either a demurrer or an answer, moved for judgment on the pleadings on the ground "that plaintiff's complaint does not state a cause of action in favor of the plaintiff but rather affirmatively indicates that the tax obligation upon which plaintiff has filed complaint upon claim for refund is due to the defendants as a matter of law; that as grounds for this motion, this court may take notice that California law establishes that contract hay baling is nontax exempt under the Unemployment Insurance Act and that the plaintiff is tax subject and that hay baling is not a part of the harvesting of an agricultural commodity."

[1, 2] In support of the motion respondents filed two affidavits introducing matters which went beyond the face of the complaint. Under settled rules this is not permissible and such extraneous matters cannot be considered either on the hearing or on appeal. As was recently said in Stockton Morris Plan Co. v. Mariposa County, 99 Cal.App.2d 210, 212, 221 P.2d 232, 234, "the sole question is whether or

not the complaint stated a cause of action. As the Supreme Court said in Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 151, 157 P.2d 1, 2: 'In considering whether the judgment on the pleadings was properly granted, it is but necessary to determine the sufficiency of the complaint upon the same principle as though it had been attacked by general demurrer. In other words, it is only where there is an entire absence of some essential allegation that a motion for judgment on the pleadings may be properly granted.' See also Bates v. Escondido Union High School Dist., 133 Cal.App. 725, 727, 24 P.2d 884, 885, in which the court, after stating the foregoing principle, said: 'This court cannot consider anything outside of the complaint itself * * *'."

We have given no consideration whatever to the affidavits or to any stipulations which might have been entered into.

The allegations of paragraph 1 just quoted are all allegations of fact. They show that plaintiff is not a farmer but a contractor engaged in the business of baling hay for others, under contract.

The allegation of paragraph 2 that "Agricultural labor is expressly exempted by Section 7 of said Act" is true. That section provides that "The term 'employment' does not include: (a) Agricultural labor; * * *." The next allegation of paragraph 2 that "The labor in which said employees were engaged was agricultural labor" is claimed by appellant to be an allegation of fact, but it is simply a statement of appellant's principal contention in this case. It is part of his contention, elaborated in paragraph 3, that "The baling of the hay is a part of the harvesting of the hay, and constitutes agricultural labor" as defined in § 43 of the California Administrative Code.

Section 43 went into effect on June 1, 1945 and was in effect during the 3-year period in question. It provided that "Agricultural labor exempted from 'employment' by Section 7(a) of the act includes all services performed:

> "a. On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting of any agricultural or horticultural commodity; * * *.
>
> "b. In the employ of the owner or tenant of a farm on which the materials in their raw or natural state were produced, in connection with the drying, processing, packing, packaging, transporting, and marketing of such materials.
>
> "c. In the employ of the owner or tenant of a farm with respect to ordinary farming operations in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, if substantially all of such services are performed on a farm.
>
> "d. The provisions of subsections (b) and (c) are not applicable with respect to the services referred to unless such services are carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations. Nor are the provisions of said subsections applicable to services performed in commercial canning or commercial freezing * * *."

Section 90 of the Act empowered the Commission to adopt rules, and it promulgated Rule 7.1 effective February 14, 1937, which remained in effect until June 1, 1945 when § 43 was adopted to replace it. Rule 7.1 is set forth in the footnote.[1]

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[1] "Rule 7.1. Agricultural Labor Defined. —The term 'Agricultural Labor' includes all services performed:

"(1) By an employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops; the raising, feeding, management of livestock, poultry and bees; which includes, among others, the spraying, pruning, fumigating, fertilizing, irrigating, and heating which may be necessary and incident thereto;

"(2) By an employee in connection with the drying, processing, packing, packaging, transportation, and marketing of materials which are produced on the farm or articles produced from such materials, providing such drying, processing, packing, packaging, transporting, or marketing is carried on as an incident to or-

The Supreme Court in California Employment Commission v. Butte County Rice Growers Ass'n, 1944, 25 Cal.2d 624, at page 632, 154 P.2d 892, at page 895, examined rule 7.1 and said:

> "Considering at the outset the challenge of the validity of rule 7.1, the objection is not well taken. Where the Legislature has by its enactments declared policies and fixed primary standards, as it did in the Unemployment Insurance Act, there can be no question but what it may validly confer on administrative officers power to 'fill up the details' by prescribing rules and regulations to promote the spirit and purpose of the legislation and its complete operation. In its general form of distinction, rule 7.1 appears to be a practical, workable definition in amplification of the unexpanded statutory exemption here presented. Practically all of the courts that have been required to pass upon regulations identical with or very similar to rule 7.1 have upheld the same as proper interpretations of the statutes involved. (Citations.) In view of the harmony of judicial decisions on the point, it is unnecessary to discuss the matter further."

There is no essential difference between rule 7.1 and section 43 as far as the present problem is concerned. The former was the parent of the latter and both provisions define agricultural labor. Subsection (1) of rule 7.1 dealt with services performed in the cultivation of the soil and the raising and harvesting of crops; paragraph "a" of section 43 does likewise. Subsection (2) of rule 7.1 dealt with services *subsequent* to the harvesting of crops and provides that such services do not constitute "agricultural labor" unless "performed by an employee of the owner or tenant of the farm"; paragraph "b" of section 43 does likewise.

Subsection (1) of rule 7.1 dealing with services constituting agricultural labor opened with the words "By an employee on a farm". Paragraph "a" of sec. 43 opens with the words "On a farm, in the employ of any person". The second paragraph of subsection (2) of rule 7.1 provided that "The services hereinabove set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials * * * were produced." Paragraph "b" of sec. 43 opens with the words "In the employ of the owner or tenant of a farm on which the materials * * * were produced." Thus these owner-tenant limitations are not found in subsection (1) of rule 7.1 or in paragraph "a" of sec. 43, but are found in subsection (2) of rule 7.1 and in paragraph "b" of sec. 43. In other words the framers of both rule 7.1 and sec. 43 drew a sharp line in these respective sets of provisions.

In the Butte County case, supra, which approved rule 7.1 the court, 25 Cal.2d 631, 154 P.2d 895, says: "* * * the principal reason for exempting 'agricultural labor' from social and industrial benefits resulting from remedial legislation has been administrative difficulties and accounting inconveniences in farm work. (Carmichael v. Southern Coal & C[oke] Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327) * * *." And, further 25 Cal.2d at page 639, 154 P.2d at page 899, the court speaks of "* * * the practical reason motivating the exemption in question—not a paramount purpose to benefit and encourage agriculture as such, but the avoidance of administrative difficulties in ascertaining and collecting the tax, involving expense disproportionate to the resulting advantage * * *." In the Carmichael case, supra, the court speaking through Mr. Justice Stone, 301 U.S. 513, 57 S.Ct. 874, said: "Administrative considerations may explain

dinary farming operations as distinguished from manufacturing or commercial operations.

"The services hereinabove set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced. Such services, however, do not constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations * * *."

several exemptions. Relatively great expense and inconvenience of collection may justify the exemption from taxation of domestic employers, *farmers,* and family businesses, *not likely to maintain adequate employment records, which are an important aid in the collection and verification of the tax.*" (Emphasis added.) The framers of rule 7.1 and its successor, sec. 43, unquestionably drew the lines in the respective provisions with these practical reasons in mind. The employees of an owner or tenant farmer come squarely within the reason for the rule; moreover, *any person* engaged in services embraced by subsection (1) of rule 7.1 or paragraph "a" of sec. 43 comes within it. But a person engaged in services embraced within subsection (2) of rule 7.1 or paragraph "b" of sec. 43 who is not an employee of the owner or tenant farmer is not within the reason for the rule since he is employed by an outsider in a commercial enterprise *wherein there is no excuse for not keeping adequate employment records.*

The question presented in this case has been before the courts on three appeals and has been decided the same way in all of them. Counsel for appellant are thoroughly familiar with all these earlier cases. All three were decided under rule 7.1. The first case was California Employment Commission v. Rose, 1945, 67 Cal.App.2d 864, 155 P.2d 702; the second, People v. Giesbrecht, 1949, 90 Cal.App.2d 569, 203 P.2d 101, and the third, Enos v. California Employment Stabilization Commission, 1951, 101 Cal.App.2d 606, 225 P.2d 641. On each appeal the decision went against the contractor who claimed to be within the "agricultural labor" exemption; in each case the contractor was engaged in the independent business of baling hay under contracts with farmers who had produced the hay, and in each the contractor baled the hay with apparatus owned by him and operated by balers employed and paid by him.

[3] The facts in California Employment Commission v. Rose, supra, are identical with the facts in the instant case except that there some of the hay was baled on the farm whereon it was grown, and some elsewhere, while here it is alleged that *all* the hay was baled on the farms whereon it was grown. This makes no difference since no matter *where* the baling is done, the controlling feature is the provision of subd. "b" of sec. 43 that there is no exemption unless the work is done by those "In the employ of the owner or tenant of a farm on which the materials * * * were produced." Without prolonging the discussion it is sufficient to say that except for the names of the parties, everything said in the Rose case in the paragraph commencing with [2] on page 868 and ending on page 869 of 67 Cal.App.2d, on pages 703, 704 of 155 P.2d exactly fits this case.

The Giesbrecht and Enos cases followed the Rose case.

In the case of California Employment Commission v. Kovacevich, 27 Cal.2d 546, 559, 165 P.2d 917, the Supreme Court criticized some of the language in the Rose case. The Butte County case, 25 Cal.2d 624, 154 P.2d 892, supra, wherein rule 7.1 was approved, was decided shortly before the Rose case and the court in the latter case, 67 Cal.App.2d at page 868, 155 P.2d at page 704, in discussing the Butte County case used this language: "the services performed, *regardless of their nature* * * * do not constitute 'agricultural labor' * * unless the workmen are employees of the owner or tenant of the farm * * *." (Emphasis added.) It must be borne in mind that both the Butte County case and the Rose case dealt (*as the present case deals*) only with the handling of farm products *after* their severance from the land, while the Kovacevich case dealt with services performed by Kovacevich (a) while the fruit was on the branch as well as (b) after its severance or harvesting. The Supreme Court in the Kovacevich case found the language of the Rose case too broad since it might be taken to mean that services in the cultivation of the soil and before the severance and harvesting of the crops were subject to the owner-tenant limitation whereas that limitation applied only to services after harvest, see par. (2), rule 7.1 and par. "b", section 43, supra. The court said [27 Cal.2d 546, 165 P.2d 924]: "Accordingly, to the extent that language of the Rose case may carry implications contrary to the import of the Butte County Rice Growers opinion, or of the opinion herein, it is hereby disapproved". But the court then went on to say: "However, the actual decision in the Rose case is entirely in line with the views herein expressed. There the employer was engaged in the business of baling hay on contract for various farmers. Sometimes the hay was baled on the farms where it was produced, but usually it was hauled to a central location nearby to save the cost and inconvenience of moving the hay-baling equipment. As so conducted, *such independent enterprise was distinct from the farmers' 'cultivation of the soil, the raising and harvesting of crops,' and the hay-baling labor would properly come within subdivision (2) of our rule* as services 'in connection with the drying, processing, packing, packaging, * * * of materials which are produced on the farm.' *Labor so identified would not be agricultural unless 'performed by an employee of the owner or tenant of the farm on which the materials * * * were produced.'* From these observations it is clear that hay baling is an admirable example of 'the nature of the work, modified by the custom of doing it,' affecting the category into which the work falls—agricultural or industrial. See H. Duys & Co. v. Tone, 125 Conn. 300, 5 A.2d 23, 28. * * *" (Emphasis added.)

Having thus made it clear that hay-baling by independent contractors and their employees was within the owner-tenant limitation of subsection (2) of rule 7.1, the court proceeded to show how and why Kovacevich's services in "girdling" and "thinning" the grapes while on the vine, and in picking them, were squarely within the exemption, while that part of his services performed *after* the severance or harvesting were not. The ultimate decision of the case demonstrates this sharp line of distinction.

[4] Appellant argues that since that case involved only grapes and other fruit the court's remarks respecting the Rose case involving hay are merely dicta. It is true that the Kovacevich case had nothing to do with hay-baling, but surely when the Supreme Court takes pains to define precisely what a lower court has held, and puts its seal of approval thereon, and in doing so says in so many words that hay-baling under contract is *an independent enterprise distinct from the harvesting of crops*, this court cannot very well hold that, as appellant contends, "The baling of the hay is a part of the harvesting of the hay, and constitutes agricultural labor". In view of the provisions of sec. 43, substantially the same as rule 7.1 interpreted by the Kovacevich case, we must hold that the question whether hay-baling (under contract with the farmers who grew the hay) is part of the process of harvesting, is a question of law declared and settled by section 43, and not a question of fact as contended by appellant.

[5] Appellant draws attention to the ruling of the Internal Revenue Department that "Services performed on a farm in the employ of any person in connection with the baling of hay from the field or stack constitute 'agricultural labor' * * *" and argues that it should be followed. It is within the province of the California Commission to amend sec. 43 in the interest of uniformity so as to conform to the federal ruling if it deems that desirable, but the fact remains that during the three-year period involved herein that section, drawn by the California Commission, read as quoted earlier. With that rule (or its predecessor) validated by the Supreme Court in the Butte County case, interpreted in the Kovacevich case, and applied by the appellate court in the Rose, Giesbrecht and Enos cases, this court cannot now very well reach out beyond our own state boundaries.

For the same reason authorities from sister states need not be discussed herein.

[6] Appellant also draws attention to three early decisions of the Industrial Accident Commission involving contract hay-baling. All three cases arose in 1914 at which time agricultural labor was totally exempted from the operation of the Workmen's Compensation Act and the Commission held contract hay-baling to be agricultural labor and exempt. In the first place, there does not appear to have been any definition of agricultural labor by rule, as there is here. Secondly, the Commission's orders were not opinions of a court of

justice. Thirdly, there is in the present case a rule which has been interpreted by the Supreme Court and applied in three appellate court decisions as we have already seen.

[7] The law seems to be definitely settled in this state and we can only conclude that the motion for judgment on the pleadings was properly granted.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

113 Cal.App.2d 528

REXALL DRUG CO. v. PETERSON et al.

Civ. 18859.

District Court of Appeal, Second District, Division 1, California.

Oct. 6, 1952.

Rehearing Denied Oct. 30, 1952.

The Rexall Drug Company, a corporation, brought action against Walter C. Peterson, City Clerk of the City of Los Angeles, and the City of Los Angeles, a municipal corporation and body politic, for a declaratory judgment determining whether charges imposed by plaintiff on its subsidiary corporations were subject to business license tax. The Superior Court of Los Angeles County, F. Ray Bennett, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that charges were subject to business license tax.

Judgment affirmed.

1. Corporations 🔑1

In exceptional cases, in order to prevent fraud or injustice, the law will look through what has been termed the corporate veil, but in tax matters a corporation and its stockholders are deemed separate entities.

2. Corporations 🔑182

Ownership of capital stock in one corporation by another corporation does not itself create identity of corporate interest as between the two.

3. Licenses 🔑15(8)

Where parent company owned all stock of ten subsidiary corporations engaged principally in manufacture and sale of articles commonly sold by drug stores, and parent company administered the whole business enterprise, maintained head office in the state, and furnished accounting, financial, personnel, legal, executive managerial, and directive services to subsidiaries on a nonprofit basis, and for such services parent company charged each subsidiary its proportionate cost thereof, charges imposed by parent company on subsidiaries were subject to business license tax imposed by city where parent corporation's head office was located.

Adams, Duque, Davis & Hazeltine, Bryant R. Burton and James E. Wallace, Los Angeles, of counsel, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Alan G. Campbell, Deputy City Atty., Los Angeles, for respondents.

DRAPEAU, Justice.

Rexall Drug Company, a corporation, owns all of the stock of ten subsidiary corporations. These subsidiary corporations engage principally in the manufacture and sale of articles commonly sold by drug stores.

Rexall administers the whole business enterprise, maintains a head office in Los Angeles, and furnishes accounting, financial, personnel, legal, executive managerial, and directive services to its subsidiaries. For these services Rexall charges each subsidiary its proportionate cost thereof. No profit is charged.

The City of Los Angeles claimed that these charges were subject to business license tax, as imposed by Section 21.190 of the Municipal Code. This section reads in part as follows:

> "(a) Every person engaged in any trade, calling, occupation, vocation,

> profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically licensed by other provisions of this Article, shall pay a license fee in the sum of $12.00 per calendar year or fractional part thereof for the first $12,000 or less of gross receipts, and in addition thereto, the sum of $1.00 per year for each additional $1,000 or fractional part thereof, of gross receipts in excess of $12,000."

Rexall denied the claim and brought this action in declaratory relief to settle the controversy.

The trial court found for the city, and adjudged that the transactions were subject to tax and that $10,011.24 unpaid taxes were due the city.

Rexall appeals from the judgment, and contends that in furnishing the administrative services on a nonprofit basis for its wholly owned subsidiaries it was not engaged in a business subject to license tax by the city.

In support of this contention Rexall argues, (a) that a business may not be taxed unless it is conducted for profit or for livelihood, (b) that Rexall was not an independent contractor, (c) that Rexall's administration of its subsidiaries was only incidental to its principal business, and (d) that in accounting between Rexall and its subsidiaries debits for inter-company bookkeeping were not gross receipts as contemplated by the ordinance.

[1, 2] While in exceptional cases, to prevent fraud or injustice, the law will look through what has been termed the corporate veil, Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522, in tax matters a corporation and its stockholders are deemed separate entities. Northwestern Pac. R. R. Co. v. State Board of Equalization, 21 Cal.2d 524, 133 P.2d 400. Ownership of capital stock in one corporation by another does not itself create identity of corporate interest as between the two. Northwestern Pac. R. R. Co. v. State Board of Equalization, supra. To do otherwise would lead to endless confusion and trouble in the imposition of taxes.

[3] Bearing in mind that each of Rexall's subsidiary corporations is an independent legal entity, it becomes manifest that the transactions here in question were subject to business license tax by the City.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

PEOPLE v. HAEUSSLER. *

Cr. 4829.

District Court of Appeal, Second District, Division 1, California.

Sept. 30, 1952.

As Modified on Denial of Rehearing Oct. 9, 1952.

Hearing Granted Oct. 27, 1952.

Defendant was convicted in Superior Court, Ventura County, Walter J. Fourt, J., of manslaughter and driving an automobile while under the influence of intoxicating liquor, and she appealed. The District Court of Appeal, Doran, J., held that where sample of defendant's blood was taken for purpose of typing for transfusion, while defendant was unconscious after automobile accident, and a portion thereof was tested for alcohol without defendant's knowledge or consent, use of evidence of intoxication obtained thereby to obtain conviction of defendant violated due process provisions of Federal and State constitutions.

Conviction set aside and cause remanded.

1. Criminal Law 🔑470

Testimony of State highway patrolman, permitted to qualify as an expert, that in his opinion, based upon marks and debris on highway, point of impact between accused's automobile and that of decedent, which collided when meeting on two-lane highway, was in decedent's lane of traffic, was inadmissible in prosecution for manslaughter and driving while intoxicated, as invading province of jury.

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* Subsequent opinion 260 P.2d 8.

Vehicle Code, § 501; Pen.Code, § 192, subd. 3.

2. Automobiles ⚿356

In prosecution for manslaughter and driving while intoxicated, arising out of collision between accused's automobile and that of decedent when meeting on two-lane highway, the location of the automobiles at the time of impact was a question for jury's determination. Vehicle Code, § 501; Pen.Code, § 192, subd. 3.

3. Automobiles ⚿356

In prosecution for manslaughter and driving while intoxicated, arising out of collision between accused's automobile and that of decedent when meeting on two-lane highway, whether marks on road were made at instant of impact or immediately thereafter and as a result thereof, was question for jury. Vehicle Code, § 501; Pen.Code, § 192, subd. 3.

4. Constitutional Law ⚿266

Where sample of accused's blood was taken for purpose of typing for transfusion, while accused was unconscious after automobile accident, and a portion of sample was tested for alcohol without accused's knowledge or consent, the use of evidence of intoxication obtained thereby to obtain conviction of accused in prosecution for manslaughter and driving while intoxicated violated due process provisions of Federal and State constitutions. Vehicle Code, § 501; Pen.Code, § 192, subd. 3; U.S.C.A.Const. Amend. 14; Const. art. 1, § 13.

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Cornwall & Westwick, John A. Westwick, Santa Barbara, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Asst. Atty. Gen., Roy A. Gustafson, Dist. Atty., Ventura County, Donald L. Benton, Deputy Dist. Atty., Ventura County, Ventura, for respondent.

DORAN, Justice.

Defendant was charged with a violation of Section 501 of the Vehicle Code in that "she did drive a vehicle while under the influence of intoxicating liquor and when so driving did an act forbidden by law and neglected a duty imposed by law in the driving of the vehicle, which act and neglect proximately caused bodily injury" to named persons; in a second count defendant was charged with violation of Section 192(3) of the Penal Code in that "she did then and there in the driving of a vehicle unlawfully kill Edward Ritter Amsel". A trial by jury resulted in a verdict of guilty on both counts, and the defendant was admitted to probation.

It is contended on appeal that,

> "The conviction of the Defendant was obtained by methods that violated the due process clause of the Fourteenth Amendment of the United States Constitution, and Section Thirteen, Article One of the California Constitution.
>
> "The court erred in instructing the jury on the subject of intoxication.
>
> "The court by its conduct at the trial permitted the jury to gain the impression that the court favored the prosecution's side of the case.
>
> "The court committed error in admitting into evidence the opinion of a mechanic relative to the speedometer reading of the Lovelace car.
>
> "The court erred in not instructing the jury that if the accident was proximately caused by the negligence of Lovelace alone defendant was not guilty."

As pointed out by respondent, the record reveals that "Shortly before midnight on October 19, 1951 the defendant left her dwelling in the city of Santa Barbara and proceeded to drive a 1947 Buick convertible automobile registered to her husband toward her parents' home in the city of Glendale. She proceeded without stopping until she was involved in an accident at a point approximately two miles west of the town of Camarillo in the County of Ventura on Highway 101. The defendant had rounded a curve in the highway and had been on a straightaway for approximately two-tenths of a mile before the collision occurred. The defendant has some recollection of going around the curve but has no memory whatsoever of the events that transpired immediately prior to the collision.

"The other car involved in the collision, a 1949 Mercury sedan, was being driven by Vernon Lovelace. Seated on the right side of the front seat was Edward Ritter Amsel, the owner of the car, and in the rear seat was Wayne Goff, a friend of the driver, Vernon Lovelace. Lovelace and Goff were hitchhikers who were picked up by the owner of the car, Amsel, in Studio City, a suburb of Los Angeles. At the request of Amsel, Lovelace was driving the car and had been driving the car for 45 minutes prior to the time of the collision.

"Highway 101, at the point of impact, is a two lane highway, each lane being approximately 10 feet wide. There are improved shoulders of approximately ten feet on each side of the highway. The last mile of the highway over which Lovelace traveled prior to the collision was straight with no turns and no hills. There were patches of fog in the area where the collision occurred. However, it was possible to see lights a distance of one thousand feet away. Lovelace was driving in his own lane of traffic at approximately 55 miles per hour when he saw headlights approaching him in his own lane of traffic. The headlights were high enough so as to interfere with his ability to see. He had never driven this particular stretch of road before and did not know what was on the shoulder. He applied his brakes leaving 108 feet of skid marks and at the last moment attempted to swerve to his left over into the other lane so as to avoid the oncoming car. This maneuver was unsuccessful and the car he was driving was struck on the right front side." Amsel was killed and the others were injured. Defendant was unconscious and taken to the hospital. There the laboratory technician withdrew a sample of blood for the purpose of typing for subsequent transfusion which was later given.

Over the objection of defendant a state highway patrolman was permitted to qualify as an expert and testify as to where the "point of impact" occurred. In that connection the record reveals the following:

"The Court: How many accidents have you examined, if any, Officer? Would you estimate? Well, I will put it this way. Have you examined or investigated a hundred accidents?

"The Witness: Yes, sir, easily in excess of that.

"The Court: Easily in excess of that?

"The Witness: Yes.

"The Court: Is that a part of your duties and your responsibilities as a California Highway Patrolman?

"The Witness: Yes, sir.

"The Court: That is a task that is assigned to you in the ordinary course of your work and labor for the Patrol, is that right?

"The Witness: Yes.

"The Court: And you were out there investigating the accident in performance of those duties?

"The Witness: Yes.

"The Court: Have you formulated an opinion, based on what you saw out there on that occasion, as to how the impact actually occurred?

"The Witness: Yes, sir I have. * * *

"The Court: You observed debris on the highway, did you?

"The Witness: Yes.

"The Court: Gouge marks?

"The Witness: Yes sir.

"The Court: And glass, oil, water and so on, on the highway also?

"The Witness: Yes, sir, dirt and parts of the vehicles.

"The Court: Go ahead and testify then, where in your opinion the point of impact was.

"The Witness: Well, the point of impact was at a point, an area which we measured, one foot and nine inches north of the center line in the westbound lane."

[1–3] The effect of this testimony was to place defendant's car in the wrong traffic lane. The ruling of the court in this regard was prejudicial error. Opinion evidence is the exception not the rule. The location of the cars at the time of impact was a question of fact for the jury to determine. Moreover the opinion of the witness was based on facts which were undecided. Whether the marks on the road upon which the opinion in part at least, was based were made at the instant of the impact or immediatey thereafter and as a result thereof, was undecided and was a question for the jury to determine. California Jurisprudence summarizes the law relating to opinion evidence as follows, "The general rule is that witnesses must testify to facts, and not to opinions. Whenever a question to be determined is the result of the common experience of all men of ordinary education, or is to be inferred from particular facts, the inference is to be drawn by the jury, or the court acting as such, and not by witnesses. In other words, when the inquiry relates to a subject whose nature is not such as to require any peculiar habits or study in order to qualify one to understand it, or when all the facts upon which opinion is founded can be ascertained and made intelligible to the court or jury, the opinion of a witness is not to be received in evidence. If the relation between the facts and their probable results can be determined without any special skill or training, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury. For example, if the circumstances out of which negligence is said to arise have been established by proof, or can be shown, the ultimate fact of negligence is an inference to be drawn therefrom by the jury, and is not to be established by the opinions of others." 10 Cal. Jur., sec. 211, pp. 948, 949, 950, 951. See also Fishman v. Silva, 116 Cal.App. 1, 8, 2 P. 2d 473. And in this connection it is noteworthy, as stated in Hawthorne v. Gunn, 123 Cal.App. 452, 455, 11 P.2d 411, 412, that, "Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred."

Appellant's contention that defendant's conviction "was obtained by methods that violated" the federal and state constitutions as above noted is based on the introduction of evidence purporting to prove intoxication.

As pointed out by appellant, "After Defendant had been brought to the hospital following the accident, a laboratory technician at the hospital withdrew from the Defendant's body a certain amount of blood. The blood was taken by means of a hypodermic needle. Defendant was unconscious at the time. She was not at any time asked if blood could be taken from her, nor did she at any time consent to the taking of any blood from her person or body.

"A blood alcohol test was made upon a portion of this blood without Defendant's knowledge or consent. Evidence pertaining to this test, and to the results thereof, was introduced at the trial over Defendant's specific objection. A doctor was permitted to testify that in his opinion the results of the test showed that Defendant was under the influence of liquor at the time of the accident. There was no other testimony of any kind to this effect.

"More blood was taken from Defendant than was required for blood typing or transfusion purposes. The excess blood was turned over to the person who made the blood alcohol test."

[4] Appellant relies on the recent case of Rochin v. California, 342 U.S. 165, 72 S.Ct. 205. In the Rochin case the contents of defendant's stomach had been removed for chemical analysis and the removal was accomplished over defendant's objection and resistance. There is no difference in principle between the facts in the Rochin case and the situation in the within action. That the law as outlined in the Rochin case applies there can be no question. The evidence of intoxication, in the circumstances was inadmissible and the trial court's ruling relating thereto was prejudicial error.

Other points raised by appellant although not without merit need not be considered.

The conviction is set aside, the order admitting to probation is reversed, and the cause remanded for a new trial.

WHITE, P. J., and DRAPEAU, J., concur.

113 Cal.App.2d 500

HEINKEL v. McALLISTER et ux.

Civ. 8126.

District Court of Appeal, Third District,
California.
Oct. 3, 1952.

Action by Alice Jane MacDowell Heinkel against H. J. McAllister, and wife, to establish alleged irrevocable parol license, or a prescriptive right, to the use of waters having their source upon defendants' land. The Superior Court, Lake County, Ben C. Jones, J., entered judgment in favor of defendants and an order denying plaintiff's motion for new trial, and plaintiff appealed. The District Court of Appeal, Per Curiam, held that evidence established that the user was permissive, and not adverse as required for establishment of prescriptive right, and that the circumstances did not give rise to an irrevocable parol license.

Judgment affirmed.

1. Appeal and Error 🔑757(3)

Where appeal was made on ground that the judgment was unsupported by evidence and the findings of fact were contrary to and in conflict with evidence, and that decision was contrary to the law and facts, but appellant nowhere in her brief stated in what manner evidence failed to support findings of fact and judgment, no question as to evidence was presented for determination and summarized evidence would be considered as intended to support contentions as to the law properly applicable to the facts found.

2. Easements 🔑8(2)

A prescriptive right cannot be founded upon a use permissive in character.

3. Waters and Water Courses 🔑152(8)

In action to enforce prescriptive easement for water, evidence established that the use of the water for more than thirty-eight years was permissive.

4. Waters and Water Courses 🔑146

The use of water from defendant's land by plaintiff's predecessor in title from 1944 until 1946 and by plaintiff from 1946 until October 1, 1948, when defendant disconnected water line, even if adverse, was not of sufficient duration to establish prescriptive right for such use. Civ.Code, § 1007.

5. Waters and Water Courses 🔑157

Where neighborly arrangement for plaintiff's predecessor to use water from land of defendants' predecessor was entered into without agreement as to duration, cost of making use of the permission was trivial and the water supplied was not necessary for the proper use of plaintiff's land, an irrevocable parol license for such user did not arise.

◆

Ralph V. DeVoto, Lakeport, for appellant.

H. G. Crawford, Lakeport, for respondents.

PER CURIAM.

This is an appeal from a judgment in favor of defendants and from the order denying plaintiff's motion for a new trial.

In 1910 plaintiff's property was owned by one Shadduck and defendants' property was owned by one Harris. Shadduck required more water for use on his land and in search for an additional source discovered a "wet spot of ground" on the Harris property. Upon request, Harris granted permission to develop the spot in the hope of finding water. Mr. Shadduck found water, and to utilize the water thus found put in a piping arrangement to bring the water across the county road which divided their properties onto his land where he used it for watering livestock, irrigation, etc. This usage continued until 1939 when the Shadducks sold their parcel to the Atkinsons. At the time of sale the Shadducks specifically informed them that they did not own the water so therefore were not selling it. By this time (1934) the Harris property was owned by one Miss Boucher.

During the year 1940 Miss Boucher fenced in her property and had the pipes taken out at the source, putting in a watering trough which was supplied by the water from the spring. Atkinson testified that a short time later Miss Boucher told him he could have the overflow water from the trough, so he replaced the pipes removed by her and from then on during the time he held the property he had the use of said overflow water. Atkinson did some maintenance work on the piping system. When asked directly as to whether he claimed to own the water Atkinson testified that he did not, unless there was a state law saying he could have it.

In 1944 Atkinson sold his property to Stevens, who owned it until 1946 when he sold it to the appellant Heinkel. Heinkel testified Stevens was using the water when she took possession of the property. Other than the fact of user there is nothing to show the character thereof, i. e. whether the same was adverse or permissive. In July 1948 Miss Boucher sold her property to respondent McAllister who on October 1, 1948 removed the pipes and prevented further use of the water by appellant, whereupon the instant action was instituted.

Appellant makes two contentions, her first being that the judgment is unsupported by evidence and the findings of fact are contrary to and in conflict with the evidence. Secondly, she contends the decision is contrary to the law and the facts.

[1] Appellant's brief, in the portion devoted to her first contention, summarizes the evidence given by Frederick Atkinson, Mrs. Hattie Atkinson, Mr. H. F. Heinkel and Alice Heinkel. But nowhere therein does she state in what manner this evidence fails to support the findings of fact and the judgment. We are unable to discern any question presented therein for our determination, hence we will consider the summarized evidence as intended to support her contentions as to the law properly applicable to the facts found.

Appellant's second contention, that "The decision of the court is against the law and contrary to the law and facts" rests upon her claim that she is entitled to the use of the water either because of an irrevocable parol license or by a prescriptive right thereto.

Appellant argues, "Where plaintiff and her predecessors in interest have used the water from such spring openly, visibly, notoriously, continuously, uninterruptedly, with the actual knowledge of the owners of such spring, and under a claim of right thereto for a period of more than thirty-eight years, does not the use of the water from such spring under such circumstances carry with it a prescriptive grant that is a prescriptive right to such water by prescriptive use?"

[2–4] The facts do not support the above contention. A prescriptive right cannot be founded upon a use permissive in character. 25 Cal.Jur. 1174. That the evidence conclusively establishes the user here was permissive cannot be doubted. Mrs. Shadduck testified she and her husband developed the spring for their use in 1910 under permission given by the then owner of the McAllister property. She further testified that upon selling their land in 1939 they told the purchaser, Mr. Atkinson, that they were not selling this water for the reason they did not own it. Atkinson's use of the water was interrupted in 1940 and his testimony was that his use thereof was resumed under permission given by Miss Boucher, the then owner of the McAllister property to use the overflow from the watering trough she had installed on her land. Atkinson sold the land to Stevens in 1944, less than five years prior to the complete interruption of the user on October 1, 1948 by the respondent. Thus, even if we concede the user of both Stevens and appellant to be adverse, no prescriptive right could have been established since such user could not have been made thereof for the statutory period. Civ.Code, § 1007. Kaler v. Brown, 101 Cal.App.2d 716, 226 P.2d 66.

Appellant next contends that "where plaintiff's predecessors in interest were the recipients of a parole grant or license to develop or 'dig out' a spring on adjoining property, and to use the flow of water therefrom for the purpose of watering livestock and irrigating crops on their property, and pursuant thereto expended money and performed labor to install or lay a pipeline with which to conduct the flow of water from such spring to tanks on their property, and had the exclusive, open, visible, continuous and uninterrupted use of the water from said spring for a period of twenty-nine years, such parol grant or license is irrevocable and the licensor or grantor and his successors in interest are estopped from interfering with the continued possession of such pipeline and the use of the water from such spring by the plaintiff."

The trial court found the original permission given by Harris "was a neighborly arrangement only" and that the Shadducks "never claimed to own the water from said spring, or any part thereof, or the right to use the same and never claimed any property right in the same"; that the owners of the respondents' land "from 1910 down to the date of the trial hereof, have always claimed the exclusive right to the use of all of the water from said spring; if any was left over, the owner of the [plaintiff's land] by a neighborly arrangement hereof was permitted to take it and use it so long as it was not needed by the owners of the [defendants'] lands." The court also found "that said E. L. Shadduck did not, nor did any other person ever, expend large sums of money in the construction of any pipeline, or in the maintenance of any pipeline; that only a trivial sum was expended in laying a half-inch pipe across the County Road"; "that said water from said spring has not been, and is not now, either necessary or indispensable for the proper or any irrigation of said lands, or any part thereof, either for production of crops growing thereon or for livestock or for domestic use; that in 1934 the lands formerly owned by Harris were acquired by a Miss Boucher; that she continued the same neighborly arrangement for the use of the excess water from the spring on the [defendants'] lands * * * by the owners or occupants of the [plaintiff's] lands * * * as was had with the owner Harris; that Miss Boucher disconnected the pipeline when the Atkinsons attempted to assert a claim of right to use said water in June, 1940; * * * That, on or about the 15th day of October, 1948, said defendants disconnected said pipe and pipeline from said spring; that by reason of the removing of said pipe and pipeline plaintiff has not been damaged in any sum or way whatever."

In view of these findings we do not think the situation here presented fits within the rule of Stoner v. Zucker, 148 Cal. 516, 83 P. 808, and those cases following it, upon which plaintiff places her reliance, but rather comes within the principle enunciated in Kaler v. Brown, supra. In that case the argument was made that "The evidence showed an executed oral license which was and is irrevocable." The court there said, 101 Cal.App.2d at page 719, 226 P.2d at page 68:

> "There was no evidence as to the value of the labor and material that went into the cement strips, and it is quite obvious that the expense was trivial. The small improvement was one which accommodated the Stevens family as well as the Kalers; it did not call for an expenditure which would have justified the former in giving the Kalers permission to use the driveway permanently. From the undisputed evidence the permission appeared to be merely a neighborly accommodation to both parties without any agreement or understanding that it was to continue for any definite time. A reasonable inference is that the parties understood it to be an arrangement terminable at the pleasure of Mr. and Mrs. Stevens. Mr. Kaler requested nothing more than this. His small expenditure was more commensurate with a temporary than a permanent right to use the driveway. Plaintiffs and their predecessors have been amply repaid for the original cost of the driveway. Revocation of permission to use it longer works no injustice to them. They were fortunate to have had twenty-five years, use of it before dissension arose."

[5] In the instant case the arrangement was a neighborly arrangement or an accommodation without any agreement or understanding that it was to continue for any definite time. A reasonable inference is that the parties understood the license to be terminable at will. In fact nothing more than this was requested. The expense the licensee was put to in order to make use of the permission given was trivial and did not call for an expenditure which would have justified the Harris' or their successors in giving a permanent right. Nor is the water supply necessary for the proper use of appellant's lands. Needless to say the original cost has been recovered many times.

For the above reasons we feel the judgment denying plaintiff's claim to a permanent right to the water must be affirmed.

The judgment is affirmed, and the purported appeal from the order denying a new trial is dismissed.

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113 Cal.App.2d 505

DORMAN et al. v. TAYLOR et al.

Civ. 8150.

District Court of Appeal, Third District, California.

Oct. 3, 1952.

Hearing Denied Nov. 25, 1952.

Action by Zo Ann Dorman, and others, by and through their guardian ad litem, Marie Dorman, and by Robert Dorman and Marie Dorman, against J. W. Taylor and another, for the death of Albert Dorman and for injuries sustained by David Dorman, in collision between automobile driven by decedent and oncoming truck driven by Taylor's co-defendant, which occurred on curve of highway following a snow storm while snow and sleet were on sides of road. The Superior Court, Shasta County, Richard B. Eaton, J., entered judgment in favor of plaintiffs for the death, and in favor of David Dorman for his injuries, and defendants appealed. The District Court of Appeal, Schottky, J., pro tem., held that evidence was sufficient to support the judgment.

Judgment affirmed.

1. Appeal and Error 🔑1010(1)

A judgment may not be reversed upon ground of insufficiency of evidence, unless, accepting full force of evidence adduced, together with every inference favorable to prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it appears that law precludes such prevailing party from recovery judgment.

2. Automobiles 🔑244(10)

In action for death and for injuries and for funeral expenses resulting from collision, which occurred after snow storm and while there was sleet and snow on sides of road, between automobile driven by decedent and oncoming truck driven by defendant's employee, on a curve in the highway, evidence was sufficient to support judgment in favor of plaintiffs.

3. Appeal and Error 🔑1011(1)
New Trial 🔑72

Appellants' argument as to weight of conflicting evidence could be properly made to trial court upon motion for new trial, but had no value in an appellate tribunal.

4. Witnesses 🔑388(7)

In action for death and injuries from automobile-truck collision, defendants could properly have impeached police officer's testimony to effect that he found nothing to indicate point of impact by asking him if he determined that there were any law violations from facts found at scene, if they had first laid foundation by asking if officer had made written report to Motor Vehicle Department following his investigation, but in absence of such foundation, question called for conclusion of the witness and was properly excluded.

◆

Peters & Peters, Chico, for appellants.
L. C. Smith, Redding, for respondents.

SCHOTTKY, Justice pro tem.

The widow and minor children of Albert Dorman commenced an action to recover damages for his death which resulted from a collision on an oiled county road in Shasta County between a 1936 Chevrolet sedan driven by decedent and a cattle truck owned by defendant J. W. Taylor and operated by his employee, Alvin Chase. A second cause of action sought damages for injuries sustained by David Dorman, a son of decedent, in the same collision.

After a trial before the court without a jury, the court found that the collision was proximately caused by the negligence of Alvin Chase, the driver of the truck, without any negligence on the part of decedent, and judgment was entered in favor of the widow and children for $32,700 and $759.16 funeral expenses, and in favor of David Dorman for $2,500. Defendants' motions for a new trial were denied and they have appealed from said judgments.

The principal contention made by appellants is that the evidence is insufficient to support the judgments. They argue that the only rational conclusion that can be drawn from the evidence is that the collision was caused by the negligence of decedent when he as appellants assert) cut across the sharp curve where the collision occurred and drove his automobile into appellant's truck.

[1] As we said in Anderson v. Wagnon, 110 Cal.App.2d 362, at pages 363–364, 242 P.2d 915, at page 916:

> "It is a rule too well established to require the citation of authorities that, before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded."

Bearing in mind this familiar rule, which we are again constrained to state is too often disregarded by many counsel who insist upon arguing conflicting evidence before an appellate tribunal, we shall give a brief summary of the evidence.

The accident happened on a sharp turn of a narrow oiled county road known as the Redding-Igo Road, following a snowstorm. There was snow and sleet on the sides of the road. The appellants' cattle truck was traveling towards Redding, and in order to negotiate the curve the driver would have to turn his truck to his right. The deceased was traveling toward Igo and in order to negotiate the curve would have to turn to his left. Robert Dorman, a son of decedent, who was following about 150 feet behind his father's car, testified:

> "Q. And did you see the truck come around the corner? A. I saw the truck come around the corner, yes.
>
> "Q. And could you see the speed with which it was traveling? A. It came in like a flash. I couldn't say how fast it was going.
>
> "Q. Now did you observe the back end of the truck? A. When it came around the corner the back end was bouncing up and down like he had his brakes on and he couldn't make the turn, he was going too fast.
>
> * * * * * *
>
> "Q. Where was your father traveling with respect to his side of the road at the time of the accident? A. He was traveling about a foot from the shoulder.
>
> "Q. Now when you say a foot, what part of his car would be a foot from the shoulder? A. His right-hand side.
>
> "Q. And how fast was your father traveling? A. Well, I would say between 35 and 40.
>
> "Q. At the time of the accident? A. No, not at the time of the accident.
>
> "Q. I am talking now about at the very moment of impact, how fast was

your father going? A. I would say between 25 and 30.

"Q. And what happened when the accident occurred? What followed the accident; that is, were you able to observe the movements of the truck and your father's car after the accident? A. The truck came around and hit him on his left-hand side and turned him in a half-spin on the road and headed him in the opposite direction back toward Redding.

* * * * * *

"Q. As he was making the turn that he had gotten the right wheels of the truck off the right-hand edge of the pavement? A. Yes. He was never making the turn. His truck was never at any angle to make the turn. He was skidding right straight like that."

A Mrs. White testified that she saw appellants' truck traveling along the road shortly before the accident at a speed of at least 50 miles per hour. The driver of the truck, appellant Chase, and one Poole who was riding with him, both testified that the decedent was driving on the wrong side of the road and drove his automobile into appellants' truck which was on its right side.

[2, 3] There was of course other evidence, but the foregoing is sufficient to show that there is a clear conflict in the evidence and that appellants' contention that the evidence is insufficient to support the judgment is entirely lacking in merit. Appellants' argument is merely an argument as to the weight of conflicting evidence, and while it could be, and no doubt was, properly made to the trial court upon the motion for a new trial, it has no value in an appellate tribunal.

[4] The only other contention made by appellants is that the court erred in not permitting appellants to impeach the witness Traffic Officer Lane. Appellants quote the following from the record:

"Mr. Peters: Q. Did you determine if there were any law violations from the facts you found at the scene?

"Mr. Smith: Objected to upon the ground that it calls for the opinion and conclusion as to whether there were any law violations or not.

"Mr. Peters: That is the way to find out.

"Mr. Smith: He didn't see the accident.

"Mr. Peters: That doesn't matter, Many a citation has been given by an officer who wasn't at the scene.

"Mr. Smith: And many a Court and jury have turned them loose, too.

"The Court: The objection is sustained."

Appellants argue that Officer Lane having testified at the trial that he found nothing whatever that would indicate the point of impact of the vehicle, appellants should have been permitted to impeach him through a report that he made to Motor Vehicle Department. The difficulty with appellants' contention is that they did not lay any foundation for impeachment, or even indicate to the court that the witness had made any contrary statement. The only question asked by appellants' counsel was: "Did you determine if there were any law violations from the facts you found at the scene?" The question in that form was certainly objectionable as it clearly called for the conclusion of the witness as to whether or not there were any law violations and the objection was properly sustained. Appellants for some reason did not pursue the matter further.

If appellants had asked the witness if he had made a written report to the Motor Vehicle Department following his investigation of the accident, we feel certain that the trial court would have permitted bringing out anything in that report tending to impeach his testimony.

In view of the foregoing the judgment is affirmed.

PEEK, J., and VAN DYKE, JJ., concur.

113 Cal.App.2d 416

PEOPLE v. SMITH.

Cr. 4848.

District Court of Appeal, Second District,
Division 2, California.
Oct. 1, 1952.

Prosecution for keeping and occupying a place with papers and paraphernalia for the purpose of recording and registering bets on horse races. From a judgment of conviction by the Superior Court of Los Angeles County, John J. Ford, J., defendant appealed. The District Court of Appeal, Fox, J., held that the evidence was sufficient to support the judgment.

Judgment affirmed.

1. Gaming ⚿98(5)

Evidence was sufficient to support judgment of conviction for keeping and occupying a place with papers and paraphernalia for the purpose of recording and registering bets on horse races. Pen.Code, § 337a, subd. 2.

2. Criminal Law ⚿316

A court trying criminal case without jury was entitled to consider defendant's failure to avail himself of opportunity to explain or deny incriminating circumstances, about which he could reasonably be expected to know, as tending to indicate truth of evidence of such circumstances and indicating that possible inferences therefrom unfavorable to defendant were more probable than those favorable to him.

3. Criminal Law ⚿393(2)

In prosecution for keeping and occupying place with papers and paraphernalia for recording and registering bets on horse races, an exemplar of defendant's handwriting on card signed by him at jail after his arrest was admissible in evidence to show that he wrote substantial portions of figures representing bets and amounts owed bettors on papers taken by police officers from defendant's pocket and desk in room wherein he was arrested as against objection that such exemplar was obtained from him without explanation as to its future use and hence caused him to testify against himself. Pen.Code, § 337a, subd. 2; Const. art. 1, § 13.

4. Gaming ⚿97(1)

The fact that evidence of one act of accused or series of circumstances does not justify his conviction under one subdivision of statute penalizing pool selling, bookmaking, keeping or occupation of place with papers or paraphernalia for recording and registering bets, etc., does not preclude admissibility thereof in prosecution for violating another subdivision of such statute, if otherwise relevant. Pen.Code, § 337a.

5. Criminal Law ⚿404(4)

In prosecution for keeping and occupying place with papers and paraphernalia for recording and registering bets on horse races, currency, which police officers saw three men hand to defendant, who wrote on a dollar bill received from one of them, was admissible in evidence as shedding some light on nature of use being made of premises occupied by defendant, though count of indictment for recording and registering a bet was dismissed on defendant's motion. Pen.Code, § 337a, subds. 2, 4.

6. Criminal Law ⚿404(4)

In prosecution for keeping and occupying place with papers and paraphernalia for recording and registering bets on horse races, sheets of paper, found by police officers on defendant's person and in room wherein he was arrested, with penciled notations in defendant's handwriting of figures representing bets on horse races and amounts owed certain bettors, were admissible in evidence as tending to prove character of business carried on in such room and defendant's participation therein. Pen.Code, § 337a, subd. 2.

7. Criminal Law ⚿404(4)

In prosecution for keeping and occupying place with papers and paraphernalia for recording and registering bets on horse races, a scratch sheet, to which defendant referred in conversations with three men, from whom he received currency, as observed by police officers before his arrest, was admissible in evidence as bearing on nature of business being carried on in premises occupied by defendant, though no writing of defendant was on such sheet and scratch sheets are easily purchased and not unlawful to possess. Pen.Code, § 337a, subd. 2.

8. Criminal Law ⚷404(4)

In prosecution for keeping and occupying place with papers and paraphernalia for recording and registering bets on horse races, scratch sheets, discovered by police officers in garage behind premises involved, were admissible in evidence as against objection that they were found in a space having no connection with such premises, especially where writing on one of such sheets was in same hand as some of writing on owe sheets found in desk on such premises. Pen.Code, § 337a, subd. 2.

9. Gaming ⚷103

An acquittal of alleged violation of one subdivision of statute penalizing pool selling, bookmaking, keeping or occupation of place with papers or paraphernalia for recording or registering bets, etc., does not render evidence of facts relating to act condemned by such subdivision inadmissible in prosecution of same defendant for violating another subdivision of statute. Pen. Code, § 337a.

10. Criminal Law ⚷254

A determination by trial court, sitting without jury, that defendant was guilty of violating one subdivision of Penal Code section in keeping and occupying place with papers and paraphernalia for recording and registering bets on horse races, was not inconsistent with court's finding that defendant was not guilty of violating another subdivision, penalizing poolselling and bookmaking, as state need not show that any bet was actually made in order to sustain conviction of keeping and occupying place for such unlawful purposes. Pen.Code, § 337a, subds. 1, 2.

11. Gaming ⚷96

In prosecution for keeping and occupying place with papers and paraphernalia for recording and registering bets on horse races, proof that defendant was proprietor or licensee or employee of proprietor of business operated in such place was unnecessary to authorize conviction. Pen.Code, § 337a, subd. 2.

Henry C. Huntington, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted by the court sitting without a jury of a violation of section 337a, subdivision 2, of the Penal Code (keeping and occupying a place with papers and paraphernalia for the purpose of recording and registering a bet). He appeals from the ensuing judgment and from the order denying his motion for a new trial.

Defendant was arrested on the morning of November 28, 1951, after he had been under the observation of a police officer for half an hour. During most of this period defendant was behind the counter in what purported to be a storage establishment. An unknown man entered the place and held a short conversation with defendant who opened a newspaper lying on the counter, removing therefrom a scratch sheet for November 28, 1951. Leaning over the counter, the man held a further conversation with defendant, handed defendant what appeared to be currency and left. Some minutes later another man entered. He and defendant went through practically the same motions. After answering the telephone defendant opened the newspaper and appeared to read the scratch sheet. He then went into a cafe next door where he held a conversation with a man who gave defendant currency. After returning to the storage place a third man came in with whom defendant held a conversation during which defendant opened the newspaper and handed the man the scratch sheet. The man removed a $5 and a $1 bill from his wallet and placed them on the counter in front of defendant who looked at the scratch sheet, took the currency and appeared to write on the $1 bill. At this point defendant was arrested and the currency removed from his hand. In addition to recovering the newspaper with the scratch sheet inside the first page and the bills, the officers took a pink sheet from defendant's pocket, another from a desk in the same room, also a sheet of white graph paper. On each of these sheets there were lines of penciled numerals along with other notations. Several scratch sheets dated November 28, 1951, were found underneath the counter behind which defendant was standing; others with penciled notations on them were found tucked inside the woodwork in the garage in the rear—one of these with writing on it was dated November 27, 1951.

Defendant filled out and signed a card at the jail. A handwriting expert determined that the same person wrote substantial portions of the figures on the white graph paper, on the two pink sheets, and on the card.

Experts in the method of recording bets on horse races in Los Angeles County testified that the figures on the various sheets and on the $1 bill represented bets on horse races either on that or the previous day. These sheets also showed the amount owed certain bettors. When bets are recorded on such sheets they are known as betting markers. When the winnings and losses are tabulated they become known as owe sheets. Such sheets are among the usual "papers * * * and paraphernalia" ordinarily used in a bookmaking venture.

The case was tried on the transcript of the testimony taken at the preliminary hearing. The defendant did not testify and no evidence was offered by him.

Defendant contends the judgment is contrary to the evidence and the law, and the court erred in decisions on questions of law arising in the course of the trial.

[1, 2] Defendant argues that since the evidence does "not even raise a suspicion" of his guilt, the conviction cannot stand. In this he is in error. The facts and circumstances herein recited and the inferences that may reasonably be drawn therefrom furnish ample support for the judgment. Furthermore, the defendant failed to avail himself of an opportunity to explain or deny a number of incriminating circumstances about which he could reasonably be expected to know. The court was entitled to consider his failure to do this "as tending to indicate the truth of such evidence, and as indicating that among the inferences that may * * * be drawn therefrom, those unfavorable to the defendant are the more probable." People v. Adamson, 27 Cal.2d 478, 490–1, 165 P.2d 3, 9. This serves to fortify the judgment. People v. Ines, 90 Cal.App.2d 495, 500, 203 P.2d 540.

[3] Defendant complains of the admission of the exemplar of his handwriting since it was obtained from him without explanation as to its future use, and hence caused him to testify against himself. This objection is fully answered in People v. Gormley, 64 Cal.App.2d 336, 338, 148 P.2d 687, where it is pointed out that the taking of exemplars of a defendant's handwriting after his arrest does not constitute a violation of his constitutional rights safeguarded by section 13, Article I of the Constitution of this state. "He was not compelled to be a witness against himself." People v. Gormley, supra, 64 Cal.App.2d at page 338, 148 P.2d at page 688.

[4, 5] Error is claimed in the admission in evidence of the currency on the ground that the count under subdivision 4 of section 337a, Penal Code (recording and registering a bet), had been dismissed pursuant to motion under section 995, Penal Code. The fact that one act or series of circumstances does not justify a conviction under one subdivision of section 337a, Penal Code, does not preclude their admissibility, if otherwise relevant, on a charge of violating a different subdivision. People v. Meade, 109 Cal.App.2d 306, 309, 240 P.2d 680; People v. Ghio, 82 Cal.App. 28, 32, 255 P. 205. Here the passage of the currency and the notations on the $1 bill were part of a transaction which the officers witnessed. These facts shed some light on the nature of the use that was being made of the premises. People v. Woods, 35 Cal.2d 504, 510, 218 P.2d 981. The problem here concerned the weight of this evidence rather than its admissibility.

[6] The presence of any bookmaking paraphernalia, betting markers or owe sheets, tend to prove the character of the business carried on at the place in question. People v. Cohen, 107 Cal.App.2d 334, 344, 237 P.2d 301; People v. Partee, 70 Cal.App.

2d 736, 739, 161 P.2d 586. Consequently the white and pink sheets were admissible. These sheets also served to establish defendant's participation in the enterprise since his handwriting was found thereon, and one of them was taken from his person and the other two discovered in a desk in the room.

[7] With respect to the scratch sheet dated November 28, 1951, which was inside the newspaper on the counter and to which defendant referred in the course of his conversations with three unknown men, defendant points out there was no writing of his thereon and that such sheets are easily purchased and not unlawful to possess. That, however, does not make it inadmissible in evidence. The court was entitled to consider its character and the use to which it might be put as having a bearing upon the nature of the business being carried on in the premises. People v. Vertlieb, 22 Cal. 2d 193, 197, 137 P.2d 437.

[8] The other scratch sheets about which defendant complains were not found, as he says, "in a space that apparently had no connection with the premises occupied by defendant" but were in fact discovered in the garage in the rear of the premises. Also, the writing on one of these sheets was in the same hand as some of the writing on the white owe sheet which was found in the desk. A sufficient connection was thus shown between these scratch sheets found in the garage and the operations in the building to warrant their admissibility in evidence.

[9, 10] Defendant further argues that the court's determination that he was not guilty of violating subdivision 1 of section 337a, Penal Code (poolselling and bookmaking), is inconsistent with the verdict of guilty on the charge of violating subdivision 2 of the section, and "in fact exculpates the defendant from any criminal act whatsoever." People v. Meade, supra, 109 Cal. App.2d at page 309, 240 P.2d 680, is again pertinent in showing that the acquittal of an alleged violation of one of the subdivisions of section 337a, Penal Code, does not prevent the facts relating to acts condemned by that subdivision from being used with reference to another subdivision. There is in fact no inconsistency in these verdicts. In order to sustain a conviction under subdivision 2 of section 337a, Penal Code, it is not necessary to show that "any bet was actually made." People v. Gompertz, 103 Cal.App.2d 153, 159, 229 P.2d 105, 108.

[11] Finally, it is said "the evidence is entirely silent" as to whether the defendant was the proprietor, employee or licensee of the business operated in these premises. Such proof is unnecessary for, as pointed out in People v. Partee, supra, 70 Cal.App. 2d at page 739, 161 P.2d 586, the defendant was charged with "keeping" and "occupying" certain premises. He was not charged as being the proprietor or licensee thereof, nor as an employee therein.

The judgment and order denying the motion for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

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113 Cal.App.2d 335

KNEELAND v. ETHICON SUTURE LABORATORIES, Inc. et al.

No. 15363.

District Court of Appeal, First District, Division 1, California.

Sept. 29, 1952.

James K. Kneeland sued Ethicon Suture Laboratories, Inc., a foreign corporation, and others. The named defendant moved to quash summons and the Superior Court, Alameda County, R. E. Hoyt, J., ordered service of summons quashed. Plaintiff appealed. The District Court of Appeal, Bray, J., held that the order was appealable as a final judgment.

Motion denied.

1. Appeal and Error ⚷80(3)

Generally, where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of decree, that decree is final and appealable, but where anything further in the nature of judicial action on the court is essential to a final determination of the rights of the parties, the decree is interlocutory.

2. Appeal and Error ⚿78(2)

Order quashing service of summons on foreign corporation for lack of personal jurisdiction on ground that corporation neither owned property nor conducted business in California was an appealable "final order", prior to statutory amendment expressly authorizing such appeals. Code Civ.Proc. § 963; Corporations Code, §§ 6501, 6502.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Order".

3. Appeal and Error ⚿1

The right of appeal is remedial and doubt should be resolved in favor of the right whenever substantial interests of a party are affected by a judgment.

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David E. Adelson, Emeryville, for appellant.

Brown, Rosson & Berry, Oakland, for respondent.

BRAY, Justice.

Defendant Ethicon Suture Laboratories, Inc.,* moved to dismiss plaintiff's appeal from an order quashing service of summons on said defendant.

Question Presented.

Was an order quashing service of summons on a foreign corporation for lack of personal jurisdiction in effect a final judgment and therefore appealable, prior to the amendment of section 963 of the Code of Civil Procedure?

Facts.

Defendant is a foreign corporation. Service of summons was attempted to be made on it by service on the Secretary of State pursuant to Corporations Code sections 6501 and 6502. Defendant moved to quash that service on the ground that defendant neither owned property nor conducted business in California. The order quashing was made September 13, 1951. Approximately nine days later, September 22, the amendment to section 963, Code of Civil Procedure, expressly allowing appeals from orders quashing service of summons, became effective. Prior to the amendment the section did not expressly provide for an appeal from an order quashing service. Defendant contends that the order is not appealable. Plaintiff contends primarily that even prior to the amendment the order was appealable as the order was in effect a final judgment.

Was the Order in Effect a Final Judgment?

[1] The test of whether an order is a final judgment is stated in Lyon v. Goss, 19 Cal.2d 659, 670, 123 P.2d 11, 17: "As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." See also Sharon v. Hill, C.C., 26 F. 337, 389, where appears a discussion of the distinction between a judgment *final* as to subject matter *for the purpose of res judicata* and *final* as to action by the court *for purposes of appeal.*

In Howe v. Key System Transit Co., 198 Cal. 525, at page 531, 246 P. 39, at page 41, the court held an order striking cross-complaints appealable, saying: "The theory upon which the decisions sustain the right of appeal from orders, where that right does not rest upon the express provisions of section 963, is that the order is in effect a final judgment against a party in a collateral proceeding growing out of the action—is so far independent of the suit itself as to be substantially a final decree for the purpose of an appeal, although there has been no final decree in the suit."

[2] The order in question here meets the test. While it is true that, in a sense,

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* herein referred to as "defendant"

the action is not final in that the defendant cannot have the action dismissed as against it until the statutory period for lack of prosecution has passed, it is final as to plaintiff in that it has been determined that defendant neither owned property nor did business in this state and hence cannot be served with summons. While the order is not final in the sense that defendant is now entitled to a dismissal of the case against it of record, it is final in the sense that for practical purposes the court's order, so far as plaintiff's right to proceed against defendant is concerned, is tantamount to a dismissal. This is not a case of error in the method of service which can be cured by a new service. It is a determination that, at least under existing conditions, defendant cannot be served. If this adjudication is wrong, as plaintiff contends, he has been denied unfairly an opportunity to have the action of the court reviewed, and in a very real sense the order is final as to him.

There are only two cases in California on the subject of the appealability of this order. In De Pier v. Maddox, 87 Cal.App.2d 460, 197 P.2d 87, an order was held appealable which quashed service of summons where the summons was served after the expiration of the period which under section 581a made the action subject to summary dismissal. It was held that the order terminated the proceedings and hence was appealable. In Thomas v. Lee, 90 Cal.App.2d 44, 202 P.2d 310, without any discussion of the subject other than a reference to Saroff v. Saroff, 66 Cal.App.2d 330, 152 P.2d 333, and Mertens v. Keene, 77 Cal.App. 786, 247 P. 543, an order quashing service of summons was held nonappealable. In both of the last cited cases the orders attempted to be appealed from were not orders *quashing* service but *denying* motions to quash. The Saroff case, in turn, was based on the Mertens case, and on the decision in Murphy v. Davids, 55 Cal.App. 416, 203 P. 802, itself one in which the order considered *denied* a motion to quash. Obviously there is a considerable difference in the finality of an order *refusing* to quash service of summons and one *quashing* it. In the one event the case is not ended and the defendant may have the order denying his motion reviewed on appeal from the final judgment. In the other the court's action, to all intents and purposes, is final as to the plaintiff, as there can be no further proceeding against defendant in the case (unless, of course, during the statutory period for service of summons the defendant comes into, or starts doing business within, the state and is served).

[3] It is doubtful if the Thomas case, supra, based as it is on cases which were considering a different kind of order, is as authoritative as the earlier De Pier case, supra, which considered the very kind of order in question. Particularly is this so in view of the fact that the Thomas case completely ignored the De Pier case. In any event it is obvious that the law in this state on the subject, at the very least, was conflicting. Thus in determining the effect of the amendment to section 963 which expressly allows appeals from orders quashing service, the decision in Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358, is applicable. There the court was considering the effect of the amendment of section 472c which did away with the rule theretofore existing, namely, requiring as basis for an appeal from an order sustaining a demurrer without leave to amend that the appellant first ask the trial court for leave to amend. The amendment expressly stated "provided, however, that this section shall not apply to any pending action or proceeding." In spite of this provision the court held that the amendment did apply to pending actions, saying: "The problem is one of procedure and there are no vested rights which would be impaired by a change in the applicable rule of law." 20 Cal.2d at page 720, 128 P.2d at page 525. Having in mind the above mentioned conflict of authority, the liberality expressed in the Wennerholm case and the rule stated in People v. Bank of San Luis Obispo, 152 Cal. 261, 264, 92 P. 481, 482, "The right of appeal is remedial, and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are af-

fected by a judgment," we are constrained to hold that the amendment merely declared the existing law rather than changed it, and that the order in question was appealable prior to the amendment.

The motion is denied.

PETERS, P. J., and FRED B. WOOD, J., concur.

113 Cal.App.2d 428

SCHAEFER v. SUPERIOR COURT IN AND FOR SANTA BARBARA COUNTY.

Civ. 19109.

District Court of Appeal, Second District, Division 3, California.

Oct. 1, 1952.

Proceeding in prohibition to restrain the Superior Court of Santa Barbara County from pronouncing sentence on petitioner until it had considered and acted upon petitioner's application for probation. The District Court of Appeal, Parker Wood, J., held that auditor in charge of district audit office of department of employment was not a public official within meaning of probation statute, Penal Code § 1203 and was entitled to have his application for probation considered upon its merits.

Alternative writ of probation discharged and peremptory writ of mandate granted.

1. Officers 🔑1

Whether a position is a public office depends upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the nature of the position and mark its character, irrespective of any formal designation.

2. Officers 🔑1

A "public office" is the right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for public benefit, one of the prime requisites being that the office be created by the constitution or authorized by some statute, and it is essential that incumbent be clothed with a part of the sovereignty of the state to be exercised in the interest of the public.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Office".

3. Officers 🔑1

Where the legislature creates a position, prescribes the duties and fixes the compensation and the duties pertain to the public and are continuing and permanent, not occasional or temporary, such position or employment is an "office", and he who occupies it is an "officer".

See publication Words and Phrases, for other judicial constructions and definitions of "Office" and "Officer".

4. Criminal Law 🔑982

Auditor in charge of district audit office of department of employment, whose position was created by director of department under general power delegated to him by legislature and was subordinate to four other positions in department and whose duties were limited to routine investigations, audits and clerical matters, except as to filing criminal complaints against employers, which must first be approved by central office, was not required or authorized to exercise a part of sovereign power of the state and he was an "employee" and not a "public official" within meaning of probation statute. Gen.Laws, Act 8780d, §§ 75–77, 83; Government Code, § 1480; Pen. Code, § 1203.

See publication Words and Phrases, for other judicial constructions and definitions of "Employee" and "Public Official".

5. States 🔑44

That auditor in charge of district audit office of department of employment subscribed an oath of office and gave a bond were matters to be considered in determining whether his position constituted a public office, but they were not determinative of the question. Government Code, § 1480; Gen.Laws, Act 8780d, §§ 75–77, 83.

6. Criminal Law ⚿982

Probation is an act of grace and clemency which the court, under certain circumstances, may grant, and not a matter of right. Pen.Code, § 1203.

7. Criminal Law ⚿982

To justify denial of permission to apply for probation on ground that circumstances of particular case bring defendant within an exception to basic rule with respect to probation, it must appear clearly and with certainty that the legislature intended an exception to such rule to render defendant ineligible for probation. Pen. Code, § 1203.

8. Criminal Law ⚿982

Amendment of statute, providing that probation should not be granted to any public official or "employee" of state who embezzled public money, by which quoted word was omitted and "peace officer" substituted definitely determined that an employee of the state was eligible for probation. Pen.Code, § 1203.

9. Criminal Law ⚿982

In absence of controlling statutory or other adequate definition of the term "public official" as used in statute providing that probation should not be granted to any such official who embezzles public money, an interpretation should be adopted in doubtful cases, which will accord defendant the right to apply for probation. Pen.Code, § 1203.

10. Criminal Law ⚿982

Whether a defendant is a public official within meaning of probation statute depends upon the circumstances of each particular case, particularly the circumstances with reference to the manner in which the position was created, the power granted and exercised, and the duties and functions performed. Pen.Code, § 1203.

11. Criminal Law ⚿982

Auditor in charge of district audit office of department of employment, being an employee and not a public official, was eligible for probation, though he had pleaded guilty to charge of embezzlement of public money, and he was entitled to have his application for probation determined upon its merits. Gen.Laws, Act 8780d, §§ 75–77, 83; Pen.Code, § 1203.

12. Criminal Law ⚿1023(10), 1134(10)

An order denying probation is not appealable, but where such denial is for lack of jurisdiction, the order will be reviewed on appeal from judgment. Pen.Code, § 1203.

13. Mandamus ⚿31

A trial court is under a duty to hear and determine the merits of all matters properly before it which are within its jurisdiction and mandate will lie to compel the performance of such duty, even where trial court's refusal to pass on the merits is based on the considered but erroneous belief that it has no jurisdiction as a matter of law to grant the relief requested.

14. Mandamus ⚿1, 31

Where superior court erroneously concluded that defendant, who had pleaded guilty to charge of embezzling public money, was a public official and therefore refused to entertain his application for probation on ground that he was not eligible therefor, petition for writ of prohibition to restrain superior court from pronouncing sentence until it had considered and acted upon application for probation would be regarded as a petition for writ of mandate and a peremptory writ of mandate would be issued commanding superior court to hear and determine application for probation upon its merits. Pen.Code, § 1203; Const. art. 6, § 5.

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Edward J. Trevey, Santa Barbara, for petitioner.

Vern B. Thomas, Dist. Atty. Santa Barbara, Frank J. McCarthy, Deputy Dist. Atty., San Francisco, and Albert W. Meloling, Deputy Dist. Atty., Santa Barbara, for respondent.

PARKER WOOD, Justice.

Proceeding in prohibition. Petitioner seeks to restrain the superior court from pronouncing sentence until it has considered and acted upon petitioner's application for probation. The trial judge was of the opinion that petitioner was a public official within the meaning of the probation statute and was not eligible for probation.

It was alleged in the petition that: On and for several years prior to March 28, 1952, petitioner was an employee of the Department of Employment, State of California, under civil service in the capacity of auditor in charge of the Santa Barbara Audit District Office of said department. On March 27, 1952, petitioner was charged with embezzlement in eight counts. On March 28, 1952, petitioner pleaded guilty to counts 1, 2 and 3. The other counts were dismissed. On April 7, 1952, the respondent court ordered the probation officer to make a pre-sentence investigation. On April 21, 1952, the petitioner made a motion for probation upon the ground that, under the provisions of section 1203 of the Penal Code, petitioner was not a public official or a peace officer and was therefore eligible to apply for probation. The court granted permission to apply for probation, and it directed the probation officer to make a report concerning petitioner's eligibility for probation. On May 5th the officer submitted a report which contained the recommendation "that probation be granted in this case subject to the usual terms and conditions including those outlined above." On said May 5th the court expressed the opinion that petitioner was not eligible for probation and made the following statement: "In this case of the People v. Arthur Christopher Schaefer, I should like to entertain the application for probation, but I believe that under the law, particularly under People v. Hess, 104 Cal.App.2d 642, 234 P.2d 65, and People v. Hess, 107 Cal.App.2d 407, 237 P.2d 568, I am not permitted to do so, and when this matter is called for hearing on May 12th, 1952, at 11 a. m., I shall deny the application for probation and proceed to sentence the defendant. That is all." It was alleged further that petitioner has no plain, speedy or adequate remedy at law, in that, unless the respondent court is restrained, petitioner will be sentenced to a term of imprisonment in the penitentiary before determination of his eligibility for probation can be had.

In the answer of respondent, signed by the district attorney, it was denied that petitioner was an employee of the Department of Employment; and that petitioner has no plain, speedy or adequate remedy at law. In said answer it was alleged that petitioner was a public official within the meaning of section 1203 of the Penal Code; that he had the remedy of an appeal from the judgment which may be pronounced by the respondent court; that said court, in passing upon the application for probation and in imposing sentence, is acting within the jurisdiction conferred upon it by article VI, section 5, of the Constitution; that the petition did not state facts sufficient to constitute a cause for the relief prayed for; and that by petitioner's plea of guilty he admitted that he was a public officer.

In the counts to which he pleaded guilty it was alleged that embezzlement, a felony, was committed by petitioner, who was then "an officer of the State of California Department of Employment, to wit, the duly appointed and qualified Auditor in Charge of the Santa Barbara Audit District Office of said Department," and who was as such officer entrusted by law with the duty of safe-keeping and transferring public moneys collected on behalf of the State; that by virtue of said duty there came into his possession a certain stated sum of public money which he embezzled and appropriated to his own use. (The sums stated in the respective three counts were $35.02, $15.53, and $19.91.)

Section 1203 of the Penal Code (in effect when the offense was committed) provides in part that "probation shall not be granted to * * * any *public official* or *peace officer* of the State, county, city, city and county, or other political subdivision who, in the discharge of the duties of his public office or employment * * * embezzled public money * * *." (Italics added.) The provision that probation should not be granted to any *public official* or *peace officer* has been in said section since the section was amended in 1931. Prior to that amendment, the section provided that: "* * * probation shall not be granted * * * to any public official or *employee* of the state, county, city, * * * who in the discharge of the duties of his public office or employment * * * embezzles public money * * *." (Italics added.) Stats.1929, p. 1385. It thus appears that by the amendment in 1931 the word "employee" was omitted from said section 1203, and the words "peace officer" were substituted in lieu thereof. In other words, before the 1931 amendment an employee of the state was not eligible for probation, but after the amendment such an employee was eligible therefor. Before and after the amendment, a public official was not eligible for probation.

Petitioner contends that he was not a public official or a peace officer; that he was an employee and is eligible for probation. Respondent contends that petitioner was a public official of the state by reason of the duties, rights and obligations of his employment; and that he is not eligible for probation.

[1-3] In People ex rel. Chapman v. Rapsey, 16 Cal.2d 636, at page 639, 107 P. 2d 388, at page 390, it was said: "'The words "public office" are used in so many senses that the courts have affirmed that it is hardly possible to undertake a precise definition which will adequately and effectively cover every situation. Definitions and application of this phrase depend, not upon how the particular office in question may be designated nor upon what a statute may name it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the nature of the position and mark its character, irrespective of any formal designation. But so far as definition has been attempted, a public office is said to be the right, authority, and duty, created and conferred by law—the tenure of which is not transient, occasional, or incidental—by which for a given period an individual is invested with power to perform a public function for public benefit. * * * One of the prime requisites is that the office be created by the Constitution or authorized by some statute. And it is essential that the incumbent be clothed with a part of the sovereignty of the state to be exercised in the interest of the public.'" In Parker v. Riley, 18 Cal.2d 83, at page 87, 113 P.2d 873, at page 875, 134 A.L.R. 1405, it was said: "[I]t is generally said that an office or trust requires the vesting in an individual of a portion of the sovereign powers of the state." Sovereignty is defined in Webster's Dictionary as: "The supreme political power, authority, or status of the person or persons in a state whom the citizens as a body habitually obey; the power that determines and administers the government of a state in the final anaylsis." In State ex rel. Pickett v. Truman, 333 Mo. 1018, at page 1022, 64 S.W.2d 105, at page 106, it was said, in referring to State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 115 N.E. 919: "Illustrative of what is meant by 'sovereignty of the state,' in the same opinion it is said: 'If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.'" In Patton v. Board of Health etc., 127 Cal. 388, 59 P. 702, it was held that, under a statute requiring the appointment of six health inspectors, such an inspector was an officer. It was said therein, 127 Cal. at page 398, 59 P. at page 706: "It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public, and are continuing and permanent, not occasional or temporary, such position or employment is an office, and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public, and the legislature

has decided for itself that the employment is of sufficient dignity and importance to be deemed to be an office. It is only where the legislature has delegated its power to create the office, and to prescribe the duties and compensation, that differences of opinion have arisen in the courts."

The Department of Employment has a director. The department has five divisions with a chief in charge of each division. One of the divisions is the division of accounts and tax collections. That division has three sections, one of which is the auditing section at Sacramento and is known as the central auditing office. A principal auditor at the central office is in charge of the auditing section and is responsible to the chief of the division of accounts and tax collections. (The chief of that division is also the deputy director of the department.) There are four area audit offices in the state, each of which is in charge of an area supervising auditor. One of those area offices is at Los Angeles. There are nine district audit offices in the Los Angeles area, one of which offices is at Santa Barbara, and it is the office for the district known as Santa Barbara County. (There are 37 district audit offices in the state.)

In 1947 petitioner was appointed office manager and auditor in charge of the Santa Barbara district audit office, and he subscribed the oath of office and furnished surety bond. His payroll and civil service classification was Auditor II and his gross salary was $412 a month. The personnel of that district office consisted of the petitioner, a typist clerk, and a part-time auditor.

It is the function of the central office to review field audit reports, review and take action on unpaid accounts, levy assessments, make adjustments on employers' accounts, issue rulings on questions of coverage, make assignments to field auditors and make investigations where correspondence is not feasible.

It is the function of the area offices to exercise administrative and functional supervision of district offices and maintain liaison between the central and district offices.

It is the general function of the district offices to determine by investigation and audit the wages paid and the resulting liabilities of employers, collect amounts due, register subject employers, provide related advisory services and promote and obtain compliance with relevant requirements of the act.

It is the specific duty of the district offices to make field audits or investigations of employers' financial records to determine tax liability; make reports of audits and investigations, including (1) proposed assessment or refund, (2) the initial determination as to correct legal entity and as to merit rate eligibility, and (3) comments upon other matters necessary to establish employers' liability under the Unemployment Insurance Act; investigate all obstructed claims, referred to them by the central office, to establish correct status and wage credits of claimant; make field audit or investigation of employer records to determine if disability insurance plans are correctly maintained; originate field audits or investigations of employing units, where a need is indicated by complaints of workers or by information from other sources; obtain delinquent reports from employers who have not complied with written demands from the central office; collect delinquent accounts; interview tax debtor to arrange for payment in full or in installments; file notices to withhold; determine tax debtors' assets, and levy thereon when necessary to protect the department's interest; prepare and file criminal complaints against employers who are not complying with the act, when the district office has determined the advisability of such action and received approval of the central office; assist the prosecutor in presentation of such cases; prepare and present the department's case in tax hearings, including examination of the petitioner and his witnesses; and take any action necessary to obtain compliance with the Unemployment Insurance Act, Gen.Laws, Act 8780d, § 1 et seq.

The Unemployment Insurance Act was enacted in 1935. Under the provisions of the act (sec. 83) the California Employment Stabilization Commission, consisting of five members, was created. The members of the commission are the three members of the appeals board, the chief of the division of the public employment offices and benefit payments, and the chief of the division of accounts and tax collections. The members of the commission are appointed by the governor, subject to the approval of the Senate, and the salary of each member is $12,000 per year. Secs. 76 and 77. The Department of Employment was created by said act, and the provisions of the act are administered by an executive officer known as the director of employment. Sec. 75. The director is appointed by the governor, subject to approval of the Senate, from the membership of the commission. The director acts as chairman of the commission.

[4] The act also provides that the director shall appoint such assistants as he may find necessary for the administration of the act and he may delegate to any of the officers or employees of the department such powers and duties as he may consider necessary. It thus appears that the position which was held by the defendant herein was not expressly mentioned by the Legislature as a position to be created under the act, but the position was created by the director under a general power delegated to him by the Legislature. Defendant was selected from a state civil service classification known as Auditor II. He was in charge of one of 37 district audit offices. He was under the immediate supervision of the Los Angeles area supervising auditor. The area supervising auditor was under the immediate supervision of the principal auditor in the central office at Sacramento. The principal auditor was under the immediate supervision of the chief of the division of accounts and tax collections. The chief of the division was the deputy director of the department and under the immediate supervision of the director. Therefore, defendant's position was subordinate to four other positions within the Department of Employment. He was not a deputy director, a deputy chief, or a deputy auditor. He was not authorized to act in the name of the director, or the chief, or the principal or supervising auditor. His duties consisted principally of routine investigations, audits, reports, ordinary clerical work, and making recommendations to the supervising and central offices. It does appear that, in addition thereto, he had the duty of filing criminal complaints against employers, provided that he had first obtained the approval of the central office. In other words, his duties were limited to usual and ordinary investigations, audits, and clerical matters, except in certain additional matters where he was required to obtain the approval of his superiors. The state budget for the fiscal year 1951-52 shows that in the field offices of the Department of Employment there were 98 positions with the same civil service classification as that of defendant, namely, Auditor, grade 2. The position occupied by defendant lacked elements which, as hereinabove stated, are usually associated with a "public office." His position did not measure up to so high a standard. He was not required, or authorized, to exercise a part of the sovereign power of the state. See Parker v. Riley, supra, 16 Cal. 2d 83, 87, 113 P.2d 873; Spreckels v. Graham, 194 Cal. 516, 528, 228 P. 1040. He was not authorized, without approval of his supervisors, to exercise any legal power that would bind third persons or the People of the state. In the case of Cleland v. Superior Court, 52 Cal.App.2d 530, 126 P.2d 622, it was held that the defendant therein, who had been appointed by the supervisors as superintendent of the Mendocino County Farm and Hospital, was not a county "officer" but was an employee.

[5] The fact that defendant subscribed the oath of office and gave a bond is a matter to be considered in determining the character of the position held by him, but that fact is not determinative of the question. In Patton v. Board of Health etc., 127 Cal. 388, at page 395, 59 P. 702, at page 704, it was said: "[I]t has been held that an oath of office is not a necessary criterion; nor is salary. These are but incidents, and form no part of the office, though they may aid in determining the nature of the position." A bond may be

required of an officer or an employee. Gov.Code, sec. 1480. The section just cited provides: "Every officer, agent or employee not required by statute to give an official bond may be required to give an individual official bond * * *."

[6–9] Probation, of course, is not a right to which a defendant is entitled, but it is an act of grace and clemency which the court, under certain circumstances, may grant. The probation statute, section 1203 of the Penal Code, states that the court, under circumstances specified therein, shall have the power in its discretion to place a defendant on probation, provided, however, that probation shall not be granted to a defendant who committed any of certain specified offenses, or to a defendant who committed any of certain specified offenses under certain circumstances. Under the provision of said section, designating exceptions to the basic provision that probation may be granted, various offenses and circumstances are enumerated. If a defendant is to be denied permission to apply for probation, upon the ground that the circumstances of his case bring him within an exception to the basic rule that he may apply for probation, it should appear clearly and with certainty that the Legislature intended by an exception to such rule to render him ineligible for probation. By the amendment of the probation statute in 1931 whereby the word "employee" was omitted, the Legislature definitely determined that an *employee* of the state was eligible for probation. The statute, as amended at that time, states that a "public official" is not eligible for probation. The statute does not define the words "public official," and it does not specify the positions which are deemed to be public offices. As stated in Patton v. Board of Health etc., supra, 127 Cal. at page 397, 59 P. at page 705: "[T]he definitions of the term 'office,' [the usual case definitions], while not inaccurate, taken in a general sense, are quite inadequate when applied to particular cases." In considering the meaning of the words "public official" with respect to a public office in which there are many positions, the question arises as to where the line of demarcation is to be drawn between positions occupied by officials and positions occupied by employees who are not officials. In the absence of a controlling statutory definition of the words "public official," and in the absence of an adequate definition otherwise which establishes that a defendant is ineligible for probation, an interpretation should be adopted in doubtful cases which will accord the defendant the right to apply for probation.

[10] Whether a person is a "public official," within the meaning of the probation statute, depends upon the circumstances of each particular case, especially the circumstances with reference to the manner in which the position was created, the power granted and exercised, and the duties and functions performed.

[11] The defendant herein was not a public official, but was an employee. He is eligible for probation, and is entitled to have his application for probation determined upon its merits.

The cases of People v. Hess in 104 Cal. App.2d 642, 234 P.2d 65, and 107 Cal.App. 2d 407, 237 P.2d 568, referred to by the trial court, did not determine the question presented here. The question presented therein, with reference to probation, was whether the provision of said section 1203, which precludes the granting of probation to public officials who embezzle public money, is unconstitutional. It was held that the provision was constitutional.

The case of People v. Brigham, 72 Cal. App.2d 1, 163 P.2d 891, cited by respondent, is not of assistance in determining the question presented here. The defendant therein, who was an examiner of applicants for automobile drivers' licenses, was convicted of bribery. In denying probation therein, the trial judge said that the defendant was not eligible for probation; and that for that reason *and other reasons* probation was denied. On appeal it was contended that the conclusion that defendant was not eligible for probation was erroneous. The reviewing court said that there was no reason for disagreement with the trial court's application of section 1203, but in any event, since there were other reasons for denying probation, the contention with reference to probation was not tenable. A reference to the reporter's transcript therein indicates that a reason for denying probation was that defendant was then on probation after having pleaded guilty to disturbing the peace.

[12–14] Respondent asserts that, since petitioner has a plain, speedy and adequate remedy by appeal from the judgment, a writ of prohibition should not issue; that the trial court had jurisdiction of the subject matter and person, and that an erroneous determination of an issue would not deprive the court of jurisdiction so as to furnish a basis for a writ of prohibition. The trial judge stated, as above shown, that he would like to entertain an application for probation, but he believed that under the law he was not permitted to do so; and that when the matter was called for hearing he would deny the application and proceed to sentence the defendant. Since the defendant pleaded guilty there would be no meritorious basis for an appeal from the judgment, except perhaps to review the order denying probation. There is no appeal from an order denying probation, but where such denial is for lack of jurisdiction the order will be reviewed on appeal from the judgment. People v. Young, 105 Cal.App.2d 612, 613, 233 P.2d 155. In view of said declaration by the trial court regarding probation, it should not be concluded that an appeal from the judgment would afford defendant a plain, speedy, and adequate remedy. It is not necessary to determine respondent's contention with respect to the propriety of prohibition as a remedy. It appears that petitioner is entitled to relief under a form of writ different from the one sought by him. The trial court declined, upon jurisdictional grounds, to consider and determine the application for probation upon its merits. "The law is well settled that a trial court is under a duty to hear and determine the merits of all matters properly before it which are within its jurisdiction and that mandate may be used to compel the performance of this duty. This is so even where the trial court's refusal to pass on the merits is based on the considered but erroneous belief that it has no jurisdiction as a matter of law to grant the relief requested." Robinson v. Superior Court, 35 Cal.2d 379, 383, 218 P.2d 10, 13. The petition herein may be regarded as one for a writ of mandate. Simmons v. Superior Court, 96 Cal.App.2d 119, 132, 133, 214 P.2d 844, 199 A.L.R.2d 288.

Let a peremptory writ of mandate issue commanding respondent court to hear and determine petitioner's application for probation upon its merits. The alternative writ of prohibition is discharged.

SHINN, P. J., and VALLÉE, J., concur.

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113 Cal.App.2d 486

CORUCCINI et al. v. LAMBERT.

Civ. 8109.

District Court of Appeal, Third District, California.

Oct. 3, 1952.

Action by Frank Coruccini, and others, against Charles F. Lambert for declaratory judgment as to rights and obligations under a lease. The Superior Court, Colusa County, Ben R. Ragain, J., sustained defendant's general demurrer, and entered judgment of dismissal and plaintiffs appealed. The District Court of Appeal, Peek, J., held that where complaint contained allegations that plaintiffs' predecessor leased realty to defendant for agricultural purposes for term of fifteen years and for additional terms of one year each at option of defendant, that lease contemplated extension of term in violation of law, and that a bona fide and actual controversy had arisen with respect to rights and duties under the lease, complaint stated a legal controversy entitling plaintiffs to declaratory relief.

Reversed.

1. Declaratory Judgment ⚷316

A complaint for declaratory relief is sufficient if it sets forth facts showing existence of actual controversy relating to legal rights and duties of respective parties under written instrument and requests that these rights and duties be adjudged by court. Code Civ.Proc. § 1060.

2. Declaratory Judgment ⚷7

Statute permitting court to refuse declaratory relief in any case in which such declaration is not necessary and proper at the time and under all the circumstances does not apply when plaintiff is entitled to some relief in connection with the matter which occasioned the controversy. Code Civ.Proc. §§ 1060, 1061.

3. Declaratory Judgment ⚷4

Plaintiff may be entitled to declaratory judgment even though such declaratory judgment may be unfavorable to him. Code Civ.Proc. § 1060.

4. Declaratory Judgment ⚷325

Where plaintiff is entitled to declaratory relief even though judgment may be unfavorable to him, court should not dispose of the case on demurrer.

5. Declaratory Judgment ⚷328

A declaratory complaint will not be dismissed because court disagrees with construction of the contract involved contended for by plaintiff.

6. Declaratory Judgment ⚷2

Purpose of declaratory judgment is to serve some practical end in quieting or stabilizing uncertain or disputed jural relations.

7. Declaratory Judgment ⚷318

Where declaratory complaint contained allegations that plaintiffs' predecessor leased realty to defendant for agricultural purposes for fifteen years and for additional terms of one year each at option of defendant, that lease contemplated extension of term in violation of law, and that a bona fide and actual controversy had arisen between the parties with respect to rights and duties under lease, complaint stated legal controversy entitling plaintiffs to declaratory relief, notwithstanding lease had run only five years. Civ.Code, § 717; Code Civ.Proc. §§ 1060, 1061.

8. Appeal and Error ⚷837(4)

Where complaint set out a count for declaratory relief and four counts for present affirmative relief, sustaining of demurrers to last four counts was not determinative of plaintiffs' rights on appeal from judgment entered against them on declaratory relief count. Code Civ.Proc. § 1060.

9. Declaratory Judgment ⚷186

Declaratory judgment would not be denied on ground that parties to contract for lease of realty for more than fifteen years were in pari delicto. Civ.Code, § 717; Code Civ.Proc. §§ 1060, 1061.

10. Appeal and Error ⚷173(10)

A defendant may not raise defense of statute of limitations for first time on appeal. Code Civ.Proc. § 343.

11. Limitation of Actions ⚷182(2)

The statute of limitations is a personal privilege to be asserted or waived at option of one entitled to assert it, and statute must be affirmatively pleaded either by demurrer or answer or its benefits are waived.

12. Appeal and Error ⚷960(1)

In order to sustain action of trial court in sustaining a demurrer without leave to amend in a declaratory judgment action on ground that trial court was exercising its discretion to deny relief in such cases, it must appear directly or indirectly that such discretion was in fact exercised. Code Civ. Proc. § 1061.

James E. Lyons, Charles W. Burkett, Jr., San Francisco, for appellants.

Clyde H. Larimer, Charles H. Frost, Jr., Willows, Devlin, Diepenbrock & Wulff, Sacramento, for respondent.

PEEK, Justice.

This is an appeal by plaintiffs from a judgment of dismissal following plaintiffs' failure to amend pursuant to the order of the trial court sustaining defendant's general demurrer.

The complaint is in five counts: (1) For declaratory judgment as to the rights and obligations of the parties under the lease for the pasturage of cattle, and to have the same declared void; (2) to quiet title to the premises; (3) and (4) for reasonable rental value for said premises, and (5) for unlawful detainer and damages therefor. To each of these counts the defendant demurred generally. Only the first count is considered by the parties as material upon this appeal.

The complaint in this count alleges plaintiffs are the owners of 587 acres of land in Colusa county; that the defendant occupies and claims the right to occupy said property for "agricultural purposes, to-wit, for the pasturage of beef cattle", under a lease from plaintiffs' predecessor; "That said purported lease contains a provision granting to the lessee, defendant herein, the right to maintain said lease at a reserved rental as therein provided, for a term of fifteen (15) years 'and for additional terms of one year each', provided only that, before October 1, of the year preceding the new term, lessee advises the lessor of his intention so to maintain said lease in full force and effect for 'an additional term of one year'. That an indefinite extension of said 15-year term, at the option of lessee is contemplated and provided for in said instrument, which was drawn up by the said defendant. That a bona fide and actual controversy has arisen between plaintiffs and defendant with respect to the rights and duties of the respective parties under the said purported lease, Exhibit A hereof, in this: Plaintiffs contend and allege that the said lease is invalid in its entirety and contrary to provisions of section 717 of the Civil Code; and they further contend that they are entitled to immediate and exclusive possession of said land; whereas defendant herein claims that the said purported lease constitutes a legal and binding contract entitling him to occupy said property for pasturage of beef cattle, except during periods when it is lawful to shoot and take migratory water fowl thereon, for as long as he shall choose to do so, that is to say, for longer term than fifteen (15) years from and after October 1, 1945."

The trial court in its memorandum opinion concluded the option "was severable from the lease proper, was not an inducing cause for making the lease, and its invalidity could not effect the validity of the lease for its full term." Concerning the allegations that there exists an actual controversy the court stated it did not see how there could be such in view of the fact that the lease, as the court interpreted it, had ten years more to run before the option provision could be exercised. This, the court thought, made the controversy an anticipated one, speculative and remote, rather than an actual present controversy. The court also stated that another reason to sustain the demurrer was that "both plaintiffs' predecessor and defendant voluntarily executed the lease and option, and if fault there be in its provisions both are equally responsible, and in such event both parties may be without relief".

Appellants first contend the complaint states a cause of action under Section 1060 of the Code of Civil Procedure, and for that reason the judgment entered following appellants' failure to amend their pleading within the time prescribed by the order sustaining respondent's general demurrer must be reversed.

[1] The general rule is well established that

> "A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court." Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 728, 146 P.2d 673, 677, 151 A.L.R. 1062. See also Photochart v. Del Riccio, 94 Cal.App.2d 315, 319, 210 P.2d 547; Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 760, 161 P.2d 217, 162 A.L.R. 747.

[2–4] It is true, as respondent contends, that the court under section 1061 of the Code of Civil Procedure, may refuse relief by sustaining a general demurrer to a complaint, if in its discretion it appears the determination is not necessary and proper at the time and under all the circumstances. However, the provisions of said section do "not apply where, upon the facts stated, the plaintiff is entitled to some relief in connection with the matter which occasioned the controversy." Lord v. Garland, 27 Cal.2d 840, 852, 168 P.2d 5, 12. See also Zimmer v. Gorelnik, 42 Cal.App.2d 440, 448, 109 P.2d 34. Thus a plaintiff may be entitled to have the court render its declaratory judgment even though such declaratory judgment be unfavorable to him. C. Dudley DeVelbiss Co. v. Kraintz, 101 Cal.App.2d 612, 615, 225 P.2d 969; Maguire v. Hibernia Savings & Loan Soc., supra, and in such situation the court should not dispose of the case on demurrer.

It is readily apparent from the allegations of plaintiffs' complaint (the truth of which are admitted by defendant's demurrer) that three possible conclusions are posed, i. e. if the lease is totally invalid, as they claim, they would be entitled to possession of the property, defendant would have no interest therein, and they could deal with the property as they desired. If the lease be valid only for a fifteen year period, as indicated by the trial court, they could plan to utilize the property or sell it at the expiration of that period. If the lease may be renewed from year to year after expiration of the fifteen year period, plaintiffs must await defendant's action each year before deciding his course of action.

[5, 6] As stated in Anderson Declaratory Judgments, at page 275, "A declaratory complaint will not be dismissed because the court disagrees with the construction of the contract involved, contended for by the plaintiff." This is true because the purpose of the declaratory judgment as stated in the Maguire case, 23 Cal.2d at page 729, 146 P.2d at page 678, is "to 'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.'" Thus it was held in the case last cited that "To hold that a plaintiff on the wrong side of a controversy is not entitled to the security and relief against uncertainty which a declaratory judgment affords would require us to read into the statute a limitation not there present."

As indicated above, the trial court in its opinion stated it considered the lease valid for a fifteen year term. Respondent, apparently basing his next argument upon this premise, states that such being the case the sustaining of the demurrer to the last four counts was proper and "since the last four counts or causes of action covered all remedies that the plaintiffs were entitled to (if correct in their contentions), there remains no legal field or object concerning which a declaratory judgment could be granted." In clarification of the argument, respondent states that no appeal being taken from the ruling sustaining the demurrer to the last four counts, and since they embrace all of the affirmative relief to which appellants could have been entitled, necessarily therefore, appellants have waived their objection to the ruling on the declaratory judgment count, relying on Ephraim v. Metropolitan Trust Co., 28 Cal.2d 824, 172 P.2d 501, 509.

[7, 8] Section 1060 of the Code of Civil Procedure is a direct answer to such contention. That section states: "the court may make a binding declaration of such rights or duties, *whether or not further relief is or could be claimed at the time.*" (Emphasis added.) Nor does the Ephraim case sustain respondent's position. In that case the declaratory relief would not lie, not because demurrers were sustained to the counts asking affirmative relief but because, as the court there said, "since no present legal controversy exists, no cause of action for declaratory relief is stated." In the present case a legal controversy is stated, and since, under Section 1060 of the Code of Civil Procedure, it is not necessary for any further relief to be claimed, or possible, the sustaining of demurrers to the last four counts which were for present affirmative relief, is not determinative of appellants' rights on appeal from the judgment entered against them on the declaratory relief count.

[9] Respondent next contends, relying upon Moss v. Moss, 20 Cal.2d 640, 128 P.2d

526, 141 A.L.R. 1422, that even if the lease be invalid in its entirety, the appellants are in pari delicto in its creation and the trial court properly refused relief. That case merely held "that a trial court does not commit reversible error when in ruling on demurrer it exercises its discretion and refuses declaratory relief to a party of equal fault to an illegal transaction. It does not hold that the fact that a plaintiff is not entitled to a favorable declaration is a proper basis for the exercise of the trial court's discretion under section 1061 of the Code of Civil Procedure." Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d at page 730, 146 P.2d at page 679.

Furthermore such an argument brings into focus the obvious answer thereto; that is, if such a contention be well founded then particular land titles might never be merchantable if one could cloud the same by instruments which violate the law against perpetuities. See Epstein v. Zahloute, 99 Cal.App.2d 738, 222 P.2d 318.

[10,11] In further support of the judgment respondent contends that plaintiffs' action was barred by Section 343 of the Code of Civil Procedure. The rule is too well established to warrant citation that not only is a defendant precluded from raising the defense of the statute for the first time on appeal, 16 Cal.Jur. 638, but since the statute is a personal privilege to be asserted or waived at the option of the one entitled to assert it, the statute must be affirmatively pleaded either by demurrer or answer, or its benefits are waived. 16 Cal. Jur. 603.

Respondent lastly contends the purported controversy constitutes a mere conjecture or supposition on plaintiffs' part that at some time in the future a controversy may arise. Again, respondent bases his argument on the assumption that the lease is valid for a fifteen year term. From this basis he then argues that since the lease has ten years to run before the option may be exercised and since at this time it cannot be told whether he will choose to exercise the option, any question as to actual or legal controversy between the parties is speculative and remote.

Also under this head respondent contends the allegations of the complaint are insufficient to show an actual controversy. What we have heretofore said in our previous discussion is likewise applicable to this argument and hence no further discussion is necessary.

[12] Lastly, it may be said that where a "trial court may exercise its discretion to deny relief in such an action by sustaining a demurrer without the right to amend, it must appear directly or indirectly that such discretion was in fact exercised. * * * While a trial judge may deny relief in his discretion, it cannot be inferred that such discretion, has been exercised where the trial judge, by opinion, fully discloses that he did not exercise any discretion, but decided the case on its merits." Collins v. City and County of San Francisco, 112 Cal.App.2d 719, 247 P.2d 362, 365.

The judgment is reversed.

VAN DYKE, J., and SCHOTTKY, J. pro tem., concur.

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113 Cal.App.2d 468

PEOPLE v. LEWIS.

Cr. 2807.

District Court of Appeal, First District,
Division 2, California.
Oct. 3, 1952.

Prosecution for statutory rape. The jury in Superior Court, County of San Mateo, Edmund Scott, J., convicted defendant, and he appealed. The District Court of Appeal, Dooling, J., held that where accused encouraged two minors to engage in illicit intercourse with one another and took photographs of the commission of the crime, he was guilty of statutory rape as a principal.

Affirmed.

1. Rape 🔑19

To establish that accused aided and abetted commission of illicit act of intercourse so as to be guilty of statutory rape as a principal, it is sufficient that accused knows the intention of the perpetrator and either by acts, words, or gestures aids or encourages the commission of the crime. Pen.Code, §§ 31, 261(1).

2. Rape ⚷52(1)

In prosecution for statutory rape, evidence established that accused, who allegedly took photographs of the commission of the crime, had encouraged two minors to engage in illicit intercourse with one another. Pen.Code, §§ 31, 261(1).

3. Rape ⚷19

Where accused encouraged two minors to engage in illicit intercourse with one another and took photographs of the commission of the crime, he was guilty of statutory rape as a principal. Pen.Code. §§ 31, 261 (1).

4. Criminal Law ⚷59(5)

The word "aid" as used in statute making persons who aid or abet commission of crime guilty as principals does not connote guilty knowledge, but word "abet" does connote such guilty knowledge. Pen.Code, § 31.

See publication Words and Phrases, for other judicial constructions and definitions of "Abet" and "Aid".

5. Criminal Law ⚷792(3), 1172(1)

Instruction that if jury were in reasonable doubt whether defendant actually abetted, that is actually counseled and advised the commission of offense charged, then jury must find defendant not guilty, and that mere presence of defendant at commission of the crime alone was not sufficient to prove him guilty sufficiently defined term aid and abet, and failure of court to refer to guilty knowledge expressly was not prejudicial error. Pen.Code, § 31.

6. Criminal Law ⚷1030(1)

In absence of objection at time of alleged misconduct, claim of misconduct can only be raised on appeal when it was of such flagrant character that no prompt admonition to jury might have cured it.

7. Criminal Law ⚷1035(3)

Alleged prejudicial remarks made and alleged prejudicial questions asked by trial court which were not objected to at the time were not of such flagrant character that no admonition to the jury could have cured prejudicial effect and, hence, objections on such grounds could not be raised on appeal.

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Millington, Dell 'Ergo, Weeks & Morrissey, Redwood City, for appellant.

Edmund G. Brown, Atty. Gen. of California, Clarence A. Linn, Asst. Atty. Gen., Charles A. McClung, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant Lewis and one Soto were jointly tried before a jury and each convicted of statutory rape. Pen.Code, sec. 261(1). They were tried and convicted as aiders and abettors, Pen.Code, sec. 31, the actual act or acts of intercourse having been committed by C, a high school boy of the age of 18, with one B, a 16 year old high school girl.

The evidence, disregarding conflicts, showed that Soto drove the appellant and the two young people to a secluded spot in the country where the two young people disrobed and engaged in the sexual act while appellant took several photographs of them.

Prior to this time C and Soto had discussed the taking of such photographs and C brought one M, a school girl of 14, to Soto as a possible participant. Soto took the two to the home of appellant where appellant showed two moving picture films depicting the sexual act and other obscenities. M after seeing these pictures refused to proceed and C then secured B who was also taken to appellant's home and shown similar moving pictures.

Appellant himself testified that he did not know in advance that C and B were to engage in a sexual act or even that B was to disrobe or to be photographed, it being his understanding that he was only to take pictures of C in the nude; and that when they arrived at the scene and both young people disrobed he was a passive bystander who made no suggestion as to any pose and only took such pictures as C suggested.

[1–3] Appellant relies on the rule that mere knowledge that a crime is being committed and the failure to take any steps to prevent its commission do not standing alone amount to aiding and abetting. People v. Weber, 84 Cal.App.2d 126, 130, 190 P.2d 46; People v. Hill, 77 Cal.App.2d 287, 293, 175 P.2d 45. It may be conceded for the purpose of this opinion, without deciding the question, that if the only evidence was that defendant took pictures of the couple while engaged in the sexual act without any suggestion or prompting to them on his part he would not be guilty as a principal. Here however the jury had the further evidence that before the crime was committed appellant had shown moving pictures of such acts both to B who afterwards participated and to M who refused to do so. The jury could reasonably infer, despite appellant's denials, that he showed the pictures to B to encourage and induce her to engage in the forbidden act and later took the pictures in aid and furtherance of that preconceived design. It thus does not avail appellant to cite People v. Beltran, 94 Cal.App.2d 197, 210 P.2d 238, and People v. King, 30 Cal.App.2d 185, 85 P.2d 928, to the effect that appellant (quoting from his opening brief) "would be guilty only to the extent (1) of his knowledge or (2) of the natural and reasonable consequences of the acts he aided and encouraged."

We must assume that the jury found that appellant showed the films with the purpose of persuading and inducing B to engage in the act later photographed and went with the others to the scene and there participated with full knowledge of the intention of C to commit the criminal act upon B's person. That this would make him an aider and abettor seems too clear for argument. It is sufficient if the defendant "knew the intention of the other, and either by acts, words or gestures, aided or encouraged the commission of the crime." People v. Le Grant, 76 Cal.App.2d 148, 153, 172 P.2d 554, 557.

[4, 5] Appellant further complains that the court failed to give a definition of the two terms "aid" and "abet", citing People v. Ponce, 96 Cal.App.2d 327, 331, 215 P.2d 75. It is true as pointed out in that case that while "abet" connotes guilty knowledge the word "aid" does not. However the court did define the term "abet" in the following language: "If you are in reasonable doubt as to whether these defendants actually abetted, that is to say actually counseled and advised the commission of the offense charged, you must find the defendants not guilty, and you are instructed that the mere presence of these defendants at the commission of any act of sexual intercourse * *, considered alone, or the fact that they may have been present * * * and neglected to prevent the act, considered alone, is not sufficient to prove them guilty."

Thus the jury was expressly, though negatively, instructed that to find defendants guilty they must find beyond a reasonable doubt that defendants actually counseled and advised the commission of the crime. If they so found appellant's guilt as a principal under Pen.Code, sec. 31 was established. Guilty knowledge must exist in one who counsels and advises the commission of statutory rape in his presence, and the failure of the court to expressly refer to guilty knowledge in this instruction could not in any way have resulted to appellant's prejudice.

The court on occasions made remarks and asked questions during the conduct of the trial which are complained of as prejudicial misconduct. No objection to any such conduct was made in any instance. The court instructed the jury: "if the court made any statement which occurred to you to reflect upon any counsel or witness, or seemed to you to indicate that the court had some opinion upon the merit of the case, or upon some facts or issues involved in the case, then you are instructed, if any such statement was made, to disregard that statement in reaching your verdict."

[6, 7] In the absence of objection at the time the claim of misconduct can only be raised on appeal if it was of such a flagrant character that no prompt admonition to the jury could have cured it. People v. Caldwell, 55 Cal.App. 280, 203 P. 440; People v. Byrd, 88 Cal.App.2d 188, 198 P.2d 561.

An examination of the record satisfies us that this is not such a case.

The judgment and order denying appellant a new trial are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

113 Cal.App.2d 571

KAPLAN v. HACKER.

Civ. 18700.

District Court of Appeal, Second District, Division 2, California.

Oct. 8, 1952.

Dave Kaplan recovered a judgment against R. M. Hacker. On defendant's motion to compel satisfaction of the judgment upon payment of $300.10 by the defendant, the Superior Court, Los Angeles County, Roger Alton Pfaff, J., granted the relief sought and plaintiff appealed. The District Court of Appeal, Fox, J., held, inter alia, that the assignee of the judgment, who was prosecuting the appeal in the name of the original plaintiff, could not, under the circumstances, complain of lack of notice of the motion to compel satisfaction.

Affirmed.

1. Appeal and Error 🔑977(1)
Motions 🔑39

Ruling on motion to reopen hearing on motion to compel satisfaction of judgment was largely a matter of judicial discretion which would not be disturbed on appeal in absence of clear abuse thereof.

2. Motions 🔑39

In proceedings on motion to reopen hearing on motion to compel satisfaction of judgment, where no showing was made as to why additional information relied on had not been made available at prior hearing, there was no abuse of discretion in refusing to reopen. Code Civ.Proc. § 675.

3. Judgment 🔑848

Mere filing of judgment assignment did not operate as constructive notice to judgment debtor.

4. Judgment 🔑848

Where judgment assignee did not notify judgment debtor of assignment and took no steps to have himself substituted as party plaintiff, as authorized by statute, but elected to permit assignor and his counsel to represent him, insofar as his dealings with judgment debtor were concerned, assignee could not successfully attack order compelling satisfaction of judgment merely by complaining that court lacked jurisdiction because assignee had not been given notice of defendant's motion to compel satisfaction. Code Civ.Proc. §§ 385, 675.

5. Evidence 🔑43(2)

Court will take judicial notice of its own records in same action, but this does not require that it take judicial notice of and accept as true and genuine every paper that appears in the file.

6. Evidence 🔑43(2)

Where judgment creditor had filed with clerk an unacknowledged document purporting to be an assignment of the judgment, but alleged assignment had not been received in evidence and its authenticity had not been shown, document did not establish fact that judgment had been assigned and document was not part of record of which court was required to take judicial notice when defendant moved to compel satisfaction of judgment.

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Buchalter, Nemer & Fields, and Milton Linder, Los Angeles, for appellant.

Leo K. Gold, Beverly Hills, for respondent.

FOX, Justice.

Plaintiff appeals from (1) an order requiring him, upon payment of $300.10 by the defendant, to execute and file a satisfaction of the judgment herein; and (2) an order denying his motion to reopen the hearing on the motion to compel satisfaction of the judgment.

Plaintiff recovered a judgment against defendant in May, 1949. Partial satisfaction was filed in February, 1950. In July, 1950, plaintiff filed with the clerk an unacknowledged document purporting to be an assignment of the judgment to one Al Kaplan. No notice, however, of such assignment was given defendant and no action has been taken by the tassignee to be substituted as a party plaintiff. The assignment was written on the stationery of counsel for plaintiff and the same counsel continued to represent plaintiff after the assignment and through both of the proceedings out of which this appeal arises. Upon three separate occasions after the assignment counsel acknowledged substantial payments on the judgment and directed entry of partial satisfaction in accordance therewith.

A dispute arose between defendant and plaintiff as to the amount unpaid on the judgment. Defendant contended the remaining unpaid amount was $300.10 and made tender thereof, demanding a full satisfaction of the judgment. Plaintiff refused this demand. Defendant thereupon gave notice to compel satisfaction of judgment pursuant to section 675, Code of Civil Procedure, supporting it with his own affidavit. Plaintiff, who lives in Phoenix, Arizona, filed a counter affidavit. On the day set for hearing both plaintiff and defendant appeared in person to give oral testimony. But before the hearing got under way plaintiff discovered a process server was waiting to serve a summons and complaint on him in a federal court case, unrelated, however, to this litigation. Not desiring to be served in that case, plaintiff absented himself from the courtroom and did not testify in this proceeding. After considering the affidavits and defendant's oral testimony the court determined the amount unpaid on the judgment was $300.10, as contended by defendant, and ordered satisfaction of judgment entered upon payment thereof. During this hearing no mention was made of any assignment of the judgment by the plaintiff to Al Kaplan.

[1, 2] A few days later plaintiff made a motion, supported by an affidavit of one Alec Newman, to reopen the hearing on the motion to compel satisfaction of the judgment. The Newman affidavit purported to support plaintiff with respect to a disputed payment. No showing, however, was made as to why this information was not available at the prior hearing. Consequently the motion to reopen was denied. The ruling on this latter motion was largely a matter of judicial discretion which will not be disturbed on appeal in the absence of a clear abuse thereof. Bovais v. Cassassa, 108 Cal.App. 649, 650, 291 P. 886; Mazzenga v. Rosso, 87 Cal.App.2d 790, 794, 197 P.2d 770. We find no abuse of discretion.

[3, 4] The assignee of the judgment who is prosecuting this appeal in the name of the original plaintiff, as he is privileged to do, Code Civ.Proc., sec. 385, attacks the order compelling satisfaction of the judgment on the ground of lack of jurisdiction because he was not given notice of defendant's motion. There is no merit in this contention. The assignee did not give actual notice to defendant of the assignment and the mere filing thereof does not operate as constructive notice to the judgment debtor. Buckeye Refining Co. v. Kelly, 163 Cal. 8, 13, 124 P. 536. Furthermore, Al Kaplan took no steps to have himself substituted as a party plaintiff as provided by statute. Code Civ.Proc., sec. 385. He elected to continue the action in the name of the original party with the same counsel until after the hearings in the court below. After the assignment these attorneys acknowledged receipt of three substantial payments by defendant and accordingly directed partial satisfaction of judgment in each instance. It is thus clear that the assignee had elected to permit the plaintiff and counsel of record to represent him insofar as his dealings with defendant were concerned. These persons were served with notice and participated in the hearings. Under these circumstances it cannot be truly said that the assignee did not have notice of defendant's motion to compel satisfaction of the judgment or that the court was without jurisdiction to make the order.

[5, 6] The assignee, Al Kaplan, further argues that on the theory of judicial notice the court had before it the fact of the assignment of the judgment to him, and should have ordered him brought into the proceedings, otherwise he is deprived of his property without due process. This argument is not sound. While a court will take judicial notice of its own records in the same action, Schomer v. R. L. Craig Co., 137 Cal.App. 620, 627, 31 P.2d 396, this does not mean that it takes judicial notice of and accepts as true and genuine every paper that appears in the file. Hurley v. Lake County, 113 Cal.App. 291, 295–296, 298 P. 123. Here the alleged assignment had not been received in evidence, and its authenticity had not been shown. The document, therefore, did not establish the fact that the judgment had been assigned. Hence it was not a part of the record of which the court was required to take judicial notice. Hurley v. Lake County, supra, 113 Cal.App. at pages 295–6, 298 P. 123.

The orders are affirmed.

MOORE, P. J., and McCOMB, J., concur.

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113 Cal.App.2d 397

FISHER v. NASH BLDG. CO., Inc. et al.

Civ. 18506.

District Court of Appeal, Second District, Division 3, California.

Sept. 30, 1952.

Hearing Denied Nov. 25, 1952.

Action by John W. Fisher, and another, against Nash Building Co., Inc., Charles Tesseyman, and others, for balance due under escrow agreement. The Superior Court of San Luis Obispo County, Ray B. Lyon, J., entered judgment for plaintiffs, and defendant Tesseyman appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to sustain finding that defendant Tesseyman's interest was subordinate to and subject to plaintiffs' prior lien claim.

Affirmed.

1. Action 🔑56

Appeal and Error 🔑964

Consolidation of actions is not a matter of right but rests within sound discretion of the trial judge, and his decision will not be reviewed except upon clear showing of abuse of discretion.

2. Appeal and Error 🔑1043(1)

In action by vendors of motel for unpaid balance of purchase price, refusal to consolidate action with another to determine interest of a defendant, other than the purchaser, in the property involved was not prejudicial to such defendant, in view of fact that other action was determined against such defendant and result would have been the same upon consolidation.

3. Vendor and Purchaser 🔑315(2)

In action by vendors of motel for unpaid balance of purchase price, where principal issue was whether vendors were entitled to recover the balance due under escrow instructions and purchaser permitted its default to be entered, evidence offered by another defendant concerning events occurring prior to execution of escrow instructions and directed to question as to source of moneys deposited and disbursed through the escrow were outside the issues and properly rejected.

4. Pleading 🔑364(2)

Irrelevant matter, though pleaded, is still irrelevant.

5. Action 🔑50(10)

In action by vendors of motel for balance due under escrow agreement, where complaint alleged that defendant, other than the purchaser, claimed some interest in the property involved, but that such interest was subordinate to vendors' claim and right, joinder of such defendant was proper, and cause of action was stated against him.

6. Appeal and Error 🔑877(2)

In action by vendors of motel for balance due under escrow agreement, where the defendant, who was not the purchaser but was alleged to have some interest in the property involved, which interest was subordinate to vendors' claim, was only party prosecuting appeal, the appeal would be limited to that part of the judgment which affected such defendant's right, and such defendant could not complain about any purported error affecting rights of vendors as against the purchaser.

7. Vendor and Purchaser ⟹260(1)

In action by vendors of motel for balance due under escrow agreement, evidence was sufficient to sustain findings that interest of defendant, who allegedly had contributed to funds used by purchaser, was subject to prior lien claim of vendors.

H. J. Kleefisch, San Francisco, for appellant.

A. V. Muller, San Luis Obispo, for respondents.

VALLÉE, Justice.

Appeal by defendant Tesseyman from a judgment for plaintiffs in an action in which plaintiffs, as sellers, sought to recover from defendant Nash Building Co., Inc., a corporation, as buyer, the balance unpaid on the purchase price of plaintiffs' motel and its furnishings and fixtures. The only part of the judgment which affects Tesseyman is that which provides that his interest in the property is subordinate and subject to the prior lien claim and rights of plaintiffs. In addition to adjudging that plaintiffs recover from the buyer, the court ordered that all deeds and bills of sale, covering the real and personal property deposited in escrow, be retained by the escrow holder until "further order of the court." This provision was inserted because, as hereafter appears, the question of title as between Tesseyman and the Nash Building Co., Inc., was involved in the companion case of Tesseyman v. Fisher, Cal.App., 248 P.2d 471. The two judgments are entirely consistent with each other and for practical purposes should be read together as if they had been rendered in a single action.

Prior to March 23, 1949, plaintiffs and a Mr. and Mrs. Cleo S. Clinton were the owners of a motel. On that day they sold, and Nash Building Co., Inc., (called Nash Company) bought the hotel, its furnishings and fixtures, and an on-sale liquor license, for $155,000. The terms of the sale are evidenced by escrow instructions dated March 23, 1949, and signed by the buyer as follows: "Nash Building Co., Inc., a corp. By George H. Jovick, Pres. Approved Charles Tesseyman." The sum of $61,840.94 cash and a promissory note for $14,103.19 secured by a chattel mortgage, were deposited in the escrow. The balance of $79,055.87 was to be paid by the buyer on or before close of escrow and was to be disbursed to the sellers when the escrow holder obtained a deed to the real property showing title in the buyer and a bill of sale to it covering the furnishings and fixtures. Out of the money deposited, $7,500 was to be paid for the transfer of the liquor license which was to be in the name of Tesseyman, and $25,000 was to be paid to the Fishers and Clintons upon the signing of the escrow instructions.

On April 11, 1949, the escrow instructions were amended to provide that instead of paying $79,055.87 cash, called for under the instructions of March 23rd, the buyer would, on or before August 15th, deposit $33,023.86 cash and assume a note and trust deed on the motel in the amount of $46,032.01. These amended instructions were signed by the buyer: "Nash Building Co., Inc. By George H. Jovick, Pres. Approved: Charles Tesseyman."

The terms of the escrow were fully performed by the sellers. They executed a deed and a bill of sale to the property in the name of the buyer, the liquor license was transferred to Tesseyman, and possession of the motel was delivered. The buyer, however, failed to pay the balance of $33,023.86 remaining on the purchase price, and prorations of taxes and fire insurance. The escrow has not been closed. Mr. and Mrs. Clinton quitclaimed to plaintiffs all their right, title and interest in the sale and the benefits under the escrow. On March 31, 1950, plaintiffs made written demand upon the buyer and Tesseyman to complete the performance of the terms of the sale, which they failed to do.

Thereafter, plaintiffs brought this action against Nash Company and others, including Tesseyman and Jovick, (1) to recover the balance due on the purchase price, prorations of taxes and fire insurance, interest, and costs, (2) to establish a lien on the property as security therefor, and (3) to have whatever interest defendants Tesseyman and Jovick claimed in the property decreed subordinate and subject to plaintiffs' prior lien. Jovick and Tesseyman were joined as parties defendant only for the purpose of having whatever interest they claimed in the property decreed subordinate to the interest of plaintiffs. The Nash Company and Jovick defaulted. Tesseyman answered. Among other things, his answer denied that his interest in the property was subordinate to plaintiffs' rights; admitted the escrow instructions and amendments thereto were known to him and were approved in writing by him. As a part of his answer, Tesseyman adopted "insofar as the allegations in the complaint * * are applicable to the defense of this answering defendant [Tesseyman]," the allegations of the complaint in action 17745, filed in the Superior Court of San Luis Obispo County prior to the instant action, wherein he, as plaintiff, sued the Nash Company, Jovick, the Fishers, the Clintons, and others.[1]

The complaint in 17745 is predicated on an alleged oral agreement between Tesseyman and Jovick with the Nash Company, the "intermediate title holder" or "dummy", to trade a hotel, then owned by Tesseyman, for the motel involved here, then owned by the Fishers and Clintons, together with an on-sale liquor license. Epitomized, the complaint in 17745 alleges that: pursuant to this oral agreement, Tesseyman executed a deed and bill of sale covering the hotel and its furnishings to the Nash Company, which were placed in escrow, as were deeds and bills of sale relating to the motel from the Fishers and Clintons to Nash Company and from it to Tesseyman, for delivery to Tesseyman; relying upon representations made by Jovick that it was necessary in order to consummate the trade, Tesseyman authorized the escrow holder to record the deed and bill of sale relating to the hotel; thereupon, the Nash Company, through its officers, Jovick and Jacobsen, sold the hotel and furnishings; the proceeds derived therefrom, including a promissory note in the sum of $14,103.19, secured by a chattel mortgage on the hotel furnishings, were retained by defendants, including the Fishers and Clintons; the on-sale liquor license was transferred to Tesseyman, and with the knowledge and consent of the Fishers and Clintons, Tesseyman entered into possession of the motel property and, since March 25th, has been in actual possession; Tesseyman has paid certain sums to the holder of the trust deed and chattel mortgage on the motel on account of interest and principal; defendants claim an interest in the property which constitutes a cloud on Tesseyman's title; Tesseyman is entitled to receive title to the motel, but defendants refuse to deliver the conveyances until he has paid "a sum of money which he did not agree to pay and in no way is obligated to pay," as a "condition prerequisite" to the delivery of such conveyances; Tesseyman has been damaged by defendants' failure to deliver the conveyances.

Tesseyman moved to stay proceedings in the present action and to consolidate it with action 17745. The motions were denied.

After plaintiffs introduced their evidence and rested, and Tesseyman was testifying, objections to the testimony were made and sustained. Tesseyman then made several offers to prove (1) the source of the funds in escrow; (2) that he has paid the full consideration he had offered to pay for the property; (3) that Jovick was the agent of Fisher; (4) that he was induced to sign the escrow instructions upon Jovick's representation that the transaction was a trade; (5) that the sums of money in escrow were paid by him; (6) that Fisher and Jovick delivered possession of the motel to him; (7) that "practically two-thirds of the consideration was paid" by him.

The offers were rejected as "not being proper at this time" in view of the fact that it had been determined to keep the two actions separate, and the facts included in the offer were germane to action 17745, his rights would be protected in that action, and, as appears by the court's remarks in the margin,[2] he would be given an opportunity to present the offered evidence at that time. Tesseyman then rested.

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[1] See Tesseyman v. Fisher, Cal.App., 248 P.2d 471.

Judgment was rendered for plaintiffs. The judgment provides: (1) plaintiffs recover from Nash Company the amounts sued for; (2) plaintiffs have a lien against the real and personal property as security therefor; (3) the premises be sold unless, within 60 days from notice of entry of judgment, defendant Nash Company pays the judgment; (4) any interest defendants Tesseyman and Jovick have in the real and personal property is subordinate and subject to the prior lien claim and rights of the plaintiffs; (5) all deeds and bills of sale covering the real and personal property theretofore placed in escrow be retained by the escrow holder until "further order of the Court". Tesseyman appeals.

We have had difficulty in deciphering appellant's points from his verbose briefs. They appear to be: (1) the court erred in denying the motions to stay proceedings and to consolidate the present action with action 17745; (2) the court erred in rejecting the offers of proof; (3) the complaint fails to state facts sufficient to constitute a cause of action against him; (4) the findings are defective; (5) the court should not have decreed a lien on the personal property.

[1, 2] In support of his contention that the court erred in refusing to stay proceedings in the present case and to consolidate the present action with action 17745, Tesseyman's argument appears to be that since a court of equity had obtained jurisdiction first over action 17745, and since the pleadings in that action were adopted and made a part of the pleadings in the present

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[2] The Court stated: "[T]here are undoubtedly some rights to be determined as between Nash Building Company, Jovick and Mr. Tesseyman, but I don't see how that concerns this case or Mr. Fisher's right to enforce his escrow," and that when action 17745 came to trial, "it may be shown that Mr. Tesseyman is entitled to the conveyance of this property, or it may be shown that the Nash Building Company and Tesseyman are entitled to certain respective interests in this real property. *That is what we'll determine at that time,* but I don't see how that can be urged against Mr. Fisher's right to have it paid for. * * * I don't see anything in all of this documentary evidence and all of the testimony that has been presented here that could cause the Court to consider seriously that Mr. Tesseyman has any claim in greater priority to Mr. Fisher's. * * * I am only concerned here as to the right to Mr. Fisher to enforce his vendor's lien. * * * Mr. Tesseyman has no claim to this money that is going to be paid Mr. Fisher. *The only thing that he [Tesseyman] is concerned in is what his interest is going to be in this real property that Mr. Fisher is going to deed when he gets the money.* He [Fisher] doesn't care who he deeds it to. All he wants is his money, and here's the deed. Then you people will then determine who is to get the deed, or what interest each may have in this real property. * * * I'm going to exclude all evidence, excepting any evidence—*that is in this trial*—excepting any evidence that may tend to show why Mr. Tesseyman's claims in here are paramount to Mr. Fisher's. And I don't know just how you're going to do that, because he [Tesseyman] has approved all the escrow instructions, and that's all Mr. Fisher is insisting on is a compliance with the escrow instructions. * * * I assure you your rights will all be protected in the other case." (Italics and brackets added). The following colloquy took place:

"The Court: Any decision I might make in that [this] case would not affect the determination of the rights of Mr. Tesseyman as against the Nash Building Company or Mr. Jovick. It would not jeopardize or limit them. This Court will be ready to fully go into that. If Mr. Tesseyman has interests and rights here, they will be protected. * * * What you people will be fighting over will be who gets the title and how much of it.

"Mr. Kleefisch [Attorney for Tesseyman]: That's right.

"The Court further said: "[B]ut it will be understood, of course, that there will be something in this decree that action, and vice versa,[3] consolidation was a matter of right. Consolidation is not a matter of right; it rests solely within the sound discretion of the trial judge, and his decision to consolidate, or his refusal to do so, will not be reviewed except upon a clear showing of abuse of discretion. Realty Const. & Mtg. Co. v. Superior Court, 165 Cal. 543, 546, 132 P. 1048. Tesseyman makes no showing of either an abuse of discretion or of prejudice resulting from the court's determination to keep the two actions separate; nor can he do so in view of the record in both actions. The trial court thought it feasible to try the actions separately because the Nash Company, by its default, admitted the money sued for was due, saying "there is this intermingling of the facts. We have the admission here that the money is due. They say they are ready to pay it. That clears out Mr. Fisher. Now, the question of where the title is to go is a matter between Nash and Jovick and Tesseyman. Fisher is not concerned about that." The issues which Tesseyman endeavored to inject into the present case by his pleadings, his offer of proof, and motion to consolidate were subsequently tried in action 17745, and there determined against him, which determination has this day been affirmed by this court.[4] Since the result would have been the same had the two actions been consolidated, he clearly suffered no prejudice.

[3, 4] There is no merit in Tesseyman's contention that the court erred in refusing his offers of proof. The court had determined to keep separate the issues involved in the two actions. The principal issue here was whether plaintiffs, as sellers, were entitled to recover from Nash Company, the buyer, the balance of the purchase price it had agreed to pay under the escrow instructions of March 23rd and April 11, 1949. Since Nash Company permitted its default to be entered, the issue of its liability was settled. The only other issue was whether Tesseyman's interest in the property was paramount to plaintiffs'. The court permitted Tesseyman to offer evidence on this issue, but he was unable to do so in view of the escrow instructions approved by him. He concedes that the evidence offered by him related to events which occurred prior to the execution of the escrow instructions and was "In the main * * * directed entirely to the questions as to the source of the moneys * * * deposited and disbursed * * * through the escrow." These were facts which could in no way affect plaintiffs' right to recover from the buyer under the escrow instructions. Since these facts were outside the issues, they were properly rejected. The fact that Tesseyman pleaded irrelevant matter in his answer did not make evidence with respect thereto admissible. Irrelevant matter, though pleaded, is still irrelevant. Decter v. Stevenson Properties, Inc., 39 Cal.2d 407, 247 P.2d 11.

[5] Tesseyman's contention that the complaint fails to state facts sufficient to constitute a cause of action against him is likewise groundless. The complaint states a valid cause of action against Nash Company. Tesseyman is not a necessary party to the determination of the respective rights of the plaintiffs as against the Nash Company under the escrow instructions. 20 Cal. Jur. 476 § 4. Since, however, the complaint alleges that Tesseyman claims "some interest in the real and personal property," but that his interest "is subordinate and subject to plaintiffs' claim and right," it was proper, under the circumstances, to join him as a defendant, and in this respect, a cause of action against him is stated. See Reed v. Hayward, 23 Cal.2d 336, 144 P.2d 561.

[6, 7] Tesseyman is the only party prosecuting this appeal. His appeal, therefore, is limited to that part of the judgment which affects his rights. Lasher v. Faw, 209 Cal. 726, 734, 289 P. 821. He is in no position to complain about any purported error in the form of the judgment or the purported inadequacy of the findings inso-

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will not permit this deed to be delivered to the Nash Building Company until this other case [17745] is disposed of."

[3] See Tesseyman v. Fisher, Cal.App., 248 P.2d 471.

[4] Tesseyman v. Fisher, Cal.App., 248 P.2d 471.

far as they affect the rights of plaintiffs as against Nash Company. Since it clearly appears from the record that the evidence supports the finding that his interest is subordinate and subject to the prior lien claim and rights of plaintiffs, the arguments advanced by Tesseyman on purported errors with respect to the rights and issues as between plaintiffs and defendant Nash Company are irrelevant.

Affirmed.

SHINN, P. J., concurs.

WOOD, J., did not participate.

113 Cal.App.2d 404

TESSEYMAN v. FISHER et al.

Civ. 18758.

District Court of Appeal, Second District, Division 3, California.

Sept. 30, 1952.

Hearing Denied Nov. 25, 1952.

Action by Charles Tesseyman against John W. Fisher, Nash Building Co., Inc., and others, to compel conveyance of motel to plaintiff under alleged verbal contract to trade plaintiff's hotel for the motel. The Superior Court of San Luis Obispo County, Anthony Brazil, J., entered judgment that plaintiff take nothing unless defendant building company paid judgment against it in another case and plaintiff paid such defendant the sums paid in satisfaction of the other judgment, whereupon defendant building company should execute a deed and bill of sale to plaintiff, and plaintiff appealed. The District Court of Appeals, Vallée, J., held that evidence was sufficient to sustain finding that transaction was a sale and to establish that plaintiff was purchasing motel through defendant building corporation and that plaintiff had knowledge of whole transaction.

Affirmed.

1. Specific Performance ⇨121(3)

In action to compel conveyance of motel to plaintiff under alleged verbal agreement to trade plaintiff's hotel for the motel, evidence was sufficient to sustain finding that transaction was a sale, not a trade.

2. Appeal and Error ⇨1010(2)

Plaintiff's contention on appeal that evidence is insufficient to support a finding requires plaintiff to demonstrate that there is no substantial evidence to support the challenge by him.

3. Appeal and Error ⇨907(2)

A reviewing court starts with the presumption that the record contains evidence sustaining every finding of fact.

4. Appeal and Error ⇨757(3)

Appellant who claims that some particular issue of fact is not sustained by the evidence is required to set forth in his brief all the material evidence on the point, not merely his own evidence, and, upon failure to do so, is deemed to have waived the error assigned.

5. Vendor and Purchaser ⇨151

Where motel and furnishings were sold to plaintiff but in name of corporation, and, under escrow agreement, plaintiff owed $37,001.17 to vendors, plaintiff was entitled to have motel and furnishings conveyed to him upon payment to corporation of judgment obtained against it by the vendors for amounts due under escrow agreement.

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H. J. Kleefisch, San Francisco, for appellant.

Courtney L. Moore, San Francisco, for respondents George H. Jovick, Leonard R. Jacobson and Nash Building Co., Inc.

A. V. Muller, San Luis Obispo, for respondents John W. Fisher, Lurene W. Fisher, Cleo S. Clinton and Loretta I. Clinton.

VALLÉE, Justice.

This is a companion case to Fisher v. Nash Building Co., Inc., Cal.App., 248 P.2d 466. Both opinions should be read together for a clear understanding of the facts. The pleadings in that action were made a part of the pleadings in the present action by reference.

Plaintiff appeals from a judgment which decrees that he take nothing; that in the event Nash Building Co., Inc., pays the judgment rendered against it in the Fisher case, the motel property and the furniture and fixtures shall be held by it as security for the sums paid by it, with power to sell in order to reimburse it for the money paid; but in the event Tesseyman pays the Nash Company the sums paid in satisfaction of the judgment in the Fisher case, the latter company shall execute a deed and bill of sale of the motel and its furniture and fixtures to Tesseyman.

The principal issue presented at the trial was whether, under the circumstances alleged by plaintiff, there was a verbal agreement to trade his hotel for the motel, or whether, as maintained by the defendants, there was an outright sale of the motel for a cash consideration, a portion of which was paid with monies derived from the sale of plaintiff's hotel and placed in escrow under instructions of March 23rd and April 11, 1949.[1]

The court found that the transaction was a sale and not a trade; title to the motel was to be taken in the name of Nash Company, and upon payment of the full purchase price it is to convey the motel to plaintiff; proceeds used in part payment of the purchase price of the motel were derived from the sale of plaintiff's hotel; these funds, together with a deed from Nash Company conveying the motel to Tesseyman, were deposited in escrow; Tesseyman had knowledge of each and all of the transactions; he agreed to pay the balance of the purchase price on or before August 15, 1949, and there is unpaid to the Fishers the sum of $37,001.17; the Fishers commenced action 17800[2] and recovered judgment against Nash Company for $37,001.17, which judgment decreed a lien against the motel property as security therefor, and ordered that all deeds and bills of sale on deposit with the escrow holder be retained by it to abide the further order of the court.

The court concluded that the Fishers are the owners of the motel "subject to an agreement to sell the same to the said plaintiff [Tesseyman] for the sum of $155,000.00, upon which purchase price there remains unpaid the sum of $37,001.17; and said Charles Tesseyman is entitled to have delivered to him, upon the payment of said sum of $37,001.17 to the said Fishers, a deed to said Motel Inn property and the furnishings and fixtures contained therein"; in the event Nash Company pays the judgment in action 17800 and receives a conveyance of the real property and a bill of sale of the furnishings, "judgment be entered to the effect that said Nash Building Company holds said Motel Inn property and said furniture and fixtures as security for the moneys so paid by the Nash Building Company to the said Fishers in satisfaction of said judgment"; upon payment by Tesseyman to Nash Company of the moneys expended in payment of the judgment, Nash Company shall forthwith convey the real and personal property to Tesseyman; in the event Tesseyman fails to pay the Nash Company within 20 days after notification thereof by Nash Company of its payment in satisfaction of the judgment, the real and personal property be sold at public auction, and out of the proceeds of said sale the sheriff shall pay Nash Company the amount paid to the Fishers, with interest, and the surplus, if any, to Tesseyman; if the proceeds are insufficient to pay the full amount due Nash Company, then the sheriff shall specify the amount, and the clerk shall docket a judgment for such balance against Tesseyman and the latter shall pay the same to Nash Company. Judgment followed accordingly.

[1–4] Plaintiff contends the evidence is insufficient to support the finding that the transaction was a sale. Such contention requires plaintiff to demonstrate that there is no substantial evidence to support the challenged finding. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550. Plaintiff, however, recites only evidence favorable to him, and disposes of the evidence introduced by defendants by saying: "A great mass of wholly irrelevant, incompetent and inadmissible testimony was introduced by the defendants with the indulgence and approval of the Court below, over the objection of plaintiff's counsel, consisting of incongruous material of many artificial and discordant hues, crudely tailored to patch holes in the ragged cloak of the defendants' case, much of it hearsay, loose talk, speculative inferences. * * *" It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. It is not the province of a reviewing court to search the record in order to ascertain whether it contains evidence that will sustain a contention made by either party to the appeal. Fuschi v. Vir Den, 107 Cal.App.2d 280, 283–284, 236 P.2d 829; Marson v. Rand, 107 Cal.App.2d 466, 468, 237 P.2d 18. Where an appellant claims that some particular issue of fact is not sustained by the evidence, he is required to set forth in his brief all of the material evidence on the point and not merely his own evidence. If this is not done, the error assigned is deemed waived. Kruckow v. Lesser, 111 Cal.App.2d 198, 244 P.2d 19, and cases cited.

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[1] See Fisher v. Nash Building Co., Inc., Cal.App., 248 P.2d 466.

[2] Fisher v. Nash Building Co., Inc., Cal. App., 248 P.2d 466.

Notwithstanding plaintiff's disregard of the rules, we have examined the record. It would serve no useful purpose to recite the many ramifications of the transactions involved. Suffice it to say that documentary evidence bearing plaintiff's signature and the oral testimony clearly and unequivocally support the court's findings. A letter of instructions, dated February 17, 1949, and signed by plaintiff, upon which he relied to establish that the transaction was a trade, was conclusively shown to have been superseded by other instructions of March 11, 1949; and escrow instructions thereafter signed and approved by plaintiff on March 23rd and April 11, 1949, clearly establish that plaintiff was buying the motel through the Nash Company.

Plaintiff says defendants have not come into equity with clean hands, and that the court "lent its aid to defendants in order to assist them in profiting unjustly by mistake of law * * * on the part of plaintiff superinduced by their fraud and deceit." Again plaintiff falls into the same error—that of reciting only his own testimony, not pointing out the specific error, and dismissing any evidence to the contrary by saying: "We should expand this brief without profit by a detailed statement and analysis of the evidence presented by the defendants in connection with the matters testified to by the plaintiff as above indicated. It is enough to state here that it is a false quantity in this case, and does not tend relatively, logically or naturally to sustain the judgment or any finding upon which it may be predicated." Plaintiff testified he was unaware of the legal consequences of his act in signing the escrow instructions entered into by the parties after February 17, 1949, but other evidence establishes, and the court found, that plaintiff had knowledge of all transactions involving the "cashing out" of his hotel and the sale to him of the motel, including all escrow instructions signed by him.

[5] In view of the findings that the transaction was a sale to plaintiff, but in the name of Nash Company, and not a trade, that under the escrow instructions plaintiff owes the Fishers the sum of $37,001.17, that a judgment for that sum was obtained by the Fishers against Nash Company, in action No. 17800, and that, as between plaintiff and Nash Company, plaintiff was entitled to have the property conveyed to him upon the conditions set forth in the judgment—other contentions raised by plaintiff are without merit and need not be discussed. As we said in Fisher v. Nash Building Co., Inc., Cal.App., 248 P.2d 466, the judgments in the two cases are consistent and must be read together.

Affirmed.

SHINN, P. J., concurs.

WOOD, J., did not participate.

113 Cal.App.2d 593

PEOPLE v. ALLEN.

Cr. 4844.

District Court of Appeal, Second District, Division 2, California.

Oct. 8, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Clement D. Nye, J., of poolselling and bookmaking, and she appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that the evidence sustained the conviction.

Affirmed.

1. Gaming 🔑79(1)

By aiding bookmaker to contact his patrons, proprietor or keeper of telephonic relay spot became "principal" in violating statute prohibiting bookmaking. Pen.Code, §§ 31, 337a, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Principal".

2. Criminal Law 🔑260(11)

After trial court has, upon substantial proof, found ultimate fact that accused was consciously aiding and abetting a criminal enterprise, reviewing court is powerless to reverse such decision.

3. Gaming 🔑98(3)

Conviction for pool-selling and bookmaking was sustained by evidence.

4. Criminal Law 🔑386

In prosecution for violation of bookmaking statute by keeping a telephonic relay spot for purpose of aiding bookmaker to contact his patrons, telephonic conversations had by police secretary with unknown patrons while she was in room occupied by defendant at time of his arrest were admissible. Pen.Code, §§ 31, 337a, subd. 1.

Murray M. Chotiner, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Convicted of poolselling and bookmaking, Penal Code, sec. 337a, subd. 1, defendant demands a reversal of the judgment on the grounds of the insufficiency of the evidence and error in the admission of certain telephonic conversations.

Appellant was the sole occupant of a two-room apartment on north Ardmore street in the west side of Los Angeles. When four police officers called there they found the sheets of a metropolitan daily newspaper scattered over the bed, a telephone on the night table and some pieces of scratch paper on the floor. After officer Foster had answered a number of telephone rings, Miss Stockley, a secretary of the Hollywood police station, entered and assumed the task of answering the telephone which rang eleven times during her 30 minutes' visit. The following is a transcript of her testimony with reference to the telephone.

> "The Witness: The first time I picked up the phone a party said, 'This is Laura. He never did call me.'
>
> "I said, 'Right.' She then hung up
>
> * * *
>
> "The next time the phone rang a woman said, 'Betty, Dunkirk 30886,' and hung up.
>
> "The next time the phone rang the party said, 'Yes, Sunset,' and then hung up.
>
> "The next time the phone rang a party said, 'This is Cliff at Dunkirk 7–0378.'
>
> "In the following conversation a man answered, and he said, '99,' and hung up.
>
> "The following man said, 'O.B. for Red,' and hung up.
>
> "The following man said, 'Tex, Normandy 2–0818. Have them call me right back,' and hung up.
>
> "The next party said, 'Oregon at Dunkirk 7–0729,' and hung up.
>
> "The next party said, 'Ken.' I told him that the other end of the line was dead; we were taking them there.

"He said, 'One to win on 3 in the fifth at Downs,' and hung up.

"The next party called and said, 'Curly, Dunkirk 2–0319.' I told them that the other line was dead; we were taking them there; what would he have. And he then gave me four Churchill Downs to win, $4 parlay to Jet Ace in the fifth, Golden Gate $2 daily double Kings Boy to Alibi and $2 daily double of Kings Boy to Shadow Count.

"The next party who called was a man stating, 'This is Beverly, Mutual 0897.'

"I told him, 'Right.' I said that we were taking them at this end as the other end was dead.

"He said, 'Is this Normandy 2–0818?' I checked the number as he said it and told him that was correct.

"This man then gave me a very long list of horses' names and amounts * * *.

"The Court: That will be stricken. Tell us what he said."

"A. 'Four daily doubles, Kings Boy to Schwinn, LaJolla High to Schwinn, Car Door to Schwinn, $4 each, Kings to Smith $2, $10 to win and $5 to place on Schwinn, Tuba Lady, I believe about the fourth.' That was his conversation.

" '$5 to win, Gustave in the sixth, $5 win, four and four parlay, Tuba Lady to Gustave, Mysteria in the sixth, $10 to win and $7 to place.'

"The next was a woman who called and she said, 'This is Sunset, I am in a phone booth. People are going in and out. Would there be any chance of his getting to me right away?"

"I told her I would try to have them call. And that was it."

Officer Foster qualified as an expert in the custom and manner of bookmaking as it is conducted in Los Angeles County. Included among the paraphernalia listed by him as commonly used by bookmakers were pencils, pieces of paper, telephone, sporting section of the newspaper. He testified that bets are commonly transmitted over the telephone; the bettor calls a "phone spot," gives his name or code number and a list of horses, designates whether he wishes a round robin, a parlay or whether he wishes to bet across the board, or to win, place or show, giving the amount of each bet. Taking the sporting section of the newspaper he had found in appellant's room, published on the day of her arrest, the witness pointed out that a horse named Blue Point on that day ran in the fourth race at Churchill Downs. Also, the sports' section reported two-year-old Jet Ace to run in the fifth race on the same track. Also, all the names mentioned by Miss Stockley were those of horses running at different tracks in the United States on that day and were in the sports' section of the newspaper. The order taken by Miss Stockley with reference to Churchill Downs, the figures 4 and 2 were wagers on horses running at various tracks on that day. It is common practice for bookmakers to receive telephone calls from bettors who state their names and telephone numbers and hang up. Such calls are made to a relay spot and the data received there is transmitted to the bookmaker who in turn calls the bettor. Sometimes the bettor gives his name to the relay spot, others give a code designation or telephone number. The relay spot transmits the names and numbers received from bettors without writing them on a memorandum.

[1] Appellant violated the law not by taking bets from those who telephoned her relay spot, but by aiding the bookmaker to contact his patron. By giving such aid, the proprietor or keeper of the relay spot becomes a principal in violating the statute. Penal Code, sec. 31; People v. Oreck, 74 Cal.App.2d 215, 220, 168 P.2d 186. The proof contains all the essentials of guilt. Eleven calls in thirty minutes indicate a flourishing business. While some gave only their names or numbers, other calls related to horses mentioned in the newspaper which lay open on appellant's bed. Although she admits having been employed to receive and transmit calls, she protests her innocence of the criminal connection.

[2, 3] But when defiance of the law is openly asserted, the state requires more of a citizen than merely to vegetate and to encourage the violator. When one is employed to transmit such mysterious messages as those that came to appellant, one must know something of the nature of his associates and the source of his sustenance. A person of normal instincts will know, and his denials of knowledge of the occupation of his employer are not sufficient evidence to overcome the inferences arising from such facts as those established against appellant. In her closing brief appellant says the reasonable inferences deductible from the evidence are: (1) there was probably bookmaking being conducted some place; (2) appellant's apartment was not used for "recording bets"; (3) it was "used for taking telephone messages such as names and telephone numbers." But she asserts also (4) that it is a reasonable inference that she had no knowledge she was assisting someone at bookmaking. Appellant would have the court accept her denial of knowledge against another inference, to wit, that she knew she was aiding bookmaking in progress somewhere. After a trial court has upon substantial proof found the ultimate fact that the accused was consciously aiding and abetting a criminal enterprise, the reviewing court is powerless to reverse such finding. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Any woman who has the intelligence whereby to remain in her home and receive $35 per week for answering a telephone is wise enough to know that when strange voices speak to her in names and numbers which she in turn delivers to her employer, some law is held up to scorn.

However, appellant's denial of knowledge of the occupation of her employer was not from the witness stand. She said to the investigating officer that she was paid to receive calls and transmit them to a certain individual. In the light of such statement and her denial to the officer, her failure to testify has an alarming significance. Her failure to give a rational explanation under oath of having a telephone in her apartment over which she received calls from unknown persons at the rate of 22 per hour, some leaving their names, some their numbers, and others specifying the horses on which they wished to place bets and the amounts thereof, her failure to testify to her lack of knowledge of the business she was building and her pretended unconcern as to the occupation of her employer, were potent evidence in support of the judgment. People v. Ines, 90 Cal.App.2d 495, 499, 203 P.2d 540; People v. Adamson, 27 Cal.2d 478, 490, 491, 165 P.2d 3. The facts adequately prove that the relay spot and appellant were integral parts of a bookmaking operation.

No Error in Ruling on Evidence

[4] While admitting that under People v. Reifenstuhl, 37 Cal.App.2d 402, 99 P.2d 564, telephonic conversations are admissible as proof of the character of the premises, appellant argues that since her apartment was not used as a place for receiving bets on horse races but merely as a relay spot, her conversations did not show the character of the premises. But if the relay spot is an integral part of a bookmaking operation, then all calls to it and all calls from it for the purpose of completing a bet on a horse race establish the character of business in which the relay premises are engaged. Not only does the use of one telephone serve to conceal both bookmaker and the better from public view People v. Reifenstuhl, supra, 37 Cal.App.2d at page 405, 99 P.2d 564, but the use of two or more telephones to effect the final act of consummating a bet will furnish greater protection to the illicit operator. Therefore, the relay spot must in all reason be a part of the bookmaker's design to place a greater distance between himself and the minions of the law.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.

113 Cal.App.2d 455

ROBINSON v. KING et al.

Civ. 19021.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1952.

Action by Frank E. Robinson against Irving King, and others, for injuries received when plaintiff fell down unlighted open stairs in defendant's hotel while plaintiff was checking work done by his employees. The Superior Court of Los Angeles County, Clarence L. Kincaid, J., entered judgment directing verdict for defendants, and plaintiff appealed. The District Court of Appeal, McComb, J., held that plaintiff was contributorily negligent.

Judgment affirmed.

1. Negligence 🔑67

Independent contractor, who, while checking work done by his employees, reached inside unlighted doorway for light switch and, finding none, stepped through doorway and fell head on down flight of stairs, was contributorily negligent.

2. Negligence 🔑136(26)

Where plaintiff's evidence discloses as a matter of law that he has been contributorily negligent, the trial court is authorized to direct the verdict in favor of defendant.

3. Negligence 🔑67, 80

Invitee who is unfamiliar with premises, but proceeds into place of impenetrable darkness, falls into aperture, and is injured, fails to exercise ordinary care for his own safety and can not recover for any resulting injuries.

4. Negligence 🔑1

Each negligence case must be determined upon its own set of facts and the relevant principles of laws.

5. Appeal and Error 🔑110

An order denying a motion for new trial is nonappealable.

◆

Richard Richards, Los Angeles, for appellant.

Moss, Lyon & Dunn, Sidney A. Moss and Henry F. Walker, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment directing a verdict in favor of defendants after trial before a jury in an action to recover damages for injuries resulting from the alleged negligence of defendants, plaintiff appeals. There is also a purported appeal from the order denying plaintiff's motion for a new trial.

Facts: Plaintiff, a licensed plumber, was employed by defendants to install certain plumbing and do repair work in connection therewith on a hotel of defendants' known as the Ohio Hotel. Specifically he was hired to install a boiler, heater and the regular pipe work in connection therewith.

The work was done in an area of the hotel below the street level and generally toward the rear thereof. When the job was nearly completed plaintiff visited the premises to inspect the work which his employees had done. It was customary for him, when the work had been completed, to "bleed the lines," an operation consisting of finding the spigots and turning them on so that impurities and air would be let out.

Plaintiff entered a large refrigeration or loading room where considerable work had been performed in assembling parts and materials for installation. In this room he found no spigots which were in working order. The only light in the room was furnished by a single electric bulb near the front of the room and some daylight which came through the open doors also at the front of the room. He went toward the back looking for spigots and particularly for a wash room where they would probably be located. As he approached the rear of the room he could see a doorway in the dim light which he thought was the entrance to a wash room. He went to this doorway, reached inside for a light switch and finding none stepped through the doorway and fell headlong down a steep flight of stairs. There was no light provided immediately in front or immediately inside of the open stair well, there was no door, sign or other guard to the entrance to the flight of stairs. As a result of the fall plaintiff was seriously injured.

[1–3] *Questions:* First: *Did the trial court err in directing a verdict in favor of defendants?*

No. This rule is applicable: Where plaintiff's evidence discloses as a matter of law that plaintiff has been contributorily negligent the trial court is authorized to direct a verdict in favor of defendant. (Bruce v. Risley, 15 Cal.App.2d 659, 663 [2], 59 P.2d 847. Cf. Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 513[4], 50 P.2d 801.)

Second: *Was plaintiff contributorily negligent as a matter of law?*

Yes. Where an invitee on premises, being unfamiliar therewith, proceeds into a place of impenetrable darkness and falls into an aperture and is injured, as a matter of law he does not exercise ordinary care for his own safety and hence any injury he receives is the result of his own contributory negligence for which he may not recover. (Medcraft v. The Merchants' Exchange, 211 Cal. 404, 406[1], 295 P. 822; Bruce v. Risley, supra, 15 Cal.App.2d 663 [3], 59 P.2d 849.)

The rule is thus accurately stated in Volume I, Sherman & Redfield on Negligence (Revised Ed.—1941), section 131, "A person who comes into an unfamiliar situation, where a condition of darkness renders the use of his eyesight ineffective to define his surroundings, is not justified, in the absence of any special stress of circumstances, in proceeding further, without first finding out where he is going and what may be the obstructions to his safe progress. Violation of that rule is contributory negligence as a matter of law."

The foregoing rule is applicable to the facts of the present case which were well summarized by Judge Kincaid, the trial judge, in granting the motion for a directed verdict, as follows:

> "In so regarding the evidence in this case we find that this plaintiff was employed as an independent contractor to do plumbing work on the premises; and further indulging the plaintiff with every possible inference in his favor, for the purpose of this motion, we must assume that he was an invitee on the premises, even to the point of this opening from the loading room to other adjacent rooms or parts of the premises.
>
> "The evidence however, discloses that the plaintiff, with full knowledge of the fact that the lighting was inadequate even in the loading room, proceeded directly through this opening, with realization of the fact that it was so dark that he could not see the floor inside of the opening, could not see whether or not there were any lights, could not see at all as to what was beyond the opening. He felt for the light switches, and not finding them, chose to step into and through the opening in the darkness, without lighting a match or having any aid by way of light in any manner whatsoever."

Stewart v. Lido Cafe, 13 Cal.App.2d 46, 56 P.2d 553, Koppelman v. Ambassador Hotel Co., 35 Cal.App.2d 537, 96 P.2d 196, Sanders v. City of Long Beach, 54 Cal.App.2d 651, 129 P.2d 511, Newman v. Fox West Coast Theatres, 86 Cal.App.2d 428, 194 P.2d 706, Wukaloff v. Malibu Lake Mountain Club, 96 Cal.App.2d 147, 214 P.2d 832, Tschumy v. Brook's Market, 79 Cal.App.2d 556, 180 P.2d 933, and Golceff v. Sugarman, 36 Cal.2d 152, 222 P.2d 665, relied on by plaintiff, are each factually distinguishable from the instant case.

[4] No useful purpose would be subserved by setting forth the differences in the facts of the present case and in the cited cases for the reason that, as often stated, each case must be determined upon its own set of facts with the relevant principles of law.

[5] The purported appeal from the order denying a motion for a new trial, since such order is nonappealable, is dismissed. (See cases cited in 5 West's California Digest (1951), Appeal and Error, 🔑110, page 134 et seq.)

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

113 Cal.App.2d 476

LOS ANGELES COUNTY v. LANE.

Civ. 18850.

District Court of Appeal, Second District,
Division 3, California.
Oct. 3, 1952.

Action by the County of Los Angeles to recover old age aid paid to defendant's mother. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Vallee, J., held that resolutions by which county board of supervisors had determined that defendant was able to contribute specified sums to support of his mother and had fixed such sums as the amount of his liability constituted sufficient finding by board that recipient of aid had within the state an adult child pecuniarily able to contribute to her support as a prerequisite to maintenance of such action.

Judgment affirmed.

1. Paupers ⚷51

County has a right of action under statute against spouse or adult child of a recipient of aid pecuniarily able to support recipient for recovery of such portion of the aid granted by board of supervisors prior to commencement of action as such relative is able to pay. Welfare and Institutions Code, §§ 2020, 2181, 2224.

2. Paupers ⚷51

Statute authorizing recovery by county of such portion of the aid granted as spouse or adult child of recipient of aid is able to pay means the portion such relative is able to pay at time board of supervisors determines he is pecuniarily able to contribute to support of applicant for or recipient of aid and not the amount such relative is able to pay at time county commences action against such relative. Welfare and Institutions Code, §§ 2181, 2224.

3. Paupers ⚷37(1), 51

Obligation of spouse or adult child pecuniarily able to contribute to support of recipient of aid from county to contribute to support of applicant for or recipient of such aid is a continuing obligation, preexistent to and independent of the aid granted by county and statute authorizing recovery by county of such portion of the aid granted as spouse or adult child of recipient is able to pay merely provides a method by which county may enforce such obligation of responsible relatives and be reimbursed for the aid extended. Welfare and Institutions Code, §§ 2181, 2224.

4. Paupers ⚷51

The finding contemplated by statute authorizing county to recover from spouse or adult child, found by board of supervisors to be pecuniarily able to support recipient of aid, such portion of the aid granted as such relative is able to pay is merely the board's determination of the fact that spouse or adult child is pecuniarily able to contribute to support of applicant for or recipient of aid, and superior court has power to determine whether spouse or adult child is pecuniarily able to support recipient of aid without any other formal finding by board. Welfare and Institutions Code, §§ 2181, 2224.

5. Paupers ⚷51

Resolutions by which county board of supervisors determine that adult son of recipient of aid to the aged was able to contribute a specified sum to support of his mother and fixed such sum as the amount of his liability constituted sufficient finding that son was pecuniarily able to contribute to support of recipient of aid as a prerequisite to maintenance of action by county to recover such portion of the aid granted as son was able to pay. Welfare and Institutions Code, §§ 2020, 2181, 2224.

◆

Edward Raiden and Charles E. Tady, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Asst. County Counsel, and Robert C. Lynch, Deputy County Counsel, for respondent.

VALLÉE, Justice.

The county of Los Angeles brought this action pursuant to section 2224 of the Welfare and Institutions Code[1] to recover old age aid paid to defendant's mother. The county had judgment from which defendant appeals.

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[1] All section references are to the Welfare and Institutions Code unless otherwise indicated.

About November 1, 1944, the Board of Supervisors of the County of Los Angeles granted the application of Selma B. Lane, mother of defendant, for aid to the aged, and during the period from November 1, 1944, to December 31, 1947, the county paid $1,747 to her. The amounts of the payments were determined by the board pursuant to the provisions of section 2020 based on the needs of the recipient, after deducting from the amounts of such needs the sum of $15 each month paid directly to her by defendant. The board determined that defendant was pecuniarily able to contribute to the support of his mother on August 15, 1944, June 4, 1945, December 10, 1946, and May 13, 1947.

Defendant failed to make the contributions determined by the board of supervisors,—hence this action.

Section 2181, in relevant part, provides:

> "The board of supervisors, directly or through an authorized investigator, shall upon receipt of an application for aid, promptly, without any unnecessary delay, and with all diligence, make the necessary investigation. Such investigation shall be completed within 60 days after receipt of the application.
>
> "The board shall upon receipt of the report of the investigation determine the ability of responsible relatives to contribute to the support of applicant and designate the amount of aid, if any, to be granted. The maximum degree of liability of the responsible relative shall be determined by 'Relatives' Contribution Scale.'" The section establishes a relatives' maximum contribution scale based upon the monthly income of the relative and the number of persons dependent on that income for support.

Section 2224, in relevant part, provides: "The board of supervisors shall determine if the applicant or recipient of aid has within the State a spouse or adult child pecuniarily able to contribute to the support of the applicant or recipient of aid. A brief form shall be sent to the relative inquiring whether the relative is in fact contributing and will continue to contribute to the support of the applicant pursuant to the provisions of Section 2181. This form shall be completed by the relative as a sworn statement. * * *

"If the person receiving aid has within the State, a spouse or adult child found by the board of supervisors pecuniarily able to support said person, the board of supervisors shall request the district attorney or other civil legal officer of the county granting such aid to proceed against such kindred in the order of their responsibility to support. Upon such demand the district attorney or other civil legal officer of the county granting aid shall, on behalf of said county, maintain an action, in the superior court of the county granting such aid, against said relative, in the order named, to recover for said county such portion of the aid granted as said relative is able to pay, and to secure an order requiring the payment of any sums which may become due in the future for which the relative may be liable."

Defendant's first point is that there is no authority for recovery from an adult child of aid granted the parent before the superior court acquires jurisdiction.

[1] Section 2224 gives the county a right of action if the person receiving aid has within the state a spouse or adult child pecuniarily able to support him, and recovery may be had of such portion of the aid advanced as the relative is able to pay. County of Los Angeles v. La Fuente, 20 Cal.2d 870, 878, 129 P.2d 378. Under the express terms of the section, the recovery may be for "such portion of the aid granted as said relative is able to pay," and, in addition, an order for future payments. Recovery of the aid granted patently means that granted by the board of supervisors prior to the commencement of the action.

Section 2224 says that recovery may be had for such portion as the relative "is able to pay". The court found: "* * * defendant was pecuniarily able to pay to plaintiff during the period of November 1, 1944, to and including December 31, 1947, the sum of $1,708.00."

[2, 3] Defendant argues that section 2224 permits recovery for only such portion of the aid granted as the relative is able to pay at the time the action is commenced, and not such portion as he was able to pay at the time the board of supervisors determined he was pecuniarily able to support his mother. We think the statute means the portion the relative is able to pay at the time the board of supervisors determines he is pecuniarily able to contribute to the support of the applicant or recipient. The obligation to support is on the relative, not the county. Liability for the aid granted is on the spouse or adult child pecuniarily able to support the applicant or recipient. County of Los Angeles v. La Fuente, 20 Cal.2d 870, 873–874, 129 P.2d 378. The obligation of the relative to contribute to the support of the applicant or recipient, is during the time the county is providing aid as well as thereafter; it is a continuing obligation; it is "pre-existent to and independent of" the aid granted by the county. Kelley v. State Board of Social Welfare, 82 Cal.App.2d 627, 631–632, 186 P.2d 429, 432. The statute merely provides a method by which the county may enforce the obligation of the responsible relative and be reimbursed for the aid extended.

In County of Lake v. Forbes, 42 Cal. App.2d 744, 109 P.2d 972, 974, the finding of the court was that the defendant's son *was* pecuniarily able to support his father, and a judgment against him was upheld. The court said the main question to be determined in an action of this character is whether "the adult children were pecuniarily able to support the parent", and that section 2224 gives the superior court power to determine whether "the adult children were able to support their father."

Defendant contends that the procedure prescribed by section 2224 was not followed in this case. Prior to 1943, the relevant part of section 2224 read: "If the person receiving aid has within the State, a spouse or adult child pecuniarily able to support said person * * *" an action may be maintained against said relative. Stat.1943, p. 1592, ch. 358. In 1945, the quoted part was amended to read: "If the person receiving aid has within the State, a spouse or adult child *found by the board of supervisors* pecuniarily able to support said person * * *." Stat.1945, p. 2474, ch. 1319. Italics added.

Defendant argues that the section, as amended, requires a formal finding by the board of supervisors that the person receiving aid has a spouse or adult child pecuniarily able to support the recipient before an action may be maintained; that no such finding was made in this case; and that, therefore, the action must fall. We think the board of supervisors made a sufficient finding.

[4] Section 2181 authorizes the board, directly, or through an authorized investigator, to make the necessary investigation; and establishes the required monthly contributions from responsible relatives based on 1) the net monthly income of the responsible relative, and 2) the number of persons dependent on the income. The finding contemplated by section 2224 is merely the board's determination of the fact that the spouse or adult child is pecuniarily able to contribute to the support of the applicant or recipient of aid. Section 2224 empowers the superior court to determine whether the spouse or adult child is pecuniarily able to support the recipient. County of Lake v. Forbes, 42 Cal.App.2d 744, 109 P.2d 972.

[5] In the present case, defendant supplied the Bureau of Public Assistance of the county with the required information on forms sent to him entitled "Statement of Responsible Relative of Applicant Under Old Age Security Law," showing gross income, net income, the number of persons dependent on the income, and the amount he was contributing to the support of his mother. The bureau then performed the ministerial act of preparing a schedule by applying the "Relatives' Contribution Scale" prescribed by section 2181 to the data furnished by defendant. The bureau then reported the result to the board of supervisors. The board then, on each of the four instances mentioned, acting on the

data furnished by defendant and the schedule prepared by the bureau, adopted a resolution by which it determined that defendant was able to contribute a specified sum to the support of his mother, and fixed such sum as the amount of his liability. Defendant was then notified of the action of the board. The resolution of the board, in each instance, was a sufficient finding under section 2224.

No other points are made.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

113 Cal.App.2d 319

In re CUSHING'S ESTATE.

KUCHEL v. CUSHING.

Civ. 15106.

District Court of Appeal, First District,
Division 1, California.

Sept. 29, 1952.

Hearing Denied Nov. 25, 1952.

Proceeding in the matter of the estate of O. K. Cushing, deceased, wherein, Ina G. Cushing, individually and as executrix of the last will of decedent, filed objections to amount of inheritance tax the state inheritance tax appraiser claimed was due from objector. The Superior Court of the State of California, in and for the City and County of San Francisco, T. I. Fitzpatrick, J., entered an order sustaining the objections and Thomas H. Kuchel, Controller of the State of California, appealed. The District Court of Appeal, Peters, P. J., held that, under statutes providing for method of computation of state inheritance tax, widow's one-half of gross estate of community property acquired after year 1927 was not part of gross estate of husband and was not liable for federal estate tax and was not to be charged with any portion of federal estate tax and, as to community property acquired prior to year 1927, portion of federal estate tax levied against such property should have been deducted from value of entire community property, as ordinary cost of administration, before dividing by two to ascertain value of widow's one-half share that was free of inheritance tax.

Order reversed with direction.

1. Taxation ⚷895(7)

State legislature has power to provide that widow's one-half of community property belonging to her and free of inheritance tax shall not be ascertained until all deductions, including federal estate tax, are first deducted from entire estate.

2. Taxation ⚷895(7)

Under statutes providing for method of computation of state inheritance tax, widow's one-half of gross estate of community property acquired after year 1927 was not part of gross estate of husband and was not liable for federal estate tax and would not be charged with any portion of federal estate tax and, as to community property acquired prior to year 1927, portion of federal estate tax levied against such property should have been deducted from value of entire community property, as ordinary cost of administration, before dividing by two to ascertain value of widow's one-half share that was free of inheritance tax. Revenue and Taxation Code, §§ 13551, 13989; Probate Code, §§ 201, 202, 970–977.

◆

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Cushing, Cullinan, Duniway & Gorrill, Ben C. Duniway, San Francisco, Everett S. Layman, San Francisco, for respondent.

PETERS, Presiding Justice.

O. K. Cushing died testate, leaving almost all of his share of the community property to his wife, the respondent, Ina G. Cushing. The state inheritance tax appraiser claimed that the inheritance tax on the portion of the decedent's estate passing by the will to his widow amounted to $6,429.79. Respondent filed objections, claiming that the correct amount of the inheritance tax due from her was $5,775.87.

The trial court sustained the objections, and fixed the amount of the inheritance tax in the amount claimed by respondent. The State Controller appeals from that order.

The solution of the controversy between the parties depends upon at what point in the administration proceedings the amount of the community estate that the wife receives, by virtue of her community property interest, free of the inheritance tax, is determined. In computing the wife's share of the community property that is free of the inheritance tax, (1) should the amount of the federal estate tax, or any part of it, be first deducted from the entire community estate, along with the expenses of administration, in order to determine the net community estate, or (2) should the entire community estate, less deductions other than the federal estate tax, be first divided in half, and then the amount of the federal estate tax deducted from the husband's one-half passing to his wife by the will, and then the state inheritance tax rates applied to this figure? The appellant contends that the first part of this question should be answered in the affirmative, while respondent urges that the last part should be so answered. The proper solution depends upon an analysis of certain federal and state statutes together with an analysis of certain cases interpreting them.

The appeal comes before this court on an agreed statement. The facts are there clearly and concisely set forth. It there appears that O. K. Cushing died testate October 6, 1948, naming his widow, the respondent, residuary legatee and executrix of the will. All of decedent's estate, including certain property held in joint tenancy, is admittedly community property. The fair market value of the community estate at the time of death was $360,726.55, of which $107,446.89 was acquired prior to 1927, and $253,279.66 was acquired subsequent to that date. There were several bequests made to strangers in blood which the will provided should pass free from inheritance and estate taxes. The amount passing to such legatees, including the bequests of inheritance taxes, is $11,582.78. Respondent, during administration, received a family allowance of $28,000, which admittedly is subject to the inheritance tax, but free of the federal estate tax. The debts of decedent, expenses of funeral and last illness, taxes, and expenses of administration, other than the federal estate tax, amounted to $14,312.27. The inheritance tax appraiser fixed the federal estate tax (then not paid) at $19,930.68, but, after the report was filed, the federal government fixed the estate tax at $18,683.40. This is allowed as a deduction from the state inheritance tax, and the smaller figure is the correct figure to use for this purpose.

In computing the amount of the state inheritance tax, the appraiser took the fair market value of the entire estate and deducted therefrom all the allowable deductions, including the federal estate tax deduction. Then he divided the remainder by two, to arrive at the value of the community property owned by the widow and free of the inheritance tax. Using the proper amount of the federal estate tax, the figure so arrived at is $163,865.44, which is the value of the community property as fixed by the appraiser belonging to respondent free of inheritance tax. Computing the state inheritance tax on the balance, the amount thereof is $6,429.79, the amount claimed by the controller to be due. No matter what language is used to describe this method of computation, its practical effect is to reduce the wife's share of the community property free of the inheritance tax by one-half of the amount of the federal estate tax.

The respondent and the trial court took the value of the entire community estate, deducted therefrom all of the allowable deductions except the federal estate tax, and divided the remainder by two to arrive at the community exemption. So computed, the community exemption amounts to $173,207.14, and the amount of the community passing to respondent by the will is reduced accordingly, so that the state inheritance tax is $5,775.87, the amount fixed by the trial court. In making such computation the trial court made no distinction between community property acquired prior to 1927 and such property acquired thereafter.

Thus, the question is whether the federal estate tax is a general charge against the entire estate which must be deducted from the entire estate before the widow's exclusion or exemption is computed, or whether such estate tax should be deducted entirely from the husband's one-half of the community passing to the widow by the will. The problem sounds complex, and it is.

Revenue and Taxation Code, section 13989, provides for a deduction for state inheritance tax purposes, of the amount of the federal estate tax paid on a transfer subject to the state inheritance tax, subject to certain limitations. It reads as follows: "Any amount due or paid the Government of the United States as a Federal inheritance or estate tax in the estate of any decedent is deductible from the appraised value of property included in any transfer subject to this part made by the decedent. The amount deductible is limited to an amount computed by the inheritance tax appraiser upon an application of the Federal inheritance or estate tax exemptions and rates (commencing at the primary rates) in force at the date of decedent's death to that portion of the decedent's property the transfer of which is subject both to the tax imposed by this part, and to any Federal estate tax law, and upon his own valuation of that portion."

The parties agree upon the amount of this deduction, but disagree as to whether it should be made before or after the wife's community half is deducted from the entire community estate.

Section 13551 defines the wife's community share that is not subject to the inheritance tax—the so-called community exclusion. So far as pertinent here, it reads as follows:

> "Upon the death of a husband:
>
> "(a) At least one-half of the community property is subject to this part.
>
> "(b) The one-half of the community property which belongs and goes to the surviving wife pursuant to Section 201 of the Probate Code is not subject to this part. * * *"

Section 201 of the Probate Code provides: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code."

Section 202, thus referred to, reads in part as follows: "Community property passing from the control [note that the husband "controls" all of the community property—§§ 172 and 172a, Civil Code] of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this code * * *."

Probate Code, section 203, to which reference is made in section 201, has no relevancy to the problem here involved.

The Controller contends that under these sections, as interpreted by the California courts, the federal estate tax must be deducted from the entire community estate before the value of the widow's share, owned by her by virtue of section 201 of the Probate Code is computed. Admittedly, debts of the husband and ordinary costs of administration, must be deducted from the value of the entire community property before the value of the widow's one-half is computed, under the express terms of Probate Code section 202. The Controller contends that the federal estate tax, for state inheritance tax purposes, must be treated the same as an ordinary cost of administration.

[1] It must be remembered that we are here concerned with a question of interpretation, that is, of legislative intent, and not with a question of legislative power. There can be no doubt that the state legislature has the power to provide that the widow's one-half of the community property belonging to her and free of the inheritance tax shall not be ascertained until all deductions, including the federal estate tax, are first deducted from the entire estate. The question here involved is whether the legislature has so provided.

So far as the debts of the husband, and the ordinary costs of administration, are concerned, the legislature, by section 202 of the Probate Code, has expressly provided that they must be deducted from the entire community estate before the wife's one-half share, free of the inheritance tax, is computed. Estate of Coffee, 19 Cal.2d 248, 120 P.2d 661, so held. In that case, decided in December, 1941, in determining the value of the widow's exclusion for inheritance tax purposes, it was held that the entire community property, proportionately of course with any separate property of the husband, was liable for the deceased husband's debts and expenses of administration, and that the community property interest of the widow should be determined by taking one-half of what was left after such debts and expenses were paid. The parties did not argue, and the Supreme Court did not give separate consideration to the question of whether the federal estate tax should be treated as a cost of administration, but simply assumed that such tax was an ordinary cost of administration.

Then, in Estate of Atwell, 85 Cal.App.2d 454, 193 P.2d 519, the District Court of Appeal in 1948 held, in reference to the estate of a husband who died in September, 1945, that the rule of the Coffee case should be applied to the deduction of the federal estate tax for state inheritance tax purposes. It held that such tax should be deducted from the entire community estate before the amount of the widow's one-half should be computed for state inheritance tax purposes. The court first held that the Coffee case was determinative of that issue, but then held that even if it were not, under the statutes, independently interpreted, such result must follow. The court came to the conclusion that the wife's community property interest is one-half of what is left after deducting debts and expenses of administration, including the federal estate tax. This decision was largely predicated upon the fact that, under the then existing law, the wife's share of the community property, for federal estate tax purposes, was part of the gross estate of the husband.

Respondent attacks the reasoning of the Atwell case and contends that the court there, in certain respects, incorrectly interpreted the statutes. These contentions need not now be discussed. The appellate court there gave careful consideration to all of the contentions now made on these points and found them without merit. The Supreme Court denied a hearing. If that case is now to be overruled, the orderly administration of justice suggests that such should be done by the Supreme Court and not by another appellate court. We, therefore, hold that the Atwell case is determinative of the proper interpretation of the pertinent statutes there discussed as they existed in 1945.

Respondent next contends that the Atwell case is no longer controlling because of certain changes made in the federal estate tax law in 1948. There is no doubt that material changes in the federal estate taxation of community property in particular, and in the method of federal taxation of community property in general, did occur in 1948, and the question is whether such changes require a change in the interpretation of the California statutes providing for the method of computation of the state inheritance tax as set forth in the Atwell case. This requires an analysis of the various methods used over the years by the federal government for the estate taxation of community property. This discussion naturally divides itself into three periods.

1. The period prior to October 21, 1942: During this period there was no specific statutory provision relating to the taxation, for estate tax purposes, of community property. The governing section was section 811(a) of the Internal Revenue Code in Title 26 of the U.S.C.A. It reads as follows:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> "(a) To the extent of the interest therein of the decedent at the time of his death."

The federal cases held that, under this section, there was a distinction in the community property taxation of California property for estate tax purposes between community property acquired prior to July 29, 1927,[1] and that acquired afterward. As to pre-1927 community property, it was held that the husband had sufficient interest so as to require taxation of the entire community as part of his gross estate. But as to post-1927 community property, it was held that the wife has a vested one-half interest, and that the husband did not have sufficient interest in her one-half to warrant taxation of it under section 811(a). Therefore, it was held, that the wife's one-half share acquired after 1927 must be excluded from the taxable gross estate of the deceased husband. See Crocker First Nat. Bank v. United States, 9 Cir., 183 F.2d 149, for a discussion of these rules. Estate of Coffee, 19 Cal.2d 248, 120 P.2d 661, was decided on December 31, 1941, during this so-called first period.

2. The period from October 21, 1942, to January 1, 1948: During this second period, under section 811(e) (2) of the Internal Revenue Code (and certain amendments to other sections of the law made to conform to that section) it was provided that all community property, whenever acquired, except earnings of the wife, was included in and taxable as a part of the community property of the husband upon his death.[2] Estate of Atwell, 85 Cal.App.2d 454, 193 P.2d 519, although decided on May 13, 1948, involved the law as it existed in 1945, the year of the death of the testator there concerned. In the decision of the Atwell case, section 811(e) (2) is referred to and relied upon. The section was repealed April 2, 1948, the date of the passage of the Revenue Act of 1948, which, by its terms, was made retroactive to January 1, 1948.

3. The period after January 1, 1948: Effective as of this date, for those dying thereafter, section 811(e) (2), and related sections were repealed, so that post-1927 community property was restored, for federal estate tax purposes, to the condition that existed prior to 1942, that is, but one-half thereof, for federal estate tax purposes, was to be included in the gross estate of either spouse who predeceased the other. Then, as a device to equalize the estate tax as between community and noncommunity property states, an elaborate "marital deduction" was put into effect by section 812(e).

So far as the problem here involved is concerned, the marital deduction so granted is limited to half of the property "passing" to the surviving spouse from the "adjusted gross estate" of the deceased spouse, which in California would include pre-1927 community property upon the death of a husband. Thus, by this section, pre-1927 community property, as well as separate property of the husband, is entitled to the marital deduction. Post-1927 community property, inasmuch as the wife's one-half does not "pass" to her upon the death of her husband, is not included in the adjusted gross estate for the purpose of determining the marital deduction, and, of course, the wife's one-half is not subject to the tax. See, generally, 36 Cal.L.Rev. 223, for a discussion of the marital deduction amendment.

Do these amendments require a change in the interpretation of the inheritance tax statute announced in the Atwell case as to post-1927 community property? We think that they do. The Atwell case was decided at a time when the wife's share of the community, whenever acquired, except one-half of her community earnings, was included in the gross estate of the predeceased husband for federal estate tax purposes. By virtue of the 1948 amendments to the federal law, that is no longer true of post-1927 community property, but it is true of pre-1927 community property. One of the basic theories of the Atwell case is that the wife's share of the community property should bear its share of the impact of the federal estate tax levied upon the husband's one-half because the wife's share of the community property was part of the taxable gross estate of the deceased husband.[3] That reasoning still applies to pre-1927 community property and is here controlling as to such property. But that reasoning, since 1948, does not apply to post-1927 community property, and as to such property the question is still an open one so far as the Atwell case is concerned.

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[1] The effective date of section 161a of the Civil Code granting to the wife a "present, existing and equal" interest in community property.

[2] During this period there was no change in the rule that but one-half of the community property was taxable to the estate of the wife upon her death.

But, says the Controller, regardless of the Atwell case, the question is not an open one because of the decision of the Estate of Coffee, 19 Cal.2d 248, 120 P.2d 661. That case was decided when the wife's share of post-1927 community property, by virtue of court decisions, was not part of the taxable gross estate of the husband, but nevertheless it held that all expenses of administration, including the federal estate tax, should first be deducted from the entire community property before computing the value of the wife's share that is free of the tax. It is true that the Coffee case so held, but in that opinion the federal estate tax deduction was not discussed separately from the general costs of administration, nor was it separately argued in the briefs. There was no evidence in the case as to what was pre and what was post-1927 community property. The debts of the husband and the ordinary costs of administration are chargeable against the entire community property. Since no one urged that the federal estate tax was any different from other cost of administration, and the court did not discuss the problem, we cannot assume that the court considered or passed upon the point. For that reason, the Coffee case is not controlling on this question.

The Controller admits that if, as to post-1927 community property, inclusion in the husband's taxable gross estate is the criterion, then, under the 1948 amendments to the federal estate tax law, the wife's share of the community property should not be charged with any part of the tax for the purpose of the computation of this tax for inheritance tax purposes. But he contends that inclusion in the husband's taxable gross estate is not the proper test. He urges that the test is whether the "probate estate" or the "gross estate" is liable for the federal estate tax. Admittedly, the wife's share is part of the "probate estate" of the husband, but, as to post-1927 community, is not part of the "gross estate."

It certainly would be reasonable to hold that, if the federal estate tax is payable from, or is a charge upon, the probate estate of the husband, for the purposes of the deduction allowed by the state inheritance tax, the federal estate tax should be, like the debts and ordinary charges of administration, deducted from the amount of the probate estate before the wife's one-half share in the community is computed. If the federal estate tax is a charge against the entire community property, then it differs in no material respect from other expenses of administration.

There seems to be no federal case that has passed upon the question. But an examination of the statute makes it reasonably clear that the federal estate tax is chargeable against, and is a lien upon, only the gross estate and not upon the probate estate. This is crystal clear so far as the tax lien is concerned. Section 827 of the federal law limits the lien of the tax tc the "gross estate." It reads in part as follows:

> "(a) Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. * * *
>
> "(b) If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under sec-

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[3] The words "gross estate" are here used, and are used hereafter, to mean the gross estate as defined in section 811 of the Internal Revenue Code.

> tion 811(b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. * * *"

There can be no doubt, and the parties agree, that the words "gross estate" in this section mean the same thing as the same words in section 811, defining the taxable estate. Detroit Bank v. United States, 317 U.S. 329, 63 S.Ct. 297, 87 L.Ed. 304.

But, says the Controller, other sections of the act impose a liability for the tax upon the probate estate of the decedent, that is, upon all the community property, and in this connection places his major reliance on sections 822(b) and 826 of the act, and upon certain federal cases.

Section 822(b) merely provides that the estate tax "shall be paid by the executor to the collector." Obviously, that section does not determine from what portion of the estate the tax shall be paid. Section 826 is a complicated section. It is divided into four subsections. The first two subsections read as follows:

> "(a) If the tax herein imposed is not paid on or before the due date thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law; or appropriate proceedings may be commenced in any court of the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This subsection in so far as it applies to the collection of a deficiency shall be subject to the provisions of sections 871 and 891.
>
> "(b) If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

The next two subsections, (c) and (d), operate similarly to subsection (b) in that they give the executor a right of contribution as against life insurance beneficiaries (c) and as against those who receive property by virtue of a power of appointment (d), when those two classes receive property, included in the gross estate, upon which the tax has been paid, unless the decedent directs otherwise in his will. But these two subsections deny the executor the right of contribution as to those two classes of property when a marital deduction has been given. The two subsections read, in part, as follows:

> "(c) * * * In the case of such proceeds receivable by the surviving spouse of the decedent for which a deduction is allowed under section 812(e) (the so-called 'marital deduction'), this subsection shall not apply to such proceeds except as to the amount thereof in excess of the aggregate amount of the marital deductions allowed under such subsection.
>
> "(d) * * * In the case of such property received by the surviving spouse of the decedent for which a deduction is allowed under section 812(e) (the so-called 'marital deduction'), this subsection shall not apply to such property except as to the value thereof reduced by an amount equal to the excess of the aggregate amount

of the marital deductions allowed under section 812(e) over the amount of proceeds of insurance upon the life of the decedent receivable by the surviving spouse for which proceeds a marital deduction is allowed under such subsection."

The Controller, by a most involved argument, seeks to spell out of these provisions a liability upon the probate estate for the federal estate tax. He urges that, while admittedly, it is for state law and not federal law to fix the final impact of the burden of the federal estate tax payment, the above sections fix the initial liability upon the probate estate. The language of the sections does not bear out this contention, but it is urged that certain federal cases have so interpreted the statute. An examination of the cases demonstrates that this contention is unsound. Appellant first cites Shwab v. Doyle, 6 Cir., 269 F. 321, which case was reversed in 258 U.S. 529, 42 S.Ct. 391, 66 L.Ed. 747, claiming that the Circuit Court held that the lien section—827, above quoted, referring only to the gross estate—is simply a remedial statute and does not define the scope of the imposition of the tax so as to limit it to the gross estate. While the language of the opinion of the Circuit Court relied upon by the Controller was in the portion of the opinion reversed by the Supreme Court, so that such language cannot now be considered as controlling, it may be that the Controller is correct in contending that that section refers only to a remedy and not to the imposition of the tax. However, it should be noted that section 827(b) specifically mentions the "spouse" of decedent and then limits her liability, along with the others mentioned "[to] property included in the gross estate." This would seem to indicate a broader application of the section than that contended for by the Controller. At any rate, the case cited is of no help on the problem here involved.

The same can be said of Riggs v. Del Drago, 317 U.S. 95, 63 S.Ct. 109, 87 L.Ed. 106, cited by the Controller for the proposition that the entire probate estate is subject to the payment of the federal estate tax. The case stands for no such proposition. It merely held that New York could, consistently with the federal estate tax law, require by statute that the burden of the estate tax should be apportioned among all the beneficiaries of specific legacies as well as beneficiaries of the residue. The Supreme Court held that except for the limited provisions of subsection (c) of section 826, referring to proceeds of insurance, and subsection (d), referring to powers of appointment, the federal estate tax law did not fix who should bear the ultimate burden of the tax—that it is left to state law to determine "where that final impact shall be." 317 U.S. at page 101, 63 S.Ct. at page 112. The case does not hold that there is any general tax liability placed, by federal law, on the probate estate.

Y. M. C. A. v. Davis, 264 U.S. 47, 44 S.Ct. 291, 68 L.Ed. 558, is in accord with the Riggs case, and, like it, of no aid to appellant. It simply held that state law can finally determine the burden of the tax so as to place it upon the residuary estate, even if the burden thus falls on charitable institutions which, because of their nature, have caused an allowance of a deduction to the estate.

United States v. Woodward, 256 U.S. 632, 41 S.Ct. 615, 65 L.Ed. 1131, not only does not support appellant, but contains language in support of respondent. The holding of the case is that the payment of the estate tax under the then existing federal law provided for an income tax deduction for that year for the estate. The very broadest language used in the opinion for supporting the contention that the federal estate tax is chargeable against the probate estate, definitely indicates that such tax is a charge only against the gross estate. The language is as follows, 256 U.S. at page 635, 41 S.Ct. at page 616: "It is made a charge on the estate and is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid. It becomes due not at the time of the decedent's death, as suggested by counsel for the government, but one year thereafter, as the statute plainly provides. It does not segregate any part of the estate from the rest and keep it from passing to the administrator or executor for purposes of administration, as counsel contend, but is made a general charge on the *gross estate* and is to be paid in money out of any available funds, or, if there be none, by converting other property into money for the purpose." (Italics added.)

Reference is also made to certain Circuit Court cases. No useful purpose would be served by analyzing them separately. Not one of these cases refers to the problem of whether the probate estate is liable above and beyond the taxable gross estate.

Thus we must conclude that under federal law there is no liability of the decedent's probate estate for the estate tax. As we have already seen, the wife's share of the post-1927 community is not part of the taxable gross estate of the predeceased husband. Do these factors have any relevancy in interpreting the state inheritance tax? We think that they do.

As already pointed out, section 13989 of the Revenue and Taxation Code, subject to certain limitations, provides for a deduction for state inheritance tax purposes of the amount of the federal estate tax, which is to be deducted "from the appraised value of property included in any transfer subject to this part". Section 13551 of that code provides that "The one-half of the community property which belongs and goes to the surviving wife pursuant to Section 201 of the Probate Code" is free of the inheritance tax. Section 201 of the Probate Code provides that upon the death of the husband "one-half of the community property belongs to the surviving spouse". Then section 202 of the Probate Code provides that all of the community property passing from the "control" of the husband either by reason of his death or by his will "is subject to his debts and to administration". As already held, debts of the husband and ordinary costs of administration are thus made a charge against the entire community estate. That is by state law. By federal law, the federal estate tax is not a charge against the entire estate, but is a lien upon and is payable from only the "gross estate," from which the widow's one-half of post-1927 community property is excluded. Thus, the federal estate tax, unlike the ordinary costs of administration, is not made a charge against the wife's share of the community property.

The respondent places a great deal of reliance on the proration statute, §§ 970–977, Probate Code, and contends that such statute conclusively determines that the wife's share of the community should not bear any portion of the impact of the federal estate tax. Respondent spells out of these sections a conclusive intent that the widow's one-half of the community is not to be charged, directly or indirectly, with any portion of the payment of the estate tax. That statute so provides, but its provisions, for the most part, are permissive and not compulsory. See Estate of Hotaling, 74 Cal.App.2d 898, 170 P.2d 111. The importance of the proration statute, in our opinion, is not that it conclusively determines how the deduction of the estate tax shall be prorated, but that it indicates a general state policy that should be used in interpreting the other provisions of the state law to which reference has already been made. There can be no doubt that the proration statute definitely expresses a policy that the federal estate tax is intended, in the absence of an expression to the contrary, to be levied, for state inheritance tax purposes, in accordance with the benefit that a person interested receives from the estate—and such benefit is, as already pointed out, limited to the taxable gross estate, and does not extend to the entire probate estate. In other words, the proration statute, in the absence of direction in the will to the contrary, expresses a general state policy directing the executor to pay the federal estate tax and to fix the impact of the tax upon each beneficiary's share of the property that has contributed to the tax. The wife's share of the community property, as already pointed out, under federal law, has not contributed to the tax. The proration statute, at least, suggests a general state policy to make only those charges that are charges against the entire estate deductible before the wife's one-half of the community property is computed, and to deduct all charges not chargeable against the entire community estate from the husband's one-half of the property. This general policy is important in interpreting the other statutes above quoted.

[2] It follows from what has been said that the California statutes indicate that the widow's one-half of the post-1927 community property, since it is not part of the "gross estate" of the husband and is not liable for the federal estate tax, should not be charged, directly or indirectly, with any portion of the federal estate tax. This reasoning does not apply to pre-1927 community property, and, as to it, Estate of Atwell is controlling. The trial court did not deduct any portion of the federal estate tax before dividing the value of the entire community property by two to ascertain the value of the wife's one-half share that is free of the inheritance tax. It deducted the entire federal estate tax from the husband's share and thus arrived at an inheritance tax of $5,775.87. This was error. The trial court should have deducted from the value of the entire community property, as an ordinary cost of administration, the portion of the federal estate tax that was levied against the pre-1927 community property before dividing by two to ascertain the value of the wife's one-half share that is free of the inheritance tax. The parties have agreed that, computed in this fashion, the correct value of the community exemption is $168,919.26, instead of $173,207.14, as fixed by the trial court, and that the correct amount of inheritance tax on the property passing to respondent by the will is $6,076.02, instead of $5,775.87 as fixed by the trial court.

The order appealed from is reversed, and the trial court is directed to modify its findings, conclusions and order in accordance with the views herein expressed, and to enter its order fixing the inheritance tax due from respondent at $6,076.02. Each side to bear its and her own costs on this appeal.

BRAY and FRED B. WOOD, JJ., concur.

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113 Cal.App.2d 534

KING v. HAWLEY et al.

Civ. 8146.

Sac. 6253.

District Court of Appeal, Third District, California.

Oct. 6, 1952.

Action by James W. King against Evelyn M. Hawley, G. W. Graves, and others, to quiet title to property held by grantees of life tenant who had power, under will, to dispose thereof for her comfort and support. The Superior Court, San Joaquin County, M. G. Woodward, J., determined that plaintiff's charges of fraud were well founded and decreed that plaintiff was owner of stated property, and named defendants appealed. The District Court of Appeal, Van Dyke, J., held that evidence was sufficient to sustain findings that life tenant did not choose any of property involved for her support but engaged in concerted plan with named defendants to dispose of the property so that plaintiff would not receive any of it.

Judgment affirmed.

1. Wills 🔑692(2)

Under will which, as construed in decree of distribution, gave all testator's property to his sister with right to dispose of all or any part thereof during her lifetime for her comfort and support, but whatever might be left at sister's death to go to third person, life estate was vested in sister with remainder over to third person, but sister's power of consumption was limited to consumption for her comfort and support, and she could not give the property away during her lifetime or will it away at her death.

2. Life Estates 🔑11

A life tenant may make only such disposition and use of the property as is fairly authorized by the grant and consistent with the purposes thereof.

3. Wills 🔑692(1)

The scope and extent of a testamentary power of sale or disposition depends largely on provisions included in the will creating the power with respect to purpose for which power is given or circumstances in which it is to be exercised.

4. Wills 🔑692(2)

Testamentary power to use, consume, or expend property for support or maintenance of donee authorizes only such sales or encroachment upon property as are necessary and proper for donee's reasonable support and maintenance, taking into consideration his position of life, style in which he maintains himself, state of health, and the like, but donee may convey the property, in good faith, for consideration of life support and care.

5. Powers 🔑18

A power to consume or dispose of property for donee's benefit is broader than one for his support or maintenance, and, in general, includes whatever promotes his personal prosperity and happiness so that only limitation upon exercise of power is that of donee's good faith.

6. Powers 🔑18

A power of sale or disposition for donee's comfort is broader than one for his maintenance, and encroachment on the property is not restricted to necessaries of life, but may include things which bring ease, contentment, or enjoyment to donee.

7. Powers 🔑18

A power of disposal for donee's benefit or comfort is exercisable only for his personal benefit or comfort, and, to a limited extent, for his mental comfort, but such power does not authorize a disposition for donee's mere mental satisfaction, such as gift to his children, church, charity, or public institution instead of remaindermen as designated by testator.

8. Appeal and Error 🔑1008(1)

In determining whether disposition or use under power is proper, if issue of fact may develop whether the disposition, use, or consumption is one for the comfort or support of the donee, then conclusion of trier of fact is binding upon the court of review.

9. Fraud 🔑50

Principle that fraud is never to be presumed and must be proven by clear and convincing evidence is not applicable on appeal but is only for guidance of trier of fact.

10. Life Estates 🔑28

In action by remainderman to quiet title in himself to property held by grantee of life tenant who had power to dispose thereof for her comfort and support, evidence was sufficient to sustain a finding that life tenant did not use any of property involved for her support but engaged in concerted plan with her husband and grantee to dispose of the property so that remainderman would not receive any of it.

11. Trial 🔑58

In action by remainderman under will to quiet title himself to property held by grantee of life tenant who had power to dispose thereof for her comfort and support, claim of error based on refusal to admit life tenant's letter into evidence could not be considered where, following objection, offer of the letter was withdrawn before the trial court ruled on its admissibility.

12. Life Estates 🔑28

In action by remainderman under will to quiet title in himself to property held by grantee of life tenant who had power to dispose thereof for her comfort and support, upon issue whether life tenant had fraudulently disposed of property involved, anything which would tend to show purpose and intent of life tenant and those dealing with her was admissible, and evidence concerning transaction surrounding transfer of property involved through probate proceedings was properly admitted.

13. Appeal and Error 🔑996

Arguments concerning inferences that trial court could have drawn from evidence constitutes only arguments as to weight of evidence and are only valid in the trial court.

14. Life Estates 🔑28

In action by remainderman under will to quiet title to property held by grantee of life tenant who had power to dispose thereof for her comfort and support, where remainderman proved conspiracy to defraud, the court was authorized to treat sum equal to down payment made on part of property involved as fund in substitution thereof.

Blewett, Blewett, Macey & Garretson, Stockton, J. C. Webster, Sonora, for appellants.

Mazzera, Snyder & DeMartini, Stockton, for respondent.

VAN DYKE, Justice.

E. O. Sylvester died August 13, 1946. His surviving sister, Ida M. Graves, was appointed executrix of his will and as such administered his estate. His will, executed April 7, 1942, disposed of his estate in the following language: "I devise and bequeath all my property to my sister, Mrs. Ida M. Graves of Stockton, California, and request that she be appointed sole executrix of my will, and that she may not be compelled to give any bond or security as such executrix, and that she may settle the estate in her own way and sell any or all of the real or personal estate at public or private sale as she may think best, and that she may use all the proceeds of my estate for her comfort and support; but that whatever may be left of my estate at her death shall go to James Woodward King of Sacramento, California, and to his heirs." The decree of distribution, made September 15, 1947, provided "That the residue of said estate * * * be and the same is hereby distributed as follows: All thereof to Ida M. Graves, with the right to sell or otherwise dispose of the same or any part thereof during her lifetime for her comfort and support; but whatever may be left at her death to James Woodward King." Ida M. Graves died May 28, 1949. During the time intervening between Sylvester's death and her own she had by a series of transactions, some occurring during the probate of the estate of Sylvester, and some after the decree of distribution was made, disposed of all of the property which Sylvester owned when he died and of the proceeds thereof, save possibly a bank deposit of $10,000, which may have been money paid to her upon the sale of real property. In the main these transactions resulted in the acquisition by defendants Evelyn M. Hawley and G. W. Graves of the Sylvester properties. Claiming that he was a remainderman under the decree of distribution in the estate of Sylvester and that these transactions whereby, with the possible exception of the said bank deposit, his claimed inheritance had been diverted, were the product of a fraudulent conspiracy on the part of Evelyn M. Hawley, G. W. Graves, one John T. Ward and Ida M. Graves to cheat and defraud him of that inheritance, respondent King brought action to quiet title in himself to certain property held by Evelyn M. Hawley and which had devolved from the estate of Sylvester. The trial court held these charges of fraud to be well founded and decreed that plaintiff was the owner of the following property: A promissory note executed by Odd Fellows Recreation Association in the principal sum of $45,000 upon which there was a balance unpaid of $35,000, the payment of which was secured by a deed of trust upon real property in Tuolumne County consisting of approximately 700 acres of land which had been owned by Sylvester when he died; a fund of $10,000 theretofore paid upon the principal of the same note and being held at the time of judgment in escrow by an abstract and title company in Sonora; the sum of $10,000 which had been deposited by Ida M. Graves with the Morris Plan Company of Stockton, California, and which stood in her name at her death; a promissory note executed by Lynn and Marguerite Lawrence in the principal sum of $3,000 on which there was a balance due of $1,450, payment of which was secured by deed of trust upon about an acre of ground which had been part of the Tuolumne County property; approximately forty acres of land standing in the name of Evelyn M. Hawley which had been also a part of the Tuolumne County property. The court further decreed that respondent King recover from Evelyn M. Hawley the sum of $1,550 which had been paid to her upon the $3,000 note above referred to.

From this judgment Evelyn M. Hawley and G. W. Graves appeal and contend as follows: 1. By the will of Sylvester and the decree of distribution made in the matter of his estate there was conveyed to Ida M. Graves a fee interest and not a mere life estate. 2. If it be true the will and decree vested only a life estate in Ida M. Graves with remainder over to respondent

James Woodward King, then the various dispositions she made of the Sylvester properties involved come within the powers given to her to dispose of and to use these properties for her "comfort and support". 3. The court erred in rejecting certain offered testimony, hereinafter more specifically referred to. 4. The court erred in admitting evidence of transactions in the estate of Sylvester participated in by appellants Eveyln M. Hawley and George W. Graves but which were wholly unrelated to the matters in issue before the court. 5. The court erred in adjudging King was entitled to the $10,000 purchase money which Eveyln M. Hawley was shown to have paid for the Tuolumne County land. Generally, appellants contend that the evidence as a whole is insufficient to support the essential findings and the judgment of the trial court.

[1] Taking up first appellants' contentions as to the proper construction to be placed upon the provisions of Sylvester's will as construed by the probate court in its decree of distribution, we hold that thereby there was vested in Ida M. Graves an estate for life with remainder over to respondent; that she was given a full right to use the property for her comfort and support and to that end could fully consume it and for that purpose could sell it and use the proceeds of such disposition, but, again, for her comfort and support. We hold further that in the exercise of the power of consumption, use and disposition, she was limited to the purpose for which the property was given to her, that is, her use and consumption for her comfort and support, and that she could not give the property away during her lifetime nor will it away at her death. Although she had a broad right to adapt the property to the purposes for which she received it, the right was not unlimited and she was charged in respect of her handling of the property with an affirmative duty to exercise her undoubted broad rights of use and consumption with due regard for the rights of the respondent, the remainderman, a duty which may be said to have been in the nature of a trust. Luscomb v. Fintzelberg, 162 Cal. 433, 123 P. 247; Adams v. Prather, 176 Cal. 33, 167 P. 534; Hardy v. Mayhew, 158 Cal. 95, 110 P. 113. In Adams v. Prather, supra, the will provided that all of the property of the testatrix was given to her husband with power to sell without order of court. Thus far the devise was in absolute terms, but the will provided further that upon the death of the husband one-half of the "unexpended portion" should go to a niece of the testatrix and the other half to other relatives. The Supreme Court said, 176 Cal. at page 37, 167 P. at page 536:

> "'A will is to be construed according to the intention of the testator' (Civ.Code, § 1317), and that 'intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made' (Civ. Code, § 1318), which words, in the absence of a clear intention to use them otherwise, 'are to be taken in their ordinary and grammatical sense' (Civ. Code, § 1324). Unless irreconcilable, 'all the parts of a will are to be construed in relation to each other, and so as if possible to form one consistent whole.' Civ.Code, § 1321. Applying these rules, *and having in mind that 'a clear and distinct devise or bequest cannot be affected * * * by any other words not equally clear and distinct'* [italics ours] (Civ.Code, § 1322), we find no difficulty in arriving at the intention of Julia P. A. Prather as expressed in her will. In disposing of her property she recognized her husband as being first entitled to consideration, but in providing for him she gave expression to the thought of her nieces, particularly the one who bore her name, Julia. While the first dispositive clause of the will, namely, 'I give all the property of which I die possessed to my husband Thomas Prather, * * *' is clear and, taken alone, admits of no construction other than that an absolute disposal of her estate to him was intended, the second dispositive clause, to wit, 'Upon the death of my husband the said Thomas Prather one-half of the unexpended portion of my estate bequeathed to my husband to be given to my niece Julia Adams, * * * the other one-half to be given to the surviv-

ing daughters of my brother Edson F. Adams in equal shares,' is equally clear and distinct. Estate of Tooley, 170 Cal. 164, 149 P. 574, Ann.Cas.1917B, 516. Hence, unless irreconcilable with the first clause, it should be construed in relation therewith. Read in connection with the first clause, it is clear that in using the words 'unexpended portion of *my estate,'* she had reference to that portion of *her estate* which should remain unconsumed by her husband at his death, and this part of her estate so remaining was, by the terms of the will, addressed, not to her husband as legatee, but to the executor of her will, 'to be given' in the manner provided by law to her nieces. Thus addressed to the executor the words were not precatory in character, but are words of command. Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071. * * * Her intention was to limit *the estate given the husband to such part thereof only as he might in his lifetime expend, consume, or make use of, without in any manner restricting him in the control and disposition thereof for such uses.* [Italics ours.] Subject to such control and disposal for his use and consumption to its complete exhaustion, it was Julia's estate, and, after such carving therefrom as the husband might make for his use and consumption, the portion, if any, remaining at his death, and designated by Julia as *'the unexpended portion of my estate'* she made the subject of testamentary disposition, directing it *'to be given,'* not by her husband, who, as we have seen, had no interest therein, but by her executor and the law to the nieces mentioned. The meaning of the second clause of the will, when viewed in connection with the first, in our opinion is as clear and distinct as any other part of the will, and, thus construed in relation to the first, effect is given to both, and the intention of the testatrix made clear."

[2–7] We proceed to the second contention of appellants, which is that, conceding a vesting in Ida M. Graves of a life estate with limited powers of disposition and in respondent King a vested remainder, yet the disposition made by the life tenant of the property which she received was within the scope of her power to dispose of and use the property for her "comfort and support". We will consider first the meaning which the law attaches to the words "comfort and support" as limiting the right or power of Ida M. Graves in the disposition, use and consumption of the property of which she became a life tenant. It is elementary that a donee of the life estate may make only such disposition and use of the property he receives as is fairly authorized by the grant and consistent with the purposes thereof. In this case the grant of power, while tersely expressed in the decree of distribution, is nevertheless clear. Ida M. Graves had the power to sell or otherwise dispose of the Sylvester estate property received by her for her comfort and support. W think the language found in 69 Corpus Juris "Wills", section 1943(b) discloses the scope and extent of such a power as was here given to Mrs. Graves and we adopt and approve the following therefrom:

> "The scope and extent of a testamentary power of sale or disposition depend largely on the provisions included in the will creating and conferring the power with respect to the purpose for which the power is given, or the circumstances in which it is to be exercised. Where the power is a limited one, it may be exercised only in good faith, and strictly within its limits, and the donee can do nothing, by way of exercise of the power, that is not authorized by the will; * * *.
>
> "A power to use, consume, or expend property for the support or maintenance of the donee, or of another, authorizes only such sales, or such encroachments upon the property, as are necessary and proper for his reasonable support and maintenance, taking into consideration his position in life, the style and manner in which he maintains himself, his state of health, and the like, and gives the donee no power of disposition for any other purpose, and

no authority to dispose by will or otherwise of the unconsumed portion of the property, even though he claims it all in his lifetime or attempts to transfer it to himself. The power may, however, be exercised by a transfer or conveyance of the property, in good faith, for the consideration of life support and care of the donee of the power by the grantee or transferee, or, in a proper case, where the power is given for the support or maintenance of another than the donee, by a conveyance of the property to such other. * * *

* * * * * *

"A power to consume or dispose of property for the donee's 'benefit' is broader than one for his support or maintenance, and, in general, includes whatever promotes his personal prosperity and happiness, so that he may consume or sell the property as he chooses, without limitation except that of good faith. *Likewise, a power of sale or disposition for the donee's 'comfort' is broader than one for his maintenance, and encroachment on the property is not restricted to the necessaries of life, but may include things which bring ease, contentment, or enjoyment to the donee,* and, in general, such a power authorizes the expenditure of the property or its proceeds for any purpose, consistent with the donee's former manner of living and station in life, and taking into consideration the value of the property, which the donee thinks will give him personal comfort. So it has been said that, so long as the donee does not deplete the estate for the mere purpose of defeating the testator's intention, or of preferring certain heirs or remaindermen over the others, the courts will be slow to condemn expenditures as not within such a power. The donee must, however, act honestly and in good faith, and a transfer with intent not to consume the property for himself, but to preserve it for others after his death, and thereby to change the beneficiaries, after him, from the remaindermen chosen by the testator to those of the donee's own selection, is a fraud on the testator and the power. *Moreover, a power of disposal for the donee's benefit, or comfort, is exercisable only for his personal benefit, or personal comfort, by the application of the property or its proceeds to, primarily, his physical comfort and ease, and not for the benefit or comfort of another; and while it includes, to a limited extent, his mental comfort, such power does not authorize a transfer or disposition for the donee's mere mental satisfaction, or peace of mind, such as a gift to his children, so that they may have the property after him, instead of the remaindermen designated by the testator, or a gift to a church, charity, or public institution."* (Italics ours.)

[8–10] In applying the foregoing rules to a questioned disposition or use under the power given the issues generally will be mixed issues of law and fact. An issue of fact may well develop as to whether in truth a disposition, use or consumption was truly one for the comfort or support of the donee of the power and if that be the case then the conclusion of the trier of fact would be binding upon courts of review. So the basic intent with which a transfer or disposition is accomplished may justify a factual finding that there was no true exercise of the power but a deliberate violation thereof for the purpose of defeating the remainderman and depriving him of his rights. With this summary of the applicable rules we proceed to a statement of the facts shown at the trial, bearing in mind of course that the trial court has found that the dispositions of the property made by the donee, Ida M. Graves, were in fact not done or intended for her comfort or support within the proper meaning of those terms, but were done and intended on the contrary in violation of the power and for the purpose of defeating and defrauding respondent.

It appeared that Sylvester and appellant G. W. Graves, who up to the time of her death was the husband of Ida M. Graves, had been lifetime friends and associates, partners in many business ventures. When Sylvester died they owned and were operating in partnership real property in San Joaquin County. Sylvester and Mrs. Graves were brother and sister and there existed long sustained affection one for the other. Appellant Evelyn M. Hawley had for many years been on friendly terms with Sylvester and with Mr. and Mrs. Graves, spending many summers at the Tuolumne County ranch and during the later years of Sylvester's life had performed for him many friendly offices which were likewise performed for Mrs. Graves during her life. Respondent King was the surviving son of a former partner and business associate of both Sylvester and Mr. Graves and Sylvester had interested himself in the career of King. At Sylvester's death his estate consisted principally of the following: Property in Tuolumne County, known as the Sylvan Lodge property, being a tract of approximately 750 acres located easterly of Sonora; a partner's one-half interest in a tract of land in San Joaquin County; a lot in Stockton improved by a duplex building with seven rooms in each unit; and cash in bank of approximately $9,500. The following is a brief chronological statement of events as shown by the testimony. Sylvester died August 13, 1946, and on September 6th following Mrs. Graves was appointed executrix of his estate which was probated in Tuolumne County. November 29, 1946 appellant Graves presented a verified claim against the estate of Sylvester for $15,200, based upon money payments he alleged he had made for Sylvester over a period of ten years or more. February 18, 1947, Mrs. Graves was hospitalized with the first of a number of heart attacks which she suffered. Three days thereafter and while the estate of Sylvester was still in probate, she executed a deed of the Tuolumne County property to Evelyn M. Hawley. Nothing was paid by the grantee for this conveyance. She testified once that Mrs. Graves wanted her to have the property and again that Mrs. Graves had desired to will the property to her. February 24, 1947 Mrs. Hawley recorded the deed and also on that day a commercial account in the American Trust Company in the name of Ida M. Graves was converted to a joint tenancy account between herself and Evelyn M. Hawley; there was deposited therein $3,850, representing proceeds of government bonds given Mrs. Graves by Sylvester in his lifetime. February 27th Mr. Graves' claim was approved by the probate court. On this date also Mrs. Graves and Mrs. Hawley entered into an agreement for the sale to Mrs. Hawley of furniture in the duplex, no consideration being expressed and none being paid. Also on that day a deed was executed by Mrs. Graves to Mrs. Hawley, conveying to her the duplex property. As to this transaction Mrs. Hawley testified that she had issued a personal check to pay for the duplex, also that Mrs. Graves gave the duplex to her for services rendered and, finally, that the transfer was a gift. March 25th Mrs. Graves petitioned the court for partial distribution to her from the Sylvester estate of the sum of $5,000. March 31st Mr. Graves made a bid of $11,000 for the one-half interest of the estate in the San Joaquin County property. April 1st a return of sale of that property was filed in the estate. April 2d Mrs. Graves left the hospital and returned home. April 3d Mrs. Hawley, already, as stated, the named grantee in a deed conveying to her the Stockton duplex, offered to buy the property from the estate for its appraised value of $4,042.50. On April 7th this bid was filed in court. On April 11th the court confirmed the sale of the half interest in the ranch property to Mr. Graves on his bid of $11,000 and ordered partial distribution to Mrs. Graves of $5,000 cash from the assets of the estate. This money was deposited in the joint account of Mrs. Hawley and Mrs. Graves. On April 18th the court confirmed the sale of the Stockton duplex property to Mrs. Hawley and on the same date Mrs. Graves, as executrix, pursuant to the orders of the court conveyed the one-half interest in the San Joaquin County ranch to Graves and conveyed the Stockton duplex to Mrs. Hawley. The actual consideration given by Graves for the estate's half interest in the ranch was a credit of the amount of his bid upon the amount of his approved claim. No money was paid by Mrs. Hawley for the duplex property, notwithstanding her bid of over $4,000 therefor, but later when Mrs. Graves, as executrix, filed her final account she charged herself as having received that amount of money, although she had not. Up to this time, either by sales in the estate as related or her original conveyance of the estate properties, Mrs. Graves, as potential distributees and as executrix, had disposed of, or at least attempted to dispose of, all of the property of the estate of Sylvester save a few thousand dollars of cash on bank deposit. At some time before July 7, 1947, Mrs. Hawley and Mrs. Graves were informed by counsel for the estate of Sylvester that Mrs. Graves could not give away any of the property of the estate, but that she might sell it. After receiving this advice and on July 7, 1947, Mrs. Hawley executed a quitclaim deed to Mrs. Graves, purportedly reconveying to her the Tuolumne County property. On September 15, 1947 the estate of Sylvester was the subject of a decree of distribution in the probate proceeding, the contents of which have been hereinbefore stated. On September 23, 1947 the following occurred: Mrs. Graves executed to a Mr. Ward a deed of the Tuolumne County property and Mr. Ward executed a deed of the same property to Mrs. Hawley. It was explained in the testimony that Mrs. Graves wanted to sell the property, asked Mrs. Hawley to buy it, and suggested a price of $10,000, to which Mrs. Hawley agreed. Mr. Ward's place in the picture was stated to be that he stood willing, on arrangements made with him by Mrs. Graves, to loan the necessary money to Mrs. Hawley to make the purchase since she was uncertain that she had that much money on hand. But it appeared that she did have that sum in bank and that she withdrew the same by cashier's check which she then deposited in the joint account of herself and Mrs. Graves. Here the money remained until October 15, 1947 when Mrs. Graves withdrew it and deposited it in the Morris Plan Bank. There it remained until her death. It was the subject of a written declaration made by her and hereafter referred to. The two deeds were recorded and constitute the basis of the claim of appellants that the property belonged to Mrs. Hawley. On March 3, 1948, after a claimed ownership of about five months, Mrs. Hawley sold an improved acre out of the Tuolumne County property to Mrs. and Mrs. Lawrence for $3,000. On March 1, 1949 Mrs. Hawley sold approximately 700 acres of the Tuolumne County property to the Odd Fellows Sierra Recreation Association for $55,000. She retained and still retains about 40 acres of the same property. In March of 1949 Mrs. Graves suffered another heart attack and was hospitalized until April 13th. During that period, Mr. Graves, acting, as he testified, at the behest of his wife, closed a personal bank account of hers by withdrawing the existing balance of $4,981.48. He said he delivered this money to her in currency and later on received a little less than $4,000 from her which he put in his own account. On March 28th Mrs. Graves wrote: "To avoid controversy over my Brother's (E. O. Sylvester) will, I have deposited what remains of the Estate in the Morris Plan Bank in Stockton Calif—for James Woodward King. Ida M. Graves. Mr. Webster of Sonora my attorney has a copy of this." On May 17, 1949 Mrs. Graves suffered a third heart attack, was hospitalized, put under an oxygen tent and kept there until she died May 28th. On May 26th Mrs. Hawley withdrew all the remaining funds from the joint tenancy account which she shared with Mrs. Graves, amounting to the sum of $4,003.41. On August 3, 1949, some 60 days after the death of Mrs. Graves, her widower, Mr. Graves, married Evelyn M. Hawley and they have since been husband and wife. We have consistently referred to the present Mrs. Graves as Mrs. Hawley to avoid confusion and shall continue to do so in our further discussions. Mr. Sylvester died at the age of 86 years and Mrs. Graves was then eighty-one; Mr. Graves was in his later seventies during the transactions above referred to, and Mrs. Hawley was 59 years of age when Sylvester died. Whether or not Mrs. Graves in her lifetime actually used or consumed any of the assets of the Sylvester estate for her comfort or support or at all was not specifically shown, but Mr. Graves testified that not only had he been willing and indeed rather insistent that he could and would support his wife wholly, but that from his assets and those of the community he did so. Mr. Graves said he had never demanded that Sylvester pay any item making up his claim against the Sylvester estate; and that he had been "burned up" when he first learned of the terms of the Sylvester will. The following occurred: "Question: [By respondent's counsel] I take it then there wasn't a very kindly feeling between you and Mr. Sylvester? Answer: Couldn't have been, could they? Would you think so? If you had any sense at all you wouldn't. I should say not. And had to give it to Mr. King when I had worked for it. * * * Nothing but a friend and I was a partner for 50 years and worked hard and made most of the money that we had." The above testimony was given when Mr. Graves' deposition was taken before trial. At the trial he testified that the will did not "burn" him up and that he then thought his deposition testimony was not true. There was much more testimony which might be referred to, including such testimony that tended to place upon the series of transactions a construction contrary to the inference of fraudulent conspiracy drawn by the trial court. We think it, however, unnecessary to further detail the evidence. Our quest of the record is only for the purpose of determining whether there is to be found therein facts which directly or by permissible inference support the findings. We may here say parenthetically that the principle to which we have been often referred in the briefs of appellant that fraud is never to be presumed and must be proven by clear and convincing evidence finds no application here, for that principle is only for the guidance of the trier of fact. We think it clear that from the foregoing portions of the record the trial court was fully supported in its findings that Mrs. Graves did not use any considerable part of the property she received in charge from the estate of her brother for her comfort or for her support and on the contrary that shortly after his death she engaged with Mrs. Hawley and Mr. Graves in a concerted and consistent plan of action by which the three intended that, so far as it could be done, and by whatever means it could be done, those properties would be so disposed of as to prevent the respondent remainderman from receiving any benefit from the bounty of Sylvester. The foregoing is particularly applicable to the proceeds of the Tuolumne County property and that was the only property affected by the judgment appealed from.

[11] Appellants contend that the trial court erred in refusing to admit into evidence a letter written by Mrs. Graves to Mrs. Hawley under date of June 7, 1947 concerning the Tuolumne County property. It was contended that the letter was admissible as showing the state of mind of Mrs. Graves concerning the property and her desire to sell the same to rid herself of its care. The letter referred to some annoyances that had arisen in the handling of the property and contained a statement that there seemed to be no other way out than to sell the property before the expenses of attending to it should bankrupt her. The point is not open to discussion on appeal since after objection made and considerable argument to the court the offer of the letter was withdrawn before the court had finally ruled upon its admissibility. Under those circumstances the claim of error is not well taken.

[12] Appellants contend that the court erred in admitting into evidence "other wholly unrelated transactions had in the estate of Ernest O. Sylvester with the defendants, Evelyn M. Hawley and George W. Graves." By this appellants refer to the transactions surrounding the transfer through probate sale of the Stockton duplex and to the proceedings in probate whereby the half interest in the San Joaquin County property was sold to Mr. Graves. The contention is not sound. The court was involved in determining issues as to whether or not the Tuolumne County property had been fraudulently disposed of by Mrs. Graves with the purpose of defeating the rights of the respondent remainderman and of preferring her friend Mrs. Hawley. Anything which would tend to show that purpose and intent was admissible and the court properly took into consideration the entire series of happenings heretofore related as bearing upon the issues before it.

[13] Appellants specifically urge that the evidence is insufficient to support cer-

tain findings of the trial court. What has heretofore been said we think adequately disposes of these contentions, but we will discuss these specific objections. Appellants say that there is no support for the court's finding that the Tuolumne County property was not conveyed for the comfort and support of Mrs. Graves. In presenting their argument counsel for the appellants refer to many matters which we have not stated, but which were in evidence and from which the trial court might have inferred innocence instead of guilt, but to argue such matters is only to argue the weight of the evidence. Such arguments are only valid in the trial court. When there is considered the early attempted gift of the property to Mrs. Hawley while it was still subject to probate, the about-face and the reconveyance when counsel advised that the gift was void, the gift of the duplex at the expense of Mrs. Graves' private estate, the inadequacy of the price therefor as shown by a following sale of the same property for in excess of $15,000 which had brought the Sylvester estate but $4,000, the resentment of Mr. Graves that Sylvester should give any interest whatever to respondent King, whom he termed a stranger, the curious circumstances attending the second conveyance of the Tuolumne County property to Mrs. Hawley with the interposition of Mr. Ward, the payment of $10,000 for the property by Mrs. Hawley by depositing that amount in the joint account of herself and Mrs. Graves, when, we say, all of the foregoing is considered, the trial court was justified in placing upon the entire series of transactions the construction which it did, that is, that there existed from a time shortly after the will was disclosed, a consistent and persistent plan and intent upon the part of Mrs. Graves, Mr. Graves and Mrs. Hawley to defeat the intentions of the testator as to the remainderman King and to substitute their desires as to where the properties should end up for those of the testator. We think it is unnecessary to labor the point, although much more could be said than has been said in support of the trial court's determination.

Appellants contend against the finding of the trial court that there was no consideration paid by Mrs. Hawley for the second transfer to her of the Tuolumne County property and they point to the evidence that she paid $10,000 in the manner hereinbefore narrated. But the trial court could have inferred that the deposit of that money in the joint account of Mrs. Graves and Mrs. Hawley indicated that it was a purported consideration never intended when made to get out of Mrs. Hawley's control and ownership and this notwithstanding that a little over a month after the deposit was made Mrs. Graves withdrew that amount of money and placed it in the Morris Plan Bank, for this act may have been motivated entirely by a fear that the veneer of joint deposit would prove too thin to conceal the real purpose of the transfer. Again we think the matter so plain that the point should not be labored. Whether an innocent construction could be placed upon these matters is of no moment here if, as we hold, the trial court was warranted in the construction it did place upon them when it found there was in fact no consideration paid.

[14] Appellants finally contend that the court was without jurisdiction to decree respondent was the owner of the $10,000 deposit in the Morris Plan Bank which, as we have seen, Mrs. Graves declared represented all that was left of the Sylvester estate. It must be borne in mind that this was an equitable action and that respondent succeeded in proving a conspiracy to defraud him of his rights. One step in the carrying out of that conspiracy was the placing by Mrs. Hawley in the joint account of herself and Mrs. Graves of a fund of $10,000 as a purported payment for the conveyance of the Tuolumne County property to her. When she sold the property she received a down payment in an equal amount. She was thereby made whole. The court, in adjusting the equities, had jurisdiction of the parties and the cause, and had the right to make a complete disposition of all relevant issues and rights between the parties before it. It was fully authorized to treat the $10,000 in the Morris Plan Bank as a fund in substitution for the $10,000 down payment on the purchase price of the property which Mrs. Hawley had re-

ceived and made no accounting for. To be sure, the decree of the court in this respect operates only between the parties. The estate of Mrs. Graves was not represented nor was her personal representative a party to the action, but it was just and equitable as far as Mrs. Hawley and Mr. Graves were concerned that the court should decree that they had no such rights in that deposit as could withstand the claim of respondent.

The judgment is affirmed.

SCHOTTKY, Justice pro tem., and PEEK, J., concur.

113 Cal.App.2d 615

HARRIS v. HARFMANN.

Civ. 18983.

District Court of Appeal, Second District, Division 1, California.

Oct. 9, 1952.

Rehearing Denied Oct. 30, 1952.

Hearing Denied Dec. 4, 1952.

Birdie Harris sued Jennie O. Harfmann for injuries sustained in an automobile accident. The Superior Court, Los Angeles County, Fred Miller, J., rendered judgment adverse to plaintiff, and she appealed. The District Court of Appeal, Drapeau, J., held that plaintiff had been a passenger for hire, rather than a mere guest, and that the case should have been tried on the theory that defendant was bound to use ordinary care in driving the automobile.

Reversed and remanded for new trial.

1. Automobiles ⟹181(2)

Where driver receives tangible benefit, monetary or otherwise, which is motivating influence for furnishing transportation, rider is a passenger for hire and driver is liable for ordinary negligence, and where one makes substantial contribution toward cost of journey he is, as matter of law, passenger and not guest. 1941 Comp.N.M. § 68–1001.

2. Automobiles ⟹181(2)

Party furnishing gasoline and oil used on the motor trip made such substantial contribution as to be a passenger for hire rather than mere guest and was entitled to recover for personal injuries sustained in accident if driver was guilty of ordinary negligence. 1941 Comp.N.M. § 68–1001.

Russell H. Pray and Eric A. Rose, Long Beach, for appellant.

Ball, Hunt and Hart, Long Beach, for respondent.

DRAPEAU, Justice.

Plaintiff, Birdie Harris, and defendant, Jennie O. Harfmann, are sisters. In July, 1949, plaintiff and defendant, their mother, and plaintiff's two small children left California on a trip by automobile to Oklahoma and return.

The trip had first been planned by the mother and defendant. The mother wanted to investigate some property rentals of hers in Oklahoma and Colorado. As first planned, the mother was to pay all expenses; defendant was to furnish and drive the car.

Then plaintiff decided that she would like to go too, and take her two children. Plaintiff's older son was in Oklahoma, about to go into the army, and she wanted to see him. So the first plans were changed, plaintiff and her two children were included in the party, and it was agreed that she was to pay for the gasoline and oil.

Plaintiff did so pay for the gasoline and oil until the trip came to an untimely end about a hundred miles east of Albuquerque in New Mexico. There, while defendant was driving, her car skidded off the highway and turned over.

Plaintiff suffered fractured vertebrae in her spine, and other serious injuries. She suffered and will suffer pain. She was in the hospital in New Mexico and then was flown home to California.

The accident occurred on a two-lane highway, in the morning after daylight. It had been raining hard. The asphalt pavement was wet and slippery.

Defendant attempted to pass a truck going in the same direction as she was. While she was in her left lane, alongside a truck, a car coming in the opposite direction pulled out of his lane of traffic. This car was coming at high speed.

Confronted with this situation plaintiff took her foot off the gas pedal, and applied her brakes. Her car skidded, swung broadside to the road, turned over, and came to rest in a ditch.

Plaintiff brought this action for damages. A jury was waived and the issues were submitted to a trial judge. He found that plaintiff was a guest of defendant and that defendant was not driving heedlessly or with reckless disregard for the rights of others. Such is the language of the New Mexico guest law. Sec. 68-1001, Stats.N.M.1941.

Plaintiff appeals from the judgment which followed. She contends that the trial court should have found that she was a paying passenger; that the New Mexico guest law did not apply, and she was entitled to the ordinary care due to a passenger for hire; or, even if the New Mexico guest law did apply, the conduct of defendant was such as to entitle plaintiff to recover.

As this case turns upon plaintiff's first contention, her second contention that the finding is contrary to the evidence need not here be considered. That feature of the case will be left for decision on a retrial.

While there are some differences in wording between the New Mexico and the California guest law, the intent and meaning of the two are so similar that it is proper to look to the California case law applying the guest-passenger relation in automobile cases, for the rule in this case.

[1] The recent case of Whitmore v. French, 37 Cal.2d 744, 235 P.2d 3, decided by our Supreme Court in 1951, is controlling here. That case states the rule that where the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. And where one makes a substantial contribution toward the cost of the journey, as a matter of law he is a passenger and not a guest.

In the Whitmore case two couples on a pleasure trip each contributed to a joint fund out of which expenses for gasoline and oil used in the automobile of one of the couples were paid. It was held that in these circumstances the parties riding in the car were passengers and not guests.

[2] In the case at bar the agreement to pay for gas and oil used on the trip was such a substantial contribution as to make plaintiff a passenger, and the case should have been tried on the theory that defendant was bound to use ordinary care in driving her automobile.

The judgment is reversed, and the cause remanded for a new trial.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

113 Cal.App.2d 460

PEOPLE v. IRVINE.

Cr. 4857.

District Court of Appeal, Second District,
Division 2, California.

Oct. 2, 1952.

Rehearing Denied Oct. 15, 1952.

Hearing Denied Oct. 30, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Ralph K. Pierson, J., of violating the book-making laws, and he appealed. The District Court of Appeal, McComb, J., held that evidence obtained by the use of microphone and recording machine which had been placed in defendant's home during his absence without a search warrant was properly admitted.

Judgment affirmed.

1. Criminal Law 🔑394

Evidence obtained by use of microphone and recording machine which had been placed in defendant's home during his absence without a search warrant was admissible in prosecution for violation of book-making laws. Pen.Code, § 337a, subds. 1–3.

2. Criminal Law ⚿393(1)

In prosecution for violation of book-making laws, evidence established that defendant voluntarily placed his hands under ultra-violet ray light, which made them fluoresce with the same color as did betting sheets upon which a police officer had surreptitiously sprinkled a fluorescent chemical before sheets were delivered to defendant by a cohort, and, therefore, evidence that defendant's hands did fluoresce was not inadmissible as illegally obtained by coercion.

3. Criminal Law ⚿772(1)

It is the duty of the trial court to see that the jury are adequately informed on the law governing all elements of offenses submitted to them, to an extent necessary to enable them to perform their function in conformity with applicable law.

4. Criminal Law ⚿777

Where court properly admitted evidence of defendant's violation of book-making laws obtained by use of microphone and recording machine placed in defendant's home during his absence without a search warrant, jury was properly instructed to consider all of the evidence permitted to be introduced irrespective of the manner obtained and, particularly, that the evidence obtained by use of the microphone and recording machine was legally admissible the same as any other competent evidence.

5. Gaming ⚿98(3)

Evidence sustained verdict of guilty of violating the book-making laws. Pen. Code, § 337a, subds. 1–3.

6. Criminal Law ⚿1186(4)

In absence of a miscarriage of justice in a prosecution for violation of book-making laws judgment of conviction and order denying new trial woud be affirmed. Pen. Code, § 337a, subds. 1–3; Const. art. 6, § 4½.

A. H. McConnell, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating (1) subdivision 1, section 337a of the Penal Code,[1] (2) subdivision 2, section 337a, Penal Code, and (3) subdivision 3, section 337a, Penal Code, after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

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[1] Section 337a of the Penal Code reads in part as follows:

"Every person,

"1. Who engages in pool-selling or book-making, with or without writing, at any time or place; or

"2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upn the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown of contingent event whatsoever; or

"3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechnical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or * * *."

Facts: On November 15, 1951, at about 11:30 a. m., Officer Calori saw an automobile which was registered to Mr. Lippe parked at the corner of Chestnut and Florista Streets in Los Alamitos. Across the street was a white house. The officer watched the car and house until 5:30 p. m., at which time a man came out of the house and drove to Seventh and Ximeno streets in Long Beach. On November 28, 1951, Mr. Lippe drove to the home of defendant at 3916 East Second Street and entered the house. He did the same thing on November 29.

On December 1, 1951, Mr. Mason, a recording engineer, went to the premises at 3916 East Second Street, Long Beach, and during defendant's absence entered his house, installed a microphone and connected it with a recording machine and loud speaker in the garage of the house. Thereafter the recording engineer made various adjustments in the equipment and on several occasions the officers heard Mr. Lippe and defendant discussing horse racing, and receiving and placing bets over the telephone.

On January 3 and 4, 1952, a Mr. Curti entered defendant's home. On January 5th, police officers stopped Curti's car and while they were searching Mr. Curti, Officer Jacobson scattered crystalline powder, which was fluorescent under ultra-violet rays, over various papers in Mr. Curti's car. That same evening over the loud speaker Mr. Curti was heard in defendant's home telling defendant how he had been stopped by the officers. He also discussed the sheets of paper indicating that they were papers showing how much money was owed, due to book-making activities.

Shortly after Mr. Curti left the house Officers Jacobsen and Kennedy entered defendant's home, put him under arrest and searched the premises. They found a number of sheets of paper of the same size, shape and texture as those found in Mr. Curti's car earlier that evening. These papers were put under an ultra-violet light and they showed a greenish purple color, the same color as the powder did which the officer had put on his hands prior to handling the papers in Mr. Curti's car.

The officers asked defendant to put his hands under the violet ray light to see whether they would fluoresce the same as the papers in his home. Under the light his hands had the same color as the papers.

Defendant does not question the sufficiency of the evidence to sustain the finding of guilty on each count, but claims that the court erred:

[1, 2] (1) In the reception of evidence, (a) obtained by the use of the microphone and recording machine which had been placed in defendant's home during his absence without a search warrant,[2] (b) that defendant's hands, when placed under an ultra-violet ray had the same greenish fluorescence as the powder which the officer had placed on the papers in Mr. Curti's car, because defendant was coerced into

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[2] This evidence was properly received. Under a long line of decisions, the most recent of which is People v. Kendall, 111 Cal.App.2d 204, 244 P.2d 418, 425 (hearing denied by the Supreme Court), wherein Mr. Justice Fox, speaking for this court, stated the rule as follows:

"The fact that this evidence was illegally obtained does not, however, render it inadmissible in the state courts. (Citing cases.) The fact that it was so obtained does not lay a foundation for attack upon the judgment in the United States Supreme Court because in Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, the court declined to interfere with the conviction of a defendant in a state court on an abortion charge where some of the evidence had been obtained in violation of the guaranty against unlawful search and seizure in Article IV of the United States Constitution. The recent case of Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, does not detract from the holding in the Wolf case. The rationale of the Rochin case was placed squarely upon the ground that the evidence supporting defendant's conviction was secured by methods so brutally shocking as to offend the due process clause of the Fourteenth Amendment. Therefore the search warrant in this case was wholly immaterial."

placing his hands under the ultra-violet ray.[3]

[3, 4] (2) In instructing the jury as follows:

> "You are instructed that any trespass which you may find to have been committed upon the property of defendants, or any of them, is not to enter into your deliberations in weighing the guilt or innocence of these defendants or to be considered by you in any manner whatsoever. That is a matter in which defendants have a separate remedy at law but which has no part in this trial. It is your duty to consider only the evidence which has been admitted for your consideration and determine from such evidence whether the guilt of defendants, or any of them, has been proved, and render your verdict accordingly."
>
> "You are instructed that you are to consider all evidence which the Court has permitted to be introduced for your consideration, irrespective of the manner by which such evidence has been obtained, and to give to all of such evidence the weight to which you shall find it to be entitled.
>
> "The above instruction refers specifically to the testimony tending to prove that a microphone was placed in the home of defendant Patrick E. Irvine without the knowledge or consent of either the said Patrick E. Irvine or his wife, Mildred Irvine, and then connected by a wire to a distant point where it has been testified a recording machine and a loud speaker were installed and voices originating in the home of defendant Irvine were allegedly heard over the loud speaker and recorded on the recording machine. Such evidence (if you find that it was so obtained) is legally admissible in this State the same as any other competent evidence."[4]

Article VI, section 4½ of the Constitution of the State of California reads in part as follows: "No judgment shall be set aside, or new trial granted, *in any case,* on the ground of *misdirection of the jury,* or of the *improper admission* * * * of evidence * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error compained of has resulted in a miscarriage of justice. * *" (Italics added.)

[5, 6] We have examined the record and are of the opinion the evidence fully sustains the verdict of guilty on each count and there has not been a miscarriage of justice in the present case. Hence, since it needs no citation of authorities to support the thesis that this court is bound by the mandate of the Constitution of the State of California, it follows the judgment and order must be affirmed.

It is likewise apparent no useful purpose would be served by an extended discussion of the errors alleged by defendant, which would only be, as indicated in the cases cited in the footnotes, a repetition of principles of law well established in this state and repeatedly reiterated in opinions of the appellate courts. We therefore refrain from further discussion of the alleged errors. Cf. Thatch v. Livingston, 13 Cal.App.2d 202, 203, 56 P.2d 549.

The judgment and order are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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[3] This contention is devoid of merit for the reason that the record shows that defendant voluntarily placed his hands under the ultra-violet ray light and did not do so under any compulsion of the police officers.

[4] The questioned instruction was properly given by the trial court since it is the judge's duty to see that the jury are adequately informed on the law governing all elements of offenses submitted to them to an extent necessary to enable them to perform their function in conformity with the applicable law. People v. Sanchez, 35 Cal.2d 522, 528 [3], 219 P.2d 9. As pointed out in footnote 2, the trial court properly admitted the questioned evidence, hence the instruction pertaining thereto was properly given by the court. Cf. People v. Sica, 112 Cal.App.2d 574, 247 P.2d 72.

113 Cal.App.2d 627

PEARCE v. LINDE et al.

Civ. 15067.

District Court of Appeal, First District,
Division 2, California.
Oct. 10, 1952.
Rehearing Denied Nov. 8, 1952.
Hearing Denied Dec. 8, 1952.

Suit for injuries allegedly resulting from negligent medical practice. From a judgment of the Superior Court, City and County of San Francisco, Frank T. Deasy, J., plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that refusal to permit a specialist in internal medicine having no experience in orthopedics or other branch of surgery to testify as an expert as to whether defendants had used proper skill and care in performing operations on plaintiff's foot was not abuse of discretion.

Judgment affirmed.

1. Physicians and Surgeons 🔑18(9)

Evidence was insufficient to take suit against physicians for negligent treatment of injured heel to jury on question of whether defendants were negligent in failing to take and use X-rays in the course of their treatment, in view of evidence that such X-rays were taken and absence of evidence that such X-rays were insufficient or that more X-rays were necessary.

2. Evidence 🔑546

Refusal to permit a specialist in internal medicine having no experience in orthopedics or other branch of surgery to testify as an expert on question of whether defendant physicians had used proper skill and care in performing operations on plaintiff's foot was not abuse of discretion.

3. Evidence 🔑536

A medical expert is not qualified as a witness unless it is shown that he is familiar with the standards required of physicians under similar circumstances.

4. Appeal and Error 🔑971(2)
Evidence 🔑546

The competency and qualification of an expert witness to give his opinion in evidence is a question for trial court to determine in the exercise of a sound discretion, and its ruling will not be disturbed on appeal, unless a manifest abuse of such discretion is shown.

5. Evidence 🔑536

Competency of an expert is in every case a relative matter, that is, relative to the topic about which expert is asked to make his statement.

6. Evidence 🔑546

The definitive criteria in guidance of trial court's determination of the qualifications of an expert rest primarily on occupational experience.

7. Evidence 🔑538

An expert medical witness must have had basic educational and professional training as general foundation for his testimony, but a practical knowledge of what is usually and customarily done by physicians under similar circumstances is of controlling importance in determining competency of expert to testify to degree of care against which treatment given is to be measured.

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Emmett R. Burns, Arthur C. Zief, Rinaldo A. Carmazzi, San Francisco, for appellant.

Harold C. Brown, San Francisco, amicus curiæ in support of appellant's contentions.

Robert L. Lamb, Robert A. Haughwout, San Francisco, for respondents Frederick G. Linde and W. Porter Forcade.

Hartley F. Peart, Gus L. Baraty, Howard Hassard, George A. Smith, Alan L. Bonnington, San Francisco, amici curiæ in support of respondents' contentions.

NOURSE, Presiding Justice.

Plaintiff sued the two individual defendants and the Franklin Hospital for injuries alleged to have been the result of negligent medical practice. At the close of plaintiff's case separate motions for nonsuit were made and granted. Thereafter a separate judgment was entered in favor of the Franklin Hospital. An appeal from that judgment was dismissed by order of this court on October 8, 1951, on the ground that it had been abandoned. Though the record does not show that a judgment of nonsuit was entered in favor of the two individual defendants the appeal was taken on the assumption that such a judgment was entered and the respondents do not raise the point here.

[1] The main ground of appeal is that the trial court erred in taking from the jury the determination of the question whether the defendants were negligent in failing to take X-rays of plaintiff's heel in the course of their treatment. The thesis is based on a misconception of the facts. The heel had been injured when the plaintiff fell while working on a scaffolding in the city of Stockton. X-rays were taken and used by Dr. Sanderson who was attending the plaintiff at the time. Following his injury plaintiff had spent seven weeks in a Stockton hospital where he was treated by Dr. Sanderson and where his condition had steadily improved. Since it was an industrial injury plaintiff was then sent to Dr. Linde and Dr. Forcade for a final examination leading to a certification for final rating for compensation. X-rays were again taken and from the examination then made these doctors recommended an operation on both heels. Plaintiff refused to permit them to operate on his right foot, but permitted an operation on the left heel. Plaintiff was under their treatment for nine months when he was certified by them as ready for a permanent disability rating. Sometime thereafter plaintiff had a fall in his home and suffered permanent injury to his left heel. He was again hospitalized and a bone graft was performed. The defendants then urged plaintiff to have X-rays taken but he refused to do so.

Appellant's argument based on the assertion that no X-rays were taken is based on a false premise since the only testimony in the record is that X-rays were taken. And it must be presumed that they were sufficient since there is no word of testimony indicating that they were insufficient, and no testimony from which the jury could possibly infer that more pictures were necessary.

Appellant's second point—that a prima facie case of negligence can be established from the testimony of the defendant—is not debatable.

[2] His third point is that the trial court erred in refusing to accept as an expert a witness called by the plaintiff. This doctor was licensed to practice medicine in both California and Nevada. Since 1931 he had practiced in Reno, Nevada, and had no practice in California. He was a specialist in internal medicine. He had had no experience in orthopedics or in any other branch of surgery. Patients coming to him requiring treatment in orthopedic surgery were all referred by him to an expert in that branch of the practice. He testified that he had some knowledge of what was the proper professional treatment of such cases from what he had read or from what he had heard from experts in that line. Since the question involved was whether the defendants had used proper skill and care in performing the several operations on plaintiff's foot, the testimony of an expert in internal medicine would be no more persuasive than that of a layman who had read and heard what was the proper professional practice.

[3–7] On this point the case is controlled by Huffman v. Lindquist, 37 Cal.2d 465, at pages 476, 478, 234 P.2d 34, at page 41, from which we quote:

> "A medical expert is not qualified as a witness unless it is shown that he is familiar with the standards required of physicians under similar circumstances. Sinz v. Owens, 33 Cal.2d 749, 753, 205 P.2d 3, 8 A.L.R.2d 757; Moore v. Belt, 34 Cal.2d 525, 532, 212 P.2d 509. It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence (Mirich v. Balsinger, 53 Cal.App.2d 103, 114, 127 P.2d 639), and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown. 2 Wigmore on Evidence [3d ed.], § 561, p. 641; Sowden v. Idaho Quartz M. Co., 55 Cal. 443, 451; Sinz v. Owens, supra, 33 Cal.2d 749, 755–756, 205 P.2d 3. The competency of an expert 'is in every case a relative one, i. e. relative to the topic about which the

person is asked to make his statement.' 2 Wigmore on Evidence, 3d Ed., § 555, p. 634.

* * * * * *

"The definitive criteria in guidance of the trial court's determination of the qualifications of an expert witness are recognized in Sinz v. Owens, supra, 33 Cal.2d 749, at page 753, 205 P.2d at page 5, to rest primarily on 'occupational experience,' as stated: 'The proof of that standard (the reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession under similar circumstances) is made by the testimony of a physician qualified to speak as an expert and having in addition, what Wigmore has classified as "occupational experience—the kind which is obtained casually and incidentally, yet steadily and adequately, in the course of some occupation or livelihood." 2 Wigmore on Evidence 3d Ed., § 556, p. 635. He must have had basic educational and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with malpractice that is of controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured.' "

Judgment affirmed.

JONES, J. pro tem., concurs.

DOOLING, Justice.

I concur. If I felt free to do so I would be inclined to hold the expert from Reno sufficiently qualified, but the trend of recent decisions culminating with Huffman v. Lindquist, 37 Cal.2d 465, 234 P.2d 34, indicates too clearly an opposite view in a majority of the justices of the Supreme Court for me to feel free to do other than concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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113 Cal.App.2d 584

GRAVES v. ROMAN et al.

Civ. 19024.

District Court of Appeal, Second District, Division 2, California.

Oct. 8, 1952.

As Amended Oct. 9, 1952.

Rehearing Denied Oct. 23, 1952.

Hearing Denied Dec. 4, 1952.

Action by Lottie Graves against Marcel Roman, individually, and doing business as Professional Building, for injuries. The Superior Court, Los Angeles County, Wm. S. Baird, J., entered judgment of nonsuit in favor of defendant American Building Maintenance Company of California, and entered judgment in favor of defendants Roman, Glazer and Lindenbaum notwithstanding verdict for plaintiff, and plaintiff appealed. The District Court of Appeal, held that raised metal strip between linoleum and marble floor one-eighth inch above surface of floor in office building was a minor and trivial defect, and defendants who had failed to repair the defect, would not be liable.

Affirmed.

1. Negligence ⚿44

Where plaintiff, after leaving elevator in office building, tripped upon a metal strip between linoleum and marble floor, fell to floor, and was injured, and, where metal strip was generally flush with the floor, but in some cases was raised a maximum of one-eighth inch above adjacent linoleum, defect in metal strip was minor, and owners of building and maintenance company were not liable for plaintiff's injuries.

2. Negligence ⚿28

The owner of a building is not the absolute insurer of his invitees' safety.

Adams, Duque & Hazeltine, Los Angeles, for appellant, A. Andrew Hauk, Los Angeles, of counsel.

Jennings & Belcher, Los Angeles, for respondent, American Bldg. Maintenance Co. of California, Wm. F. Clements, Los Angeles, of counsel.

Moss, Lyon & Dunn, Gerold C. Dunn, and Henry F. Walker, Los Angeles, for respondents Roman, Glazer, Lindenbaum.

MOORE, Presiding Justice.

Appellant sued to recover damages for injuries allegedly received while she was on the premises of defendants as invitee. A judgment of nonsuit was awarded and entered in favor of American Building Maintenance Company, and after a verdict had been entered in favor of plaintiff against defendants Roman, Glazer and Lindenbaum, the court pursuant to defendants' motion entered judgment in their favor notwithstanding the verdict. The appeal is from the judgment of nonsuit and the judgment notwithstanding the verdict.

Appellant was severely injured when she caught her foot and fell to the floor upon leaving an elevator in the lobby of an office building owned by respondents Roman, Glazer and Lindenbaum. She testified that she rode down in the elevator after a visit to her physician on an upper floor; she proceeded out of the elevator and after taking one or two steps forward her toe kicked something which gave a metallic sound; this caused her to fall on her left hip and side.

The lobby floor was marble with linoleum pieces which were recessed in front of each of the elevators. The linoleum pieces were the width of the elevator doors and extended out from the elevators a distance of approximately thirty inches. A brass stripping bordered the linoleum which covered the space between linoleum and marble. The stripping was generally flush with the marble, but in some places in front of the elevator was raised a maximum of one-eighth inch above the adjacent linoleum.

Contending that the maintenance of such allegedly dangerous condition constituted negligence proximately causing her injuries, appellant instituted this action against the owners of the building and American Building Maintenance Company, the organization which supplied janitorial and elevator service to the premises. In pursuit of a reversal, appellant recites the proof of the height differential between the metal strip and the linoleum, of the carelessness on the part of respondents in maintaining and inspecting their building, of the failure of the manager and owners to do any maintenance work of any kind on the linoleum and metal stripping, and of their failure to look for defective conditions. Also, she contends that the day man never did look at or do anything with respect to the linoleum and metal stripping and that he never saw any maintenance work being done. Dr. Clegg, a tenant, testified that he was in the building daily but had never noticed any inspection or repairs of the linoleum.

On the other hand, respondents urge that this maximum rise of one-eighth inch constitutes a minor and trivial defect which as a matter of law affords no basis for a recovery. The authorities clearly support such contention. In a series of appellate decisions with respect to the alleged negligence of municipalities and others for damages arising from injuries sustained by reason of defective sidewalks, it is held that where the defect is slight there is no liability cast upon the owner of the premises. Whiting v. City of National City, 9 Cal.2d 163, 166, 69 P.2d 990; Meyer v. City of San Rafael, 22 Cal.App.2d 46, 50, 70 P.2d 533; Dunn v. Wagner, 22 Cal.App.2d 51, 54, 70 P.2d 498; Balmer v. City of Beverly Hills, 22 Cal.App.2d 529, 531, 71 P.2d 854. In each instance the issue was concerned with the difference in elevation between adjoining sections of sidewalk where the rise varied from one-fourth inch to one inch and in each instance the court held the defect to be minor and trivial and as a matter of law not such as to impose liability upon the owner for injuries thereby sustained by the plaintiff.

In Robson v. Union Pacific Railway Company, 70 Cal.App.2d 759, 161 P.2d 821, 823, this court affirmed a judgment entered upon a directed verdict for the defendant where the plaintiff fell as a result of having caught her heel in a chipped place in the tile flooring in front of the entrance to defendant's waiting room. The chipped area was approximately two inches in diameter and one-fourth inch deep. There it was held as a matter of law that "the defect in the sidewalk was a minor and trivial one" for which "defendants were not liable".

[1, 2] Such authority is controlling in the case at bar. A thorough reading of the

testimony in the record and a scrutiny of the exhibits compel the conclusion that the alleged dangerous condition in respondents' linoleum and metal stripping was merely a trivial defect. To assess liability on these defendants for the slight depressions existing in the strip concerned, a difference in elevation of one-eighth inch at its maximum variation, would be to permit the trier of fact to determine an owner of a building to be the absolute insurer of his invitees' safety. If such were the rule, it could result in severe oppression to owners of buildings visited by the public. Such is not the law. Robson v. Union Pacific Railway Company, supra, 70 Cal.App.2d 761, 161 P.2d 821.

Appellant seeks to distinguish these "trivial defect" authorities on the ground that they are all "sidewalk" cases involving municipalities, and hence deal with the plaintiff's problem of demonstrating that the city had express or constructive notice of the condition. See Nicholson v. City of Los Angeles, 5 Cal.2d 361 at page 363, 54 P.2d 725. It is argued that the courts there were only concerned with whether the defect had "a sufficient appearance of danger to put the city on constructive notice." The obvious answer to appellant's argument is the Robson decision where no notice problem was involved and where the defendant was not a municipality. See also Clarke v. Foster's, Inc., 51 Cal. App.2d 411, 125 P.2d 60. The authorities disclose that the underlying basis of the decisions is a practical recognition of the impossibility of maintaining heavily travelled surfaces in a perfect condition and that minor defects such as differences in elevation are bound to occur in spite of the exercise of reasonable care by the party having the duty of maintaining the area involved.

The decisions relied upon by appellant are factually distinguishable, the majority involving foreign substances allowed negligently to remain in the path of the injured patron. Others such as Blumberg v. M & T, Inc., 34 Cal.2d 226, 209 P.2d 1; Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576; Morton v. Manhattan Lumber Company, 41 Cal.App.2d 70, 106 P.2d 212, are likewise factually distinguished. In those decisions either the court failed to consider the trivial nature of the defect, or they involve situations where such contention could not reasonably have been made.

The appeals from the orders are dismissed and the judgments are affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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113 Cal.App.2d 339

PEOPLE v. REED.

Cr. 2799.

District Court of Appeal, First District, Division 1, California.
Sept. 29, 1952.

Defendant was convicted in the Superior Court of the State of California, in and for the City and County of San Francisco, Harry J. Neubarth, J., of grand theft and of sending a false message by telegraph, and defendant appealed from the judgment and from an order denying a new trial. The District Court of Appeal, Wood, J., held that evidence sustained convictions.

Judgment and order affirmed.

1. False Pretenses 🔑26

In grand theft prosecution, indictment charging that defendant did wilfully, unlawfully, and feloniously take certain sum of money belonging to a named person, was not fatally defective because it was the theory of the prosecution that money was obtained by false pretenses and it was not alleged what constituted the alleged false representations. Pen.Code, §§ 484–487, 952.

2. Indictment and Information 🔑57

Amendment in 1951 of second paragraph of statute dealing with requisite contents of indictment or information, so as to require that indictment or information contain a statement of public offense or offenses charged therein in lieu of former requirement for a statement "of the acts constituting the offense," did not manifest an intent by the Legislature that the acts be specified until the effective date of the 1951 amendment. Pen.Code, § 950.

3. False Pretenses ⚷49(4)

In grand theft prosecution, evidence was sufficient to prove falsity of representations made by defendant in obtaining money from prosecuting witnesses. Pen.Code, §§ 484–487.

4. False Pretenses ⚷49(1)

In grand theft prosecution, evidence was sufficient to corroborate testimony of prosecuting witnesses concerning the alleged making of false representations by defendants as charged in certain counts of the indictment. Pen.Code, §§ 484–487.

5. Larceny ⚷55

Grand theft, consisting of the obtaining of money by trick and device, is not subject to statute requiring corroboration of testimony of complaining witness in prosecution for obtaining money by false pretenses. Pen.Code, §§ 484–487, 1110.

6. False Pretenses ⚷1
Larceny ⚷14(1)

Loan transactions ordinarily create only civil rights and obligations, but where evidence is sufficient to show larceny by trick and device or the obtaining of money under false pretenses, borrower may be held criminally liable. Pen.Code, §§ 484–487.

7. False Pretenses ⚷49(3)

In grand theft prosecution, evidence established that alleged false representations by which defendant was charged in certain counts of the indictment with having obtained money from prosecuting witnesses by false representations, were representations as to present facts, conditions, circumstances, qualities, or characteristics, and not merely representations or promises pertaining to the future. Pen.Code, §§ 484–487.

8. False Pretenses ⚷38

In grand theft prosecution, there was no fatal variance between pleading and proof because indictment charged the taking of $7,000 while proof showed that defendant obtained the $7,000 in separate amounts of $3,000 and $4,000 a few weeks apart, where they represented substantially a single transaction. Pen.Code, §§ 484–487.

9. Criminal Law ⚷112(1)

Where defendant, while he and his associate were in San Francisco, instructed associate to go to Los Angeles and send him a telegram, and associate went to Los Angeles and sent telegram to defendant in Contra Costa County, Superior Court in and for the City and County of San Francisco had jurisdiction of prosecution under statute making it an offense to send or furnish false or forged telegraph or telephone message with fraudulent intent. Pen.Code, § 474.

10. Telegraphs, Telephones and Radio ⚷79

Where facts warranted inference that defendant sought by false telegram to continue to deceive prosecuting witness concerning oil lease, in order to postpone time when prosecuting witness would lose confidence in defendant, so that defendant could get more money from prosecuting witness, and defendant did by means of the telegram bolster and renew prosecuting witness' confidence in defendant for an appreciable period of time, fact that telegram was sent months after defendant got money from prosecuting witness, did not preclude conviction of defendant under statute making it an offense to send or furnish false or forged telegraph or telephone message with fraudulent intent. Pen. Code, § 474.

11. Telegraphs, Telephones and Radio ⚷79

Statute making it an offense to send or furnish false or forged telegraph or telephone message with fraudulent intent, does not require accomplishment of injury in the sending of a false telegram, and it is the sending of such a telegram with knowledge of its falsity with intent to deceive, injure, or defraud another which constitutes the offense. Pen.Code, § 474.

12. Telegraphs, Telephones and Radio ⚷79

The expression "intent to deceive" as used in statute making it an offense to send or furnish false or forged telegraph or telephone message with fraudulent intent, is broader than the expression "intent to defraud" as used in forgery statute, and is not limited to an act whereby one does or may suffer financial loss. Pen. Code, §§ 470, 474.

See publication Words and Phrases, for other judicial constructions and definitions of "Intent to Deceive".

13. Criminal Law ⚿1037(1, 2), 1063(5)

District attorney was not guilty of prejudicial misconduct in asking six leading questions, to which objections by defendant were sustained during course of long trial, where defendant did not at time assign asking of questions as prejudicial misconduct or request court specially to admonish jury or move for new trial.

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Sefton & Anderson, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., William Acton, Asst. Dist. Atty., San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant was accused of violating sections 484–487 of the Penal Code (grand theft) in one indictment of five counts, and of violating section 474 of the Penal Code (sending a false message by telegraph and telephone) in another indictment of but one count.

The jury rendered a verdict against him upon each of the six charges. Upon his motion the court ordered a new trial on the third grand theft count. The district attorney then moved and the court ordered that the third count be dismissed. Defendant has appealed from the judgment and from an order denying a new trial as to the remaining five charges.

In support of his appeal defendant claims: (1) none of the grand theft counts charges an offense, (2) under none of the grand theft counts was there proof of the falsity of representations made by defendant, (3) in respect to three of the grand theft counts there was lacking the requisite corroboration, (4) each of the same three grand theft counts involved a loan transaction, (5) in respect to two of the grand theft counts the representations concerned the future, not facts of the present or the past, (6) in one of the grand theft counts there was a variance between the pleading and proof, (7) in respect to the false telegram charge neither intent nor deceit was shown and the trial count was without territorial jurisdiction, and (8) the prosecutor committed prejudicial misconduct in asking leading questions.

[1,2] (1) In each count the grand theft indictment accused the defendant of the crime of felony: violation of sections 484–487 of the Penal Code (grand theft) committed as follows: that on a certain date at the city and county of San Francisco he "did wilfully, unlawfully and feloniously take * * * [a designated number of dollars] * * * in money, lawful money of the United States, the personal property of * * * [the name of a person]." Defendant says the people's theory was that in each case the money was obtained by false pretenses and that therefore the indictment was fatally defective for failure to state the facts which constitute the asserted false representations. This point is not well taken. In charging an offense the statement that the accused has committed a specified public offense "may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another." Pen.Code, § 952. The quoted words mean what they say. Each grand theft charge is sufficient. People v. Yant, 26 Cal.App.2d 725, 730, 80 P.2d 506. See, also, People v. Pierce, 14 Cal.2d 639, 644–646, 96 P.2d 784, and People v. Dunn, 40 Cal.App.2d 6, 12–13, and 17, 104 P.2d 119. Defendant relies upon People v. Walther, 27 Cal.App.2d 583, 81 P.2d 452, but, as stated in a later decision by the court which rendered the decision in the Walther case, "No attempt was made in that case to charge the crime of theft under the provisions of section 952 of the Penal Code.

Neither did the court there take into consideration the provisions in said section that 'It, (the count in the information or indictment) may be in the words of the enactment describing the offense.'" People v. Dunn, supra, 40 Cal.App.2d at page 13, 104 P.2d at page 123. Defendant also argues that by amending the second paragraph of section 950 of the Penal Code in 1951 to require that a pleading contain "A statement of the public offense or offenses charged therein" in lieu of the former requirement for a statement "of the acts constituting the offense," the Legislature manifested an intent that the acts be specified until the effective date of the 1951 amendment. We do not so view that amendment. All the Legislature was really doing in 1951 was to make the second paragraph of section 950 conform to the change in the law which was made in 1927 when the Legislature amended section 952 to permit the charging of theft by alleging that "the defendant unlawfully took the property of another." Stats.1927, ch. 612, p. 1043.

[3] (2) In respect to each of the grand theft counts, defendant claims there was a failure to prove the falsity of the representations made by the defendant. A brief resume of the evidence will demonstrate that this point is not well taken.

Count I accuses defendant of taking $15,000, the personal property of Thomas F. J. Carroll, Jr. Carroll met defendant in January, 1950. At that time Carroll was in the restaurant business in Walnut Creek with Kenneth Arvidson and Stephen Forbragt. Defendant gave Carroll the impression that he was a man of great wealth, an industrial engineer and business expert. They next met, at Carroll's request, on February 4, 1950, to discuss a business proposition in which Carroll was interested, the purchase of a hotel and resort business. Defendant told Carroll (who was at defendant's home with Mrs. Carroll and Arvidson and a friend) of defendant's great wealth; that he had about $35,000,000 in addition to $20,000,000 which was committed to defendant's Mt. Davidson foundation to build a hospital and business district on Twin Peaks in San Francisco. Defendant explained that he had been able to solve the income tax problem through the use of a charitable foundation.

On February 5, 1950, Carroll met defendant again. Defendant said that Carroll's problem could be handled under a charitable foundation which would allow a more rapid accumulation of capital.

Carroll told defendant that he and Mrs. Carroll owned 90 acres of land in the Walnut Creek area. Defendant suggested a "Carroll Foundation"; told Carroll that he (defendant) had all the money he wanted; his problem was to conserve it from taxation; he was not interested in making any profit; he would be glad to handle the organization of the foundation. The cost would be about $3,000, which defendant wanted immediately. Defendant decided that they should organize an engineering company to manage the affairs of the foundation.

Carroll got the $3,000 and gave it to defendant at defendant's office in San Francisco. Defendant gave Carroll a receipt.

Thereafter Carroll saw defendant almost daily at Carroll's restaurant. At these meetings defendant talked about foundations, the great wealth behind them, their management, how they cooperated one with another.

Carroll, his wife, and Arvidson believed these statements because defendant was prone to make quotations from the Bible and because of "his sincerity in doing things for other people," as Carroll expressed it.

In early March defendant announced that he had purchased the Quality Oil lease for the Carroll foundation for $3,200,000. Carroll, his wife and Arvidson told defendant that they did not have such money, that the thought was insane. Defendant told them that no money was necessary, that he had arranged for the sale of the lease to Mr. Monroe (whom they had met earlier at defendant's home) for $4,500,000, a paper profit of $1,300,000 and a net profit of $805,000 to the Carroll foundation. The Carrolls were to transfer their 90 acres to the foundation at a price of $90,750.

Two nights later defendant told Carroll that he had paid $30,000 of his own personal money as a deposit on the oil lease; he was not concerned about it, he was very happy to do it in order to help the Carroll foundation to get started, but he had used $15,000 of money that he had reserved for other purposes and it would be necessary to reimburse him for the $15,000 of the $30,000. He told them that the whole transaction would be closed in a matter of two weeks, by March 31st at the latest.

Carroll (on behalf of himself, his wife and Arvidson) told defendant that they did not have $15,000 available. Defendant said he had embarrassed himself in using the money set aside and it would be necessary for them to get the money. Carroll told defendant that the money would have to be borrowed, and he said "The trouble with you fellows is you don't realize your own ability and you will have to get over that. You have ability to try anything."

So the Carrolls borrowed the $15,000, giving as security a second mortgage on their 90 acres. They told defendant in advance that they were going to get the money and he told them to have the check cashed and to bring him the cash to his office in San Francisco. And they took the cash to him at his office. Defendant gave them a receipt reading: "Received of Carroll Properties, Inc. Fifteen Thousand and no/100 Dollars on account of loan for purchase of oil lease" (Ex. 4–B). Defendant told them the money was a repayment on the $30,000 he had loaned to them.

Defendant used $14,000 of this money to pay on a home he had purchased near Walnut Creek in November, 1949, and on which he was to pay $14,000 within 90 days. Carroll was not aware it was used for that purpose.

The Carrolls lost the 90 acres when the second mortgage (originally for 60 days, but twice extended for 30 days at a cost of $500 for each extension) was foreclosed. When there was no money on March 31 from the sale of the oil lease, defendant explained that the seller had gone to Europe and would be gone six weeks.

The falsity of defendant's pretenses is evidenced by the testimony of Claire Newport, a public accountant who was associated with defendant, who also was a public accountant, and kept his books. She testified that she was sufficiently familiar with the books to know that no such $30,000 transaction took place. She also testified that from all appearances defendant was a man of moderate circumstances; she saw no signs of wealth; he had no funds of his own, as far as she knew, to establish any foundation; he earned no money from his office during 1946 to 1951; at times he had a $5,000 bank balance which was usually borrowed money; he was constantly being pressed by creditors and suits were filed against him by them.

Defendant himself, asked if he was not so deeply in debt on February 1, 1949, that he could not make a financial statement which would pass a loan at the bank, said: "Certainly. Had been right along." He admitted that in February, 1949, he owed in excess of $100,000, in various amounts to some 8 or 9 different persons; that he never filed an income tax return, never made any money. He testified he told Carroll and Arvidson he had purchased those oil royalties for $3,200,000; that it was not true, but he had reason to believe it was going to be true, but it had not been completed; that he told them he had resold for $4,500,000; that he did not have a definite contract for the acquisition of those royalties. He said he told them he made a deposit of $30,000 in connection with these oil leases; later, that he said nothing to the effect that the $15,000 was to be used in connection with the option, because the oil leases came after the $15,000 was paid; then, confronted with the fact that in the receipt for the $15,000 he had written "On account of loan for purchase of oil leases," he said he put that in because he figured the Quality oil leases would have to be purchased and that he knew more would have to be put out for that than $15,000; finally, that before the payment of the $15,000 he explained, to Carroll and Arvidson, these oil leases, what they were worth and so on.

Count II charges the taking of $3,000 from Helen Wagner on or about February 5, 1949. Helen Wagner met defendant in 1947 through Emile Darsow. Defendant obtained $500 from her either for sale of stock or for expense of organizing a certain corporation, and $2,600 as an advance for his and Darsow's expense upon business of the Mt. Davidson foundation.

In early 1949 defendant told her he had an agreement with the Thornbury family to sell $19,000,000 of the assets of the Thornbury foundation to the Mt. Davidson foundation.

Some time in January, 1949, defendant told her of a deal to sell $500,000 worth of his Business Maintenance Corporation stock to a Mr. Day. He told her he needed $3,000 to buy revenue stamps to close the deal and asked her to lend him the money. She did. She gave him two checks. He promised to return the money in 60 days. Defendant gave her a note for $3,000 and another bonus note for $1,285. In March, 1949, defendant asked for a loan of $1,200 to pay for architectural drawings for the Mt. Davidson foundation; he told her that if this were not paid it would endanger the proposition and be detrimental to her interests and to her getting her money back. She loaned him $1,200 for 60 or 90 days.

In April, 1949, she loaned him an additional $500.

In May, 1949, she loaned him $750 upon his representation that he was about to be evicted from his office.

He told her he owned Christmas Island and that he valued it at $85,000,000. He showed her a certificate for 100,000 shares of stock in National Radio of Arizona and told her that R.C.A. had acquired that corporation and when he accepted the R.C.A. stock it would be worth about $3,000,000.

In June, 1949, she was trying to get her money back, particularly the $3,000. He said the $500,000 sale to Mr. Day had not gone through and that he had used the money for other purposes. He never asked her if he could use it for other purposes than for revenue stamps. About July, at his suggestion, she went to work in his office as a receptionist and remained there until February, 1951. She was not put on the payroll but she received some payments ($1,900 or $2,000) in small amounts which were credited against the money that defendant owed her.

As to the falsity of defendant's representations, defendant admitted upon the witness stand that the revenue stamps would cost only 10 cents or 11 cents per $100 of value of stock upon an original issue, 5 cents per $100 for a subsequent transfer of stock; that all of the authorized stock of his Business Maintenance Corporation had been issued prior to February, 1949, at the face value of $300,000, in respect to which revenue stamps in the amount of $300 had been affixed; that said stock was entered on the books as of the value of $1,000; he knew at the time that the corporation had defaulted in payment of the state franchise tax and that its charter was "defunct." It was stipulated that the charter was forfeited for that reason on April 1, 1948, and was revived June 26, 1950. He did not recall how much of the $3,000 he had in mind at the time for revenue stamps, because there were some back payments to be made for services that had been rendered the corporation in connection with its organization. He admitted he told Mrs. Wagner he was going to sell to a Mr. Day for some $500,000; asked who was Mr. Day, he said "Mr. Day was the name of a man I don't care to disclose." In respect to assets running into the millions predicated upon a contract of January 15, 1949, with a Mr. Thornbury, it appeared that Thornbury died March 28, 1949, and that he left no estate, no life insurance, no funds of any kind. In other words, the contract with Thornbury furnished no basis for assets of any kind, even though defendant during the trial said there were tremendous assets in that contract.

Defendant further testified that at the time he got the money from Mrs. Wagner, neither his Business Maintenance Corporation nor his Mt. Davidson foundation had any assets.

Count IV charged the taking of $4,000 from Joseph Chapman. Chapman met defendant in December, 1950. Defendant told him of the Mt. Davidson foundation, the millions of dollars behind it, that he had earned $750,000 handling the trust funds. December 6, 1950, defendant told Chapman that a $7,000 check from one of his clients (a transit company in Santa Rosa, the Mendocino or Napa Transit Line) had been dishonored or returned unpaid and he needed $4,000 to cover checks written against it. On December 6, 1950, defendant gave Chapman a post dated check for $5,000 and on December 7, 1950, Chapman gave defendant a check for $4,000. Chapman was to cash the $5,000 check and give defendant the difference between the $4,000 and the $5,000; he did not want any interest on his $4,000 loan to defendant. Defendant cashed the $4,000 check. The money was to be repaid in a few weeks but was never paid. Chapman considered this "purely a loan," not an investment.

As to the falsity of these representations, Miss Newport testified that she knew nothing of any $7,000 due defendant for services rendered to a transit company that ran bus lines in Santa Rosa, Napa and Mendocino county. She knew of no check in that amount sent to defendant's office for accounting services by the Mendocino Transit Company in the early part of December, 1950. She knew of no such sum in the early part of December, 1950, or at any other time, from the Mendocino Transit Company. Her testimony concerning defendant's financial condition and lack of business during 1946–1951 tends to show that there was no accounting service transaction that would give rise to such a check. It appeared also by testimony of an officer of defendant's bank that defendant's account showed a deposit of $4,000 on December 7, 1950, but no deposit of $7,000 shortly before that date. Defendant testified that the $7,000 check was not given him by a client; it was given to him for collection; it had been drawn by a young man who came from a good family; this young man had made checks but his family had made his checks good on prior occasions.

Count V charged the taking of $7,000 from John Schlemmer. Schlemmer was Chapman's partner in the heating business. He met defendant through a Mr. Skottowe who was indebted to Schlemmer in the amount of $4,000 but could not pay. Skottowe was employed by defendant at a salary of $1,000 per month, but had not been paid his first two months' salary. Defendant was engaged in a ship patch venture and needed money. Defendant told Schlemmer that he had sold some patches to the government and had a contract with the government in negotiation. So he asked Schlemmer to lend him $3,000 and he would assume Skottowe's obligation to Schlemmer and he would pay the whole obligation in 30, 60 and 90 day payments. Defendant had a mortgage on a boat ("The Drip") for $2,500 and $1,250 on other equipment which he gave Schlemmer as security. The boat, according to defendant, was insured for $6,000 and could be sold for more than that amount. When the first payment was due, Schlemmer went to collect but was told by defendant that he could not pay. Defendant said that things were not going along as fast as he had anticipated. About a week later defendant phoned Schlemmer, told him things were moving along but he still was not able to pay, that the Mt. Davidson foundation owed him $750,000 for services and when he got things straightened out with the foundation he would pay.

When the second payment was due Schlemmer again went to defendant. Defendant said things were progressing pretty well and they had a man in Washington who was negotiating a large contract. He needed $4,000 more to get the whole thing washed up and the U. S. Rubber Company was going to buy defendant out. Schlemmer loaned defendant the $4,000 on two notes, one for $2,000 due in 10 days and the other for $2,000 due in 20 days. None of the money was ever paid.

Concerning the falsity of defendant's representation to Schlemmer, the lack of assets of his Mt. Davidson foundation and his Business Maintenance Corporation show that he had no reasonable chance of realizing anything upon any putative debt of either of those organizations to him. A Mr. Boese, a boat builder of 19 years' experience who had known "the Drip" for three years (it had been moored at his dock) testified that during the years 1948 through 1950 it was worth between $800 and $1,000, $1,000 at the most. The evidence indicated also that the insurance on the boat amounted to only $2,625, not $6,000.

(3) Defendant claims there is lacking the requisite corroboration in respect to the proof of the charges made in Counts II, IV and V and since Penal Code section 1110 requires corroboration for a conviction of the crime of obtaining money under false pretenses, the conviction must be reversed as to those counts.

Section 1110 provides: "Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, * * * or having obtained from any person * * * money * * *, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances; * * *"

In respect to count II, defendant, asked if he told Mrs. Wagner he was going to sell his stock in Business Maintenance Corporation to Mr. Day for some $500,000, said "That's right." Carroll testified that defendant made the same representation to him in June of 1950, about a Mr. Day buying $500,000 of Business Maintenance Corporation stock and defendant wanting additional money to pay for the revenue stamps. Asked if he recalled making such a statement to Carroll and Arvidson, defendant said "that's right," and that he told Carroll he had a party in mind he could sell some stock to, a man named Day who was willing to buy some stock.

Defendant testified he had discussed the Thornbury contract with Mrs. Wagner; they discussed a lot of things about the Thornbury contract prior to the $3,000 transaction; he could not recall exactly what was said; he mentioned it to her at that time because the getting of "those organizations" functioning hinged a great deal upon the Thornbury contract. Carroll testified that defendant told Carroll he had purchased the Thornbury family foundation, valued in excess of $18,000,000. Defendant admitted the Thornbury contract was mentioned to Carroll and Arvidson in connection with Carroll's $15,000 payment; they were to handle that contract for the affairs of the foundation and for the Business Maintenance, in which they would get 2½% of the gross turnover of that contract; that contract calls for approximately $18,000,000 but defendant had seen enough evidence that it was more than that; he mentioned to them the amount that was in the contract and the fact that it would run into considerably more than that.

As to corroboration of count IV, defendant admitted upon the witness stand that he told Chapman that the $7,000 check came from a client, the Mendocino or the Napa Transit Company. According to Carroll defendant told Carroll in May, 1950, the same story about a $7,000 check that had been returned unpaid, and that defendant accordingly needed $5,000; but Carroll did not advance the money for he did not have it.

As to count V, defendant admitted on the witness stand that he made the specific statement to Schlemmer that the boat could be sold for more than $6,000. He also testified that he probably mentioned to Schlemmer that all the expenses "and so forth" of the Business Maintenance in conducting business for the foundation would be paid when they were properly operating. He did not know what the amounts were that the foundation owed him, it amounted to a great deal. Asked if he recalled mentioning the amount of $750,000 as owing to him from the foundation, he said, "the amounts that were to be realized out of it would amount to that probably and more," and that he did not recall mentioning any particular amount.

[4, 5] The facts recited show that there was corroboration of the testimony concerning the making of false representations under counts II, IV and V. Moreover, the facts proven under counts II and IV really show the obtaining of the money by trick and device, for which such corroboration is not required. See People v. Brennan, 41 Cal.App.2d 143, 144–146, 106 P.2d 36, and People v. Beilfuss, 59 Cal.App.2d 83, 89, 138 P.2d 332.

[6] (4) The defendant claims that a loan transaction cannot furnish the basis for a criminal charge and concludes that the evidence under counts II, IV and V fails to prove the commission of a public offense. As well expressed in one of the cases upon which defendant relies, loan transactions "ordinarily create only civil rights and obligations and it is only where the evidence is sufficient to show larceny by trick and device or the obtaining of money under false pretenses that a borrower may be held criminally liable." People v. Lautenschlager, 56 Cal.App.2d 615, 618, 133 P.2d 839. In support of this statement the court in the Lautenschlager case cited four earlier decisions each of which was a loan transaction induced by false pretenses or by trick and device, in which conviction was affirmed. In each of those four cases the fact that the money was obtained as a loan did not absolve the defendant.

[7] (5) In respect to counts II and V, defendant erroneously claims that his representations pertained to the future, not to present or past facts. Count II charged the taking of $3,000 from Helen Wagner. Defendant represented to her that he had a deal to sell $500,000 worth of corporation stock to a Mr. Day and needed $3,000 to buy revenue stamps to close the deal; also, that he had an agreement with the Thornbury family to sell $19,000,000 of Thornbury assets to the Mt. Davidson foundation. Count V charged the taking of $7,000 from John Schlemmer. As security for the loan, defendant assigned to Schlemmer a mortgage on a certain boat, telling him the boat was insured for $6,000 and was worth more than that, and that the Mt. Davidson foundation owed defendant $750,000. These were all representations as to present facts, conditions, circumstances, qualities or characteristics, not mere representations or promises that sometime in the future certain events might occur.

[8] (6) Defendant further claims in respect to grand theft count V that there was a fatal variance between the pleading and proof. The indictment charges the taking of $7,000. It is true that the defendant did obtain $7,000 in separate amounts of $3,000 and $4,000, a few weeks apart, but they represented substantially a single transaction, moneys obtained for the putative purpose of facilitating the consummation of negotiations which defendant represented at the time were pending between him and the government in respect to his ship patching device.

(7) Concerning the telegram, which defendant admitted was false (he testified, "that whole thing was fictitious"), defendant claims that the trial court lacked territorial jurisdiction of the offense and that there was a failure to prove the requisite intent, and no proof of the possibility of deceiving, injuring or defrauding any one.

Defendant's dealings with Carroll and with Arvidson did not end in March of 1950, when he obtained the $15,000. In May of that year he sought unsuccessfully to borrow $5,000 from Carroll representing the money was to be used to cover checks he had drawn upon depositing a $7,000 check which was returned unpaid. He did get from Carroll $3,500 in May and $2,000 in August for the purpose, putatively, of bringing two attorneys from the east to set up the Carroll foundation. They never came.

By October, 1950, Carroll began to have misgivings. Carroll, Mrs. Carroll, and Arvidson drove out to see defendant and ask what this was all about. Defendant was tied up that afternoon with Mr. Schlemmer, could not talk to them, and suggested that they come back. Next, defendant asked Carroll to come out, saying it was very important, that something urgent had happened, that defendant must talk to them, and to bring Arvidson. When they arrived defendant told them he had just received a telegram on the oil lease. Carroll was shown a transcript of the message defendant said he had received over the phone. Later, defendant showed Carroll the telegram and read it to him. Defendant said the person who sent it was his agent, had handled a number of projects for him in Los Angeles, and had handled the oil transaction for defendant. Defendant told Carroll that this telegram was the evidence that the oil lease was safe, that he didn't want to worry them before, so he didn't tell them he had fear in his mind that the deal might be lost, but now there was no question it was entirely safe; Mr. Munro had put up the $3,200,000 to secure the purchase; the balance of the $4,500,000 would be forthcoming shortly. Carroll believed that and continued to have faith and confidence. He continued to work with defendant, attempting to borrow money for payment of defendant's office expenses. It was not until January, 1951, that Carroll lost confidence in the defendant, when Carroll had a talk with Mr. Munro and Munro told him the oil transaction was a fraud.

The telegram, dispatched October 15, 1950, from Los Angeles to defendant at Walnut Creek, California, read as follows: "Oil royalties purchase completed secure and safe total 3278982 and 56. Stop. Turned over all papers Swartz attorney here. Stop. Field production cut which will drop monthly returns from average of seventyfive to sixtyfive. Stop. Next year cut again to fiftyfive and to stay there until 1965. Stop. Check your Richfield operating lease on this. Stop. Could not change name of purchases from West Coast Industrial Engineers to Cairns as requested. Stop. Your attorneys will have to do that. Stop. Swartz and Company certainly think a lot of Munro. Stop. No question or delay about draft. Stop. Congratulations on deal. Stop. You are still just small fry in oil game. Stop. Grace and I are now going on a well earned holiday to South America. Thanks to you and your associates. Stop. Will keep you posted to where we are. Stop. To phone you no success. Stop. Sent letter of confirmation on deal to your office. Stop. Have feeling something wrong up there. Stop. Knowing the importance of keeping this subrosa I worried so I thought I should wire. Stop. Goodbye and good luck. (signed) J C Keeler."

Claire Newport testified that on Friday, October 13, 1950, at his office in San Francisco, defendant told her he wanted her to go to Los Angeles and send a telegram for him. He did not at that time discuss what the wire would contain. He telephoned her the next morning from his home in Walnut Creek, dictating the contents of the telegram over the telephone to her. She was in San Francisco at the time of this telephone conversation between him and her. He suggested that she sign the telegram with the name of Mr. West. She suggested the name of J. C. Keeler, a relative of hers in New Hampshire who was not consulted about the use of his name. She flew to Los Angeles and sent the telegram by Western Union, and returned to San Francisco.

[9–12] Upon the basis of these facts we entertain no doubt that the superior court in and for the city and county of San Francisco had jurisdiction. "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." Penal Code, § 781, as enacted in 1872 and in effect during 1950. Defendant and Miss Newport were in San Francisco when he instructed her to go to Los Angeles and send the telegram. She was in San Francisco when over the telephone he transmitted to her and she received from him the very words to be incorporated in the telegram. She then flew to Los Angeles and on October 15 sent the telegram to him in Contra Costa county. Here we have a chain of events, all interconnected, occurring within a short period of time and constituting a single transaction. We conclude that acts requisite to the consummation of the offense charged occurred in two or more counties, one of the counties being the city and county of

San Francisco. See People v. Megladdery, 40 Cal.App.2d 748, 774–780, 106 P.2d 84. Defendant argues that because the telegram was sent in October, months after defendant got the $15,000 from Carroll in March, 1950, defendant could not have harbored an intent to injure, deceive or defraud Carroll. That argument misses the point. The facts which we have recited warrant an inference that defendant sought by this false telegram to continue to deceive Carroll concerning the oil lease, to postpone the time when Carroll would lose confidence in defendant and meanwhile to get more money from Carroll. He did by means of this telegram bolster and renew Carroll's confidence in him for an appreciable period of time. However, the statute does not require the accomplishment of injury in the sending of a false telegram. It is the sending of such a telegram with knowledge of its falsity "with the intent" to deceive, injure or defraud another which constitutes the crime. Penal Code, § 474. "The expression 'intent to deceive,' used in section 474, is broader than the expression 'intent to defraud,' used in section 470 of the Penal Code, and is not limited to an act whereby one does or may suffer financial loss." People v. Norwoods, 100 Cal. App.2d 281, 288, 223 P.2d 490, 494.

[13] (8) In support of his claim that the district attorney committed prejudicial misconduct in asking leading questions of witnesses, defendant cites some six isolated instances of leading questions asked by the people, objected to by the defendant, and not permitted by the court. That, in a transcript of testimony embracing 665 pages does not impress as formidable, especially in the light of the fact that none of those questions was answered in view of the trial court's rulings, and defendant did not at the time assign the asking of any of the questions as prejudicial misconduct or request the court specially to admonish the jury to disregard those questions or move the court for an order declaring a mistrial. This point is not well taken.

The judgment and order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

PEOPLE v. SULLIVAN et al.

Cr. 771.

District Court of Appeal,
Fourth District, California.
Oct. 3, 1952.

Rehearings Denied Oct. 17, 1952.
Hearing Denied Oct. 30, 1952.

Certain of the defendants were convicted in the Superior Court of San Diego County of violating Criminal Conspiracy Statute, and from orders denying motions for new trial, from orders denying motions in arrest of judgment, and from judgments of conviction, defendants appealed. The District Court of Appeal, Mussell, J., held that indictment sufficiently stated a public offense.

Judgments and orders affirmed.

See also, Cal.App., 242 P.2d 348.

1. Conspiracy ⚷43(1)

In prosecution of city manager, principal stockholder of loan company, and promoter under criminal conspiracy statute, indictment charging that city manager attended official meetings of city council and advised and recommended action to be taken by council in official business affairs, and that while acting as city manager, she and principal stockholder of loan company and promoter unlawfully conspired and agreed that she would use her official position to influence council to enact zoning variance for private gain of city manager, principal stockholder of loan company, and promoter, was sufficient to state a public offense. Pen.Code, §§ 70, 182.

2. Conspiracy ⚷34, 35

Provision of criminal conspiracy statute making it an offense for two or more persons to conspire to commit any act injurious to the public health or public morals, or to pervert or obstruct justice, or due administration of the laws, is not unconstitutional. Pen.Code, § 182, subd. 5.

3. Courts ⚷91(1)

Ruling of the California Supreme Court that a statute is constitutional is binding on District Court of Appeal.

4. Municipal Corporations ⚷123, 231(1)

Officers of municipal corporations, like those of private corporations, are agents of the municipal corporations, and may not use their official position for their own benefit, or for the benefit of any one except municipalities, and may not represent municipal corporations in any contract or transaction in which they are personally interested, for purpose of obtaining an advantage at expense of municipal corporations.

5. Conspiracy ⚷47

Evidence sustained convictions of city manager, principal stockholder of loan company, and promoter under criminal conspiracy statute, on ground that they allegedly conspired to have city manager use her influence with city council to have it approve zoning variance so that they might profit in purchase of realty for subdivision. Pen.Code, §§ 70, 182.

6. Conspiracy ⚷27

An overt act, which must be shown in order to justify conviction under criminal conspiracy statute, need amount to no more than an act showing that conspiracy has gone beyond state of a mere meeting of the minds on attainment of an unlawful object and that action between conspirators as such has begun. Pen.Code, § 182.

7. Criminal Law ⚷510½

Entire conduct of parties, their relationship, acts and conduct during and after alleged conspiracy may be taken into consideration by jury in prosecution for violation of criminal conspiracy statute, in determining sufficiency of corroboration of testimony of alleged accomplices. Pen. Code, § 182.

8. Criminal Law ⚷511(2)

Evidence is sufficient to corroborate testimony of accomplice, if evidence tends in some slight degree at least to implicate defendants, and such evidence need not be strong.

9. Conspiracy ⚷45

In prosecution of city manager, principal stockholder of loan company, and promoter under criminal conspiracy statute, on ground that they allegedly conspired to have city manager use her influence with city council to have it approve zoning variance so that they might profit in purchase of realty for subdivision, court did not err in admitting in evidence transcript of city council meeting of April 10, over objection of principal stockholder of loan company that such evidence was not binding on him because he was not present at meeting and alleged conspiracy had already been completed, where there had been division of net profits from sale of certain realty on February 24, and council had approved zoning variance on March 6, but loan company still had 400 acres of realty under option and there was nothing to indicate any intention to terminate alleged conspiracy. Pen.Code, §§ 70, 182.

10. Witnesses ⚷277(4)

Court properly permitted cross-examination of defendant as to all facts and denials which were necessarily implied from his testimony in chief.

11. Witnesses ⚷277(4)

Where defendant contended that money received by her from loan company in January was a loan to enable her to pay pressing debts, court did not err in permitting cross-examination of defendant as to source of $4,400 deposit in her bank account in April.

12. Criminal Law ⚷1173(2)

In prosecution under criminal conspiracy statute, failure of court to give requested instruction that certain witness was an accomplice as a matter of law was not prejudicial error under evidence raising question of fact for jury whether witness was an accomplice. Pen.Code, § 182.

13. Criminal Law ⚷742(2)

A disputed question of fact as to whether witness was an accomplice, whose testimony must be corroborated, is for jury.

14. Criminal Law ⚷742(2)

Jury must determine whether witness was actual or feigned accomplice where evidence is conflicting.

15. Conspiracy ⚷48

In prosecution of city manager, principal stockholder of loan company, and promoter under criminal conspiracy statute, on ground that they allegedly conspired to have city manager use her influence with city council to have it approve zoning variance so that they might profit in purchase of realty for subdivision, instructions given with reference to section of the Penal Code dealing with solicitation or acceptance of gratuities by public officers or employees were not erroneous. Pen.Code, §§ 70, 182.

16. Criminal Law ⟹863(2)

In prosecution of city manager, principal stockholder of loan company, and promoter under criminal conspiracy statute, on ground that they allegedly conspired to have city manager use her influence with city council to have it approve zoning variance so that they might profit in purchase of realty for subdivision, court did not err in giving additional instruction that jury should render a verdict as to defendants on whose innocence or guilt they were in agreement. Pen.Code, §§ 70, 182.

17. Criminal Law ⟹1202(4)

Where evidence in criminal prosecution in California showed that one of the defendants, who was charged with having previously been convicted of a felony in Massachusetts, was convicted of conspiracy to break and enter a shop in the nighttime with intent to commit larceny, court did not err in instructing jury that prior offense, of which that defendant was convicted in Massachusetts, was, as a matter of law, a felony. G.L. (Ter.Ed.) Mass. c. 266, § 16; c. 274, § 1.

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John Preston, Los Angeles, and Thomas Whelan and Eli H. Levenson, San Diego, for appellant Samuel Fishman.

Richard E. Adams, San Diego, and A. Brigham Rose, Los Angeles, for appellant Doris Sullivan.

David A. Block, San Diego, for appellant Eugene Albertini.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondents.

MUSSELL, Justice.

The defendants and appellants, together with one John J. McKenna, were accused by the Grand Jury of the County of San Diego of the crime of Conspiracy to Commit Acts Injurious to the Public Morals, to Pervert or Obstruct Justice or the due Administration of the Laws, and that the said Doris Sullivan, from April, 1950 to May, 1951, was at all times the duly appointed City Manager of the city of National City, county of San Diego, State of California; that while acting as said City Manager, the said Doris Sullivan attended the official meetings of the duly elected City Council of the said city and in her official capacity presented matters for consideration of, advised and made recommendations to, the said City Council in matters pertaining to the official business affairs of the said city; that while she was so acting as said City Manager of said city, the said Doris Sullivan, Eugene Albertini and Samuel Fishman and John J. McKenna did wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to use the official position of City Manager of the said city for an unlawful purpose, to wit: For the purpose of having the said City Manager, while purporting to represent the interests of the said city, to influence and persuade the said City Council of the said city to officially enact a zoning variance when the enactment of said zoning variance was in fact for the private gain of the said Doris Sullivan, Eugene Albertini and Samuel Fishman and John J. McKenna.

Three overt acts were set forth in the Indictment. In overt act number one it was alleged "that pursuant to said combination, confederacy, agreement and conspiracy and to carry out the objects and purposes of the same, the defendant Samuel Fishman, appeared in the vicinity of 1205 Palm Avenue, National City, California, being the residence of Doris Sullivan, on or about the 5th day of January, 1951, in and at the County of San Diego, State of California, and then and there delivered to the said Doris Sullivan the sum of One Thousand Dollars ($1,000)." Overt act number two: "That pursuant to said combination, confederacy, agreement and conspiracy and to carry out the objects and purposes of the same, the defendant Samuel Fishman, executed a check, drawn on the Home Owners Mortgage and Loan Company, Inc., account in the Security Trust and Savings Bank, San Diego, for the sum of Four Hundred and Thirteen Dollars and Ninety-four cents ($413.94), dated February 24, 1951; check No. 1711 and the said Samuel Fishman on or about the 24th day of February, 1951, at and in the County of San Diego, State of California, delivered the said check to Doris Sullivan with a notation on said check in the following language: 'Balance of share in full, sale of first parcel of Cape Cottage home, $413.94'." Overt act number three: "That pursuant to said combination, confederacy, agreement and conspiracy and to carry out the objects and purposes of the same, the defendant Doris Sullivan, appeared in the City Hall of the City of National City, on or about the 10th day of April, 1951, at and in the County of San Diego, State of California, said appearance being at a duly called meeting of the City Council of the City of National City, County of San Diego, and the said Doris Sullivan while acting in her official capacity as City Manager of the said city, did then and there urge and persuade the said City Council to enact and approve a zoning variance on certain properties in which the said Samuel Fishman and Eugene Albertini were beneficially interested."

A prior felony conviction was also alleged as to the defendant Albertini.

A jury found the defendants Sullivan, Albertini and Fishman guilty and acquitted defendant McKenna. Motions for a new trial and applications for probation were presented by defendants and in each case denied. The trial court fined each defendant $3,500 and they were all sentenced to imprisonment in the state prison.

Numerous grounds of appeal are stated in the briefs, the primary contention being that the Indictment does not state a public offense and that the statute, Penal Code, Sec. 182, Subd. 5, is unconstitutional.

The reporter's transcript herein contains over 2,000 pages and the evidence presented by the prosecution is summarized as follows: The principle parties involved in this proceeding are Doris Sullivan, who was the City Manager of National City; Sam Fishman, who was the principal stockholder of Home Owners Mortgage and Loan Company; Eugene Albertini, a promoter, who was associated with Fishman and John J. McKenna in certain enterprises; and defendant John J. McKenna, a financier, who was found not guilty by the jury. Fred Fishman was the president of Home Owners Mortgage and Loan Company and is the son of Sam Fishman. Sol Blanc is a licensed real estate broker, employed by Home Owners Mortgage and Loan Company in December, 1950.

Fred Fishman testified that he held 500 shares of the outstanding stock of the Home Owners Mortgage and Loan Company and the remaining 14,500 shares were held by his father; that the loan company had an agreement with a syndicate composed of Sam Fishman, Eugene Albertini and John McKenna whereby they were to obtain options on property in National City; that he sent Sol Blanc to National City to get the options; that one of them, executed on or about January 4, 1951, and obtained by Blanc, was on 10 acres, to be purchased from a Mr. Taylor; that this was an option to purchase for $17,500; that this property was purchased by the loan company and resold to Cape Cottage Homes for $35,000; that the net profit to the syndicate from this sale was $9,600; that the parties who made a profit from the transaction were the defendants Doris Sullivan, Sam Fishman, Eugene Albertini and John J. McKenna; that he was informed that Doris Sullivan had joined the syndicate just prior to the 24th of February, 1951, and he was told that she was the fourth party for the distribution of the profits; that he kept the records and distributed the profits from the Taylor transaction; that at the instance of his father he prepared People's exhibit three which was a check drawn on the account of the mortgage and loan company on Security Trust and Savings Bank, payable to cash, for $1,000, signed by S. E. Fishman, with a notation "loan to Doris Sullivan" and endorsed by S. E. Fishman; that he also prepared People's exhibit four, a check drawn on January 15, 1951, on the account of the mortgage and loan company, on the same bank, payable to cash in the sum of $1,000, signed by S. E. Fishman, and also bearing the notation "loan to Doris Sullivan; that People's exhibit five was a check drawn on the same bank, on the same account, dated February 24, 1951, payable to cash in the sum of $413.94; that it was signed by S. E. Fishman and contained a notation "balance of share in full. Sale of first parcel to Cape Cottage Homes, $413.94"; that the signature on the back of this check was that of defendant Doris Sullivan. The witness also identified records showing that Eugene Albertini received a check for $500, advance against profits from sale of the Taylor property, and later received the sum of $1,931.44 of his share in full; that McKenna received $2,433.94 from the sale; that the syndicate had options on approximately 400 acres but the Taylor property was the only one that resulted in a sale.

Sol Blanc testified that he obtained the option on the Taylor property; that in a conversation during December, 1950, with Fred and Sam Fishman, Albertini and McKenna, he received instructions from Sam Fishman that he was to go out and get options in National City and that Doris Sullivan would assist him; that the Taylor property was R-1-A agricultural property and that he understood that defendant Sullivan would take care of the zone variances if it became necessary; that defendant Sullivan told him that she would take care of the zoning variance; that he went with defendants Sam Fishman and John McKenna to defendant Sullivan's house during the first week in January, 1951; that defendant Fishman stated that he was to give defendant Sullivan $1,000 and that he wanted to be sure that he had the cash; that on the return from this trip, defendant Sam Fishman stated to McKenna that he had given Doris Sullivan $1,000 and that "he had her where he could hold her in the future"; that Sam Fishman told him that Mrs. Sullivan would annex property or rezone in National City; that she had power over the planning commission and the city council; that he had a conversation with Mrs. Sullivan and a Mr. Gordon in Mrs. Sullivan's office concerning the zoning of this property; that Mr. Gordon was a buyer for an organization known as the Cape Cottage Homes corporation; that he asked Mrs. Sullivan about the rezoning and she assured him that it would be done; that some time in January, 1951, he met Taylor, the owner of the Taylor property, at defendant Sullivan's office in National City, where she had the petition for variance of the property ready; that he later made another trip to defendant Sullivan's house and at this time defendant Fishman showed him another $1,000 which he was taking to her; that when they arrived at the house, Fishman took Mrs. Sullivan to another room and later informed Blanc that he was tired of giving her money; that it was the last time he going to give her any money and when asked how much he had given her to that date, he said "$2,000"; that Fishman said that if there were any zone variances that worried Blanc that he, Fishman, would see that the property was rezoned; that in February the loan company refused to pay his commissions and he went to Mrs. Sullivan and was informed by her that she had nothing to do with the agreement between Blanc and Fishman; that he then informed Mrs. Sullivan that he knew she was going to receive compensation for the sale of the Taylor acreage and defendant Sullivan then said "You wont be able to prove it. I will term it hearsay. I have studied law and I know how to protect myself"; that in a conversation with the defendant Sullivan about what she had done to be entitled to a share in the Taylor profits she said "If it wasn't for my getting the planning commission or council to rezone it, it would still be out there unzoned."

Mr. Taylor testified that he went with Blanc to sign a petition for variance; that the petition was handed to him by a man named Simmons (secretary to defendant Sullivan) and notarized by Oscar L. Harkey (also in defendant Sullivan's office); that he attended a council meeting on January 8, 1951, at which Doris Sullivan was present and at which the question of zone variance was discussed.

Robert Gordon, who was associated with a construction corporation which owned the Cape Cottage Homes, testified that when the property was purchased the corporation felt that there would be no objection to the zoning of the property for multiple dwellings as there was no objection from any of the members of the commission nor the council; that he had been told by defendant Albertini to attend a council meeting on January 9th and that they could go ahead and purchase the property; that he would not have made the purchase if he had any reason to believe that the property would not be rezoned for multiple dwellings.

Edwin Campbell, city attorney of National City, testified that on April 10, 1951, he attended a meeting of the city council where the question of the adoption of the final map of the Taylor property was discussed and a motion was made to adopt it. Campbell made an objection and stated that it was necessary that there be an agreement between the subdivider and the water company before the city could accept the final map. Defendant Doris Sullivan then recommended the adoption of the final map.

Mrs. Alston, city clerk, testified that during the time Mrs. Sullivan was city manager her recommendations and proposals were generally accepted by the council and that everything that came before the council went through defendant Sullivan; that she had received instructions from Mrs. Sullivan to the effect that all land transactions were to be handled in the city manager's office; that Mrs. Sullivan did not disclose to members of the city council or planning commission that she had a private interest in the Taylor transaction.

The Mayor of National City testified that he was a member of the city council prior to June, 1951; that Mrs. Sullivan appeared at numerous times before the council and gave advice concerning various administrative matters and that as to most matters the council accepted her recommendations; that as to matters of zone variances which were brought before the council, they relied on the planning commission's recommendations; that if it had been brought to his attention that Mrs. Sullivan was to make a substantial profit on the Taylor property, that he would not have voted for the zoning variance.

An investigator for the District Attorney testified that he had a conversation with the defendant Sam Fishman on or about September 5th in which Fishman stated that he knew defendant Sullivan; that he was interested in obtaining land in and around National City in connection with housing prejects; that he had made two loans to Mrs. Sullivan; that he did not split any moneys with Doris Sullivan and that he had not been interested with Mrs. Sullivan in any real estate transactions in National City; that he had a conversation with defendant Albertini in which he asked Albertini about the division of the profits with Mrs. Sullivan; that Albertini stated that he was interested in promoting multiple dwelling housing in National City; that he had seen Mrs. Sullivan and talked to her; that he had not offered her any money for any services that she had given in the past or would give in the future and that as far as he was concerned, Doris Sullivan had no interest in any real property transaction in which he or Gordon were concerned.

A copy of an ordinance of National City defining the powers and duties of the city manager was introduced in evidence. The pertinent provisions of the ordinance are as follows:

> "Section 2. The City Manager shall be the administrative head of the City Government under the direction and control of the Council, except as otherwise provided by Ordinance. The City Manager shall be responsible to the City Council for the efficient administration of all the affairs of the City which are under the City Manager's control. In addition to the City Manager's general powers as administrative head and not as a limitation therein, it shall be the duty and the City Manager shall have power:
>
> "1. To see that all laws and ordinances are duly enforced.
>
> "3. To exercise control over all departments and divisions of the City Government and over all appointive officers and employees thereof subject to the approval of the City Council, except as herein provided.
>
> "4. To attend all meetings of the Council and its committees unless ex-

> cused therefrom by the Council or the committee * * *
>
> "5. To recommend to the Council for adoption such measures and ordinances as are deemed necessary or expedient.
>
> "10. To make investigations into the affairs of the City or any department or division thereof or any contract, or the proper performance of any obligation running to the city."

The foregoing summary states, in substance, the testimony and evidence introduced by the prosecution to prove that the four defendants entered into a conspiracy to purchase or option land in National City, to obtain any necessary rezoning of the property through the use of the official position of the city manager and to sell the property at a profit for themselves in violation of section 182 of the Penal Code.

[1, 2] The first contention of appellants is that the Indictment does not state a public offense and that Penal Code, section 182, subdivision 5, is unconstitutional. We conclude that this contention is untenable.

The statute, so far as is here applicable, provides as follows:

> "(Criminal conspiracy: Acts constituting: Punishment: Venue.) If two or more persons conspire:
>
> "1. To commit any crime;
>
> * * * * * *
>
> "5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws",

they are punishable as stated in the section. The constitutionality of this statute was directly passed upon in the case of Lorenson v. Superior Court, 35 Cal.2d 49, at pages 59, 60 and 61, 216 P.2d 859, at page 865, where the court said:

> "Section 182 defines as criminal conspiracy acts committed with the purpose '* * * to pervert or obstruct justice, or the due administration of the laws.' Generally speaking, conduct which constitutes an offense against public justice, or the administration of law includes both malfeasance and nonfeasance by an officer in connection with the administration of his public duties, and also anything done by a person in hindering or obstructing an officer in the performance of his official obligations. Such an offense was recognized at common law and generally punishable as a misdemeanor. Now, quite generally, it has been made a statutory crime and, under some circumstances, a felony. Burdick, Law of Crimes (1946), vol. 1, p. 382 et seq.; 20 Cal.Jur. 347–354.
>
> "In California, the statutes relating to 'Crimes Against Public Justice' are found in Part I, Title VII, of the Penal Code. Bribery, escapes, rescues, perjury, falsifying evidence, and other acts which would have been considered offenses against the administration of justice at common law are made criminal by legislative enactment. Section 182, subdivision 5, is a more general section making punishable a conspiracy to commit any offense against public justice. The meaning of the words 'to pervert or obstruct justice, or the due administration of the laws' is easily ascertained by reference either to the common law or to the more specific crimes enumerated in Part I, Title VII. A conspiracy with or among public officials not to perform their official duty to enforce criminal laws is an obstruction of justice and an indictable offense at common law. People v. Tenerowicz, 266 Mich. 276, 253 N.W. 296. * * *
>
> "To comply with the constitutional requirement of due process of law, the crime for which a defendant is being prosecuted must be clearly defined, but it is only necessary that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them. 'To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited.'

People v. Smith, 36 Cal.App.Supp.2d 748, 752, 92 P.2d 1039, 1042.

* * * * * *

"Considering the well-settled meaning at common law of the words 'to pervert or obstruct justice, or the due administration of the laws', the other and more specific provisions in the Penal Code concerning 'Crimes Against Public Justice', and the relative certainty of words employed in statutes which have been held valid, it cannot be said that subsection 5 of section 182 of the Penal Code is unconstitutional. For substantially the same reasons, the indictment against Lorenson is not vague, indefinite, or uncertain and it complies with the statutory requirement for such an accusation. Section 952 of the Penal Code allows an indictment to be stated 'in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.' Lorenson was indicted in the terms of the 'enactment describing the offense', and the grand jury has fairly informed him of the acts of which he is accused to the extent which will enable him to defend himself. People v. Emmons, 13 Cal.App. 487, 492, 110 P. 151."

In People v. Cossey, 97 Cal.App.2d 101, 110, 217 P.2d 133, this court held that the offense designated in section 182 of the Penal Code may be to do a number of things which are specifically set forth in subdivisions, 1, 2, 3, 4 and 5 of the section and that the gist of the charge is conspiracy and all of the objects of such a conspiracy may be the object of one charge. In People v. Johnson, 22 Cal.App. 362, 364, 134 P. 339, it was held that to do all of the things enumerated in different subdivisions of the section amounts to a single offense only. And in People v. MacPhee 26 Cal.App. 218, 221, 146 P. 522, it is held that the language of section 182 of the Penal Code is inclusive and elastic enough to permit the framing of an indictment charging a conspiracy to do or permit the doing of any or all of the illegal acts referred to therein. See, also, People v. Gilbert, 26 Cal.App.2d 1, 6, 78 P.2d 770. When we examine the indictment in the instant case in the light of these decisions, it is apparent that the defendants herein were fully advised in the charging part of the indictment of the accusation that the defendant Doris Sullivan attended the official meetings of the city council of National City, advised and made recommendations to the council in matters pertaining to the official business affairs of the city, and that while acting as city manager, the said Doris Sullivan and the other defendants did wilfully, unlawfully and feloniously conspire and agree together to use the official position of the city manager for an unlawful purpose, to wit, for the purpose of having the city manager, while purporting to represent the interests of said city, to influence and persuade the city council to officially enact a zoning variance when said enactment was in fact for the private gain of said defendants.

Section 70 of the Penal Code provides as follows:

> "(Solicitation or acceptance of gratuities by public officers or employees.) Every executive or ministerial officer, employee or appointee of the state of California, county or city therein or political subdivision thereof, who knowingly asks, receives or agrees to receive any emolument, gratuity or reward, or any promise thereof excepting such as may be authorized by law for doing an official act, is guilty of a misdemeanor."

In the instant case the evidence shows that defendant Sullivan, as city manager, was required by law to see that all laws and ordinances of the city were duly enforced, to attend all council meetings and to recommend for adoption such measures and ordinances as were deemed necessary or expedient. It was her official duty to present the petition for variance to the planning commission and city council. The record contains substantial evidence showing that for the performance of these official acts she unlawfully received substantial sums of money pursuant to agreement with her codefendants. Under such circumstances the evidence is sufficient to show a violation of section 70 of the Penal Code and the indictment sufficiently charges a conspiracy to violate section 182 of the same code. The proven acts and conduct of the defendants constituted an offense against public justice and the administration of the law as defined in Lorenson v. Superior Court, supra.

[3] Appellants rely upon the case of Musser v. State of Utah, 333 U.S. 95, 68 S.Ct. 397, 92 L.Ed. 562. In that case the Supreme Court considered the constitutionality of a Utah statute, UCA 1943, 103–11–1, under which the defendants were convicted of conspiracy "to commit acts injurious to public morals * * *". The statute defined conspiracy: "(5) To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws * * *." The defendants were charged with the crime of conspiracy to counsel, advise and practice polygamous or plural marriage. The court did not presume to give an interpretation as to what the statute included and stated that standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order; that statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt and may be unconstitutional in not advising defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused. The court further said:

> "We recognize that the part of the statute we have quoted does not stand by itself as the law of Utah but is part of the whole body of common and statute law of that State and is to be judged in that context. * * * What the statutes of a State mean, the extent to which any provision may be limited by other Acts or by other parts of the same Act, are questions on which the highest court of the State has the final word. The right to speak this word is one which State courts should jealously maintain and which we should scrupulously observe."

The court then restored the controversy to the Supreme Court of Utah and that court, in State v. Musser, 223 P.2d 193, held that the statute was void for vagueness and uncertainty under the Fourteenth Amendment to the Federal Constitution. Our Supreme Court has ruled on the question of the constitutionality of a similar conspiracy statute in Lorenson v. Superior Court, supra, and that ruling is binding upon us. Furthermore, in the instant case the defendants were fully advised as to the nature of the offense with which they were charged, which was not the situation in the Musser case.

[4] Officers of a municipal corporation, like those of private corporations, are agents of the corporate body, and may not use their official position for their own benefit, or for the benefit of any one except the municipality itself, and may not represent the corporation in any contract or transaction in which they are personally interested in obtaining an advantage at the expense of the corporation, for in such cases the city would not have the benefit of their unbiased judgment. 18 Cal.Jur., sec. 253, p. 978; Capital Gas Co. v. Young, 109 Cal. 140, 143, 41 P. 869, 29 L.R.A. 463. Proof of the private interest of the defendant Sullivan in the passage of the zone variance in question and her presentation of the variance petition for her own advantage establishes malfeasance in connection with the administration of her public duties.

[5, 6] Appellants next argue that the verdict of the jury is contrary to the law and the evidence and argue that the handing of certain sums of money to Doris Sullivan did not constitute an overt act in furtherance of the conspiracy. This argument is without merit. The acts of the conspirators in delivering to the city manager the sum of $1,000 on one occasion, and, as alleged in the second overt act, the sum of $413.94 on another occasion, were acts in furtherance of the conspiracy. These payments assured the accomplishment of the object of the conspiracy to use the official position held by defendant Sullivan for the obtaining of a zoning ordinance. An overt act need amount to no more than an act showing that the conspiracy has gone beyond the state of a mere meeting of the minds upon the attainment of an unlawful object and that action between conspirators as such has begun. People v. George, 74 Cal.App. 440, 456–457, 241 P. 97.

It is contended that proof that defendant Sullivan requested the city council on April 10, 1951, to accept the final subdivision map is not proof of the third overt act alleged. In this overt act it was alleged that appellant Sullivan in her official capacity as city manager urged and persuaded the city council to enact and approve a zoning variance. The accomplishment of the purpose of zone variance was effected by the approval of the subdivision map.

[7, 8] It is contended that the witnesses Sol Blanc and Fred Fishman were accomplices and that there was no corroboration of their testimony. We need not pass upon the question of whether these parties were accomplices because their testimony was in fact amply corroborated. The checks showing the distribution of the proceeds of the sale of the Taylor property, the testimony of the various city officials and members of the planning commission and city council as to the activities of the city manager in connection with the Taylor property, the false and equivocal statements of the defendants Sam Fishman and Eugene Albertini to the investigator for the District Attorney's office, furnish adequate corroboration of the testimony of the witnesses Blanc and Fishman. The entire conduct of the parties, their relationship, acts and conduct during and after the crime may be taken into consideration by the jury in determining the sufficiency of the corroboration. People v. King, 33 Cal. App.2d 538, 542, 92 P.2d 510; People v. Ross, 46 Cal.App.2d 385, 395, 116 P.2d 81. The evidence is sufficient if it tends in some slight degree at least to implicate the defendants. It need not be strong. People v. Negra, 208 Cal. 64, 69, 280 P. 354; People v. Malone, 82 Cal.App.2d 54, 61, 185 P.2d 870.

[9] Appellants contend that the trial court erred in its decision on questions of law arising during the trial. In this connection it is first argued that the court erroneously admitted in evidence a transcript of the city council meeting of April 10, 1951. Appellant Fishman contends that this evidence was not binding upon him because he was not present at the meeting and he argues that the alleged conspiracy had been terminated and completed; that the division of the net profits from the sale of the Taylor property was made February 24, 1951, and that the action of the city council approving the recommendation of a zone variance was taken March 6, 1951. The record shows that the "syndicate" had about 400 acres of land under option and there is nothing to indicate that there was any intention to terminate the conspiracy on the sale of the Taylor property. Under the circumstances shown, this evidence was admissible.

[10] Appellant Fishman contends that his cross-examination was improper in that it exceeded the scope of the direct examination in which Fishman was asked by his counsel if he had made certain statements to the witness Sol Blanc concerning a combination of partners which included defendant Sullivan. The prosecution was permitted, over objection, to cross-examine Fishman at length concerning testimony he had previously given before the Grand Jury concerning the partnership and division of profits. The trial court limited the cross-examination to the time and events concerning the conversations which were denied by Fishman on direct examination. It was proper to permit cross-examination of Fishman as to all facts and denials which were necessarily implied from his testimony in chief. People v. Kynette, 15 Cal. 2d 731, 752–753, 104 P.2d 794.

[11] It is claimed that the court erred in permitting cross-examination of defendant Sullivan as to the source of a deposit in her bank account made on about April 27,

1951, of the sum of $4,400 in currency. The cross-examination was proper since it was the contention of defendants that Mrs. Sullivan "borrowed" certain sums of money in January, 1951, in order to pay certain pressing debts. Evidence of defendant Sullivan's financial condition was presented by the defense and the cross-examination was proper under the circumstances. We find no prejudicial error in the rulings of the trial court on the admission or rejection of this evidence.

[12–14] The next contention is that the court misdirected the jury in matters of law in instructing the jury, and in its failure to give instructions requested by the defendants. Appellant Sullivan contends that the court erred in failing to give an offered instruction that Sol Blanc was an accomplice as a matter of law. Where, as here, the question was left to the jury of whether Blanc was an accomplice, it was one of fact and there was no prejudicial error in refusing to give the requested instruction. Fred Fishman testified, on cross-examination, that he did not participate in the conspiracy and that he did not consider Sol Blanc a fifth member of the syndicate. This was also admitted by defendant Sam Fishman. As was said in People v. Griffin, 98 Cal.App. 2d 1, 22, 219 P.2d 519, 532:

> "It is settled law that if there is a disputed question of fact as to whether a witness was or was not an accomplice, the jury must decide. (Citing cases.) Likewise, it is for the jury to determine, when the evidence is conflicting, whether a witness was an actual or a feigned accomplice. (Citing cases.) As pointed out in People v. Gibbs, 87 Cal.App. 177, 261 P. 1057, an accomplice usually comes upon the stand admitting his complicity in the commission of the offense. But where complicity is denied it becomes a question for the jury when the facts are disputed or susceptible of different inferences."

Appellant Sullivan also contends that cautionary instructions in regard to the testimony of an accomplice should have been given; that the court failed to instruct the jury that the testimony of an accomplice must be corroborated in order to sustain a conviction as required by Penal Code § 1111, and that she was entitled to an instruction that corroborative evidence which raises no more than grave suspicion of guilt is insufficient upon which to base a conviction. These contentions are without merit. The trial court gave the required cautionary instruction and also properly instructed the jury on the sufficiency of the corroboration required of the testimony of an accomplice and the manner in which it must be supplied.

[15] Appellant Fishman complains of the instructions given to the jury concerning public officers. These instructions contain the language of section 70 of the Penal Code, supra, and the jury was told that the evidence must convince them beyond a reasonable doubt of the following three necessary elements or facts: 1. That the defendant Doris Sullivan was a public official at the time of the alleged offense; 2. That there was an agreement, either formal or through a tacit mutual understanding between or among the defendants; that the defendant Doris Sullivan as such public official did aid, assist or influence or did attempt to aid, assist or influence, any matter involving real estate within the city of National City for the private gain of one or more of the defendants; and 3. That one or more of the defendants committed one or more of the overt acts alleged in the indictment and that said defendants committed said acts with a specific intent to commit the crime here charged. In view of what we have heretofore said concerning the sufficiency of the indictment and the statement of an offense therein, the instructions given in this connection were not erroneous.

[16] Appellants next contend that it was error for the court to instruct the jury, after their return for additional instructions, that they should render a verdict as to the defendants on whose innocence or guilt they were in agreement. The trial court instructed the jury that in conspiracy cases, the case must be consid-

ered as to each defendant and that if they found a criminal combination to exist they should determine which, if any, of the defendants were parties to such conspiracy. We have examined the other instructions given and refused and conclude that the trial court fully and fairly instructed the jury and that no error was committed by the court in instructing the jury.

[17] Appellant Albertini contends that the court erred in its instruction to the jury that the prior offense of which he was convicted in Massachusetts was, as a matter of law, a felony, and that the portion of the judgment which finds the defendant Albertini had suffered a prior felony conviction should be reversed. The record shows that the conviction involved was of "the offense of conspiracy to break and enter in the night time the shop * * * with intent therein to commit larceny, a felony." The Massachusetts statutes applicable and then in effect, December 16, 1934, provided as follows: "§ 1. Felony and Misdemeanor.—A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors." Ann.Laws of Mass. vol. 9, chap. 274, sec. 1. "§ 16. Breaking in Night Time, Building or Ship.—Whoever, in the night time, breaks and enters a building, ship or vessel, with intent to commit a felony, shall be punished by imprisonment in the state prison for not more than twenty years." Ann.Laws of Mass. vol. 9, chap. 266, sec. 16. Under these statutes the prior offense charged was a felony. Wax v. McGrath, 255 Mass. 340, 151 N.E. 317. Under California law such a charge is a felony unless and until punishment in a county jail is decreed by the court. People v. Williams, 27 Cal.2d 220, 222, 163 P.2d 692. Under such circumstances the instruction was properly given.

Application for admission to bail pending appeal in the instant action were heretofore made by defendants Doris Sullivan and Sam Fishman. These applications were denied by this court for the reasons set forth in People v. Sullivan, 110 Cal.App.2d 4, 242 P.2d 348; In re Fishman, on Habeas Corpus, 109 Cal.App.2d 632, 241 P.2d 605; and In re Fishman, 109 Cal.App.2d 634, 241 P.2d 603. In view of our conclusion that the judgments herein must be affirmed, the subsequent applications for admission to bail filed herein by each of the defendants are denied.

The judgments and the orders denying motions for a new trial, and denying motions in arrest of judgment, are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

FRAENKEL v. WILLIAMSON.*

Civ. 14961.

District Court of Appeal, First District,
Division 2, California.

Oct. 10, 1952.

Rehearing Denied Nov. 8, 1952.

Hearing Granted Dec. 8, 1952.

Action by Carl M. Fraenkel, doing business as the Matthis Company, against Gordon F. Williamson, for balance allegedly due under written contract for construction of grain elevator. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., sustained demurrer and entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Goodell, J., held that, assuming plaintiff was contractor, demurrer on ground that complaint failed to allege that plaintiff had been duly licensed contractor was properly sustained, but permission to amend complaint to allege that plaintiff was exempted from licensing by reason of fact that said construction was incidental to farming or agriculture was improperly denied.

Judgment reversed; cause remanded with directions.

Licenses 🔑39.44

In action for balance allegedly due under written contract for construction of grain elevator, where it was assumed that plaintiff was contractor, demurrer on ground that complaint failed to allege that plaintiff had been duly licensed as contractor was properly sustained, but permission to amend complaint to allege that plaintiff was exempted from licensing by reason of fact that said construction was incidental to farming or agriculture was improperly denied. Business and Professions Code, §§ 7028, 7031, 7049.

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* Subsequent opinion 256 P.2d 569.

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Jack Flinn, San Francisco, Carroll F. Jacoby, San Francisco, for appellant.

John W. Hutton, King City, for respondents.

GOODELL, Justice.

This is an appeal from a judgment for defendant after the sustaining of a demurrer to the complaint without leave to amend.

There are three companion cases, Cal. App., 248 P.2d 533, in which the same plaintiff sued other defendants in similar circumstances where the plaintiff's demands are for $12,259.01, $2,633.45, and $5,064.46, respectively, and the court made similar rulings. It has been stipulated that the decision therein will depend on the court's action herein.

This action is based on a written contract for the construction of a grain elevator for respondent by appellant on the basis of "cost plus ten per cent." The estimated price stated in the contract was $12,383.04. During the progress of construction respondent paid $15,286.82 to appellant on account. On completion appellant demanded a total of $18,720.36 for the work, and on respondent's refusal to make any further payment appellant brought this action to recover the claimed balance of $3,433.54, plus interest, attorneys' fees and costs.

The complaint alleges that plaintiff performed the contract as an engineer. Defendant contends that the contract, pleaded as part of the complaint, shows that he did the work as a contractor, and that he does not allege, and cannot allege, that he held a contractor's license. The court adopted this view, which was the sole basis for its ruling.

Section 7028 of the Business and Professions Code provides: "It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor, *unless such person is particularly exempted from the provisions of this chapter.*" (Emphasis added.)

Section 7031 provides: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract *for which a license is required by this chapter* without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract." (Emphasis added.)

For the purpose of the discussion it will be assumed that the plaintiff's services, or at least a substantial part of them, were rendered as a contractor.

The position of appellant is that whatever he agreed to do, and did, was within the exemption provisions of § 7049 reading as follows: *"This chapter does not apply to any construction or operation incidental* to the construction and repair of irrigation and drainage ditches of regularly constituted irrigation districts, reclamation districts, or *to farming,* dairying, *agriculture,* viticulture, horticulture, or stock or poultry raising, or clearing or other work upon land in rural districts for fire prevention purposes, except when performed by a licensee under this chapter." (Emphasis added.)

We must agree with respondent that "The complaint, as it stands, contains no reference to farming." Although it is alleged that plaintiff built a grain elevator, there is nothing in the complaint to show that the elevator was located, or to be located, on defendant's farm or connected or identified with farming operations, or any similar allegations to show that it was "incidental" to farming or agriculture. Such allegations are of course necessary to show, as a matter of pleading, that plaintiff required no contractor's license while on such construction work, and to avoid the requirement of § 7031 that a license must be alleged. For these reasons the demurrer was properly sustained. But it by no means follows that the order denying leave to amend was proper, since it does not appear on the face of the complaint that it is not susceptible of amendment in the respects just outlined.

The language of § 7049 exempts "any construction or operation incidental to * * * farming, * * * agriculture" etc. The case of Kelly v. Hill, 104 Cal. App.2d 61, 230 P.2d 864, so construed that section, and with that construction we wholly agree. The Supreme Court denied a hearing. In the case of Bowline v. Gries, 97 Cal.App.2d 741, 218 P.2d 806, where the question was, as it is here, whether a contractor's license was required, the same court had put a different construction on § 7049 but in Kelly v. Hill the court, see 104 Cal.App.2d 62, 230 P.2d 865, reconsidered what it had first said in the Bowline case.

In fairness to the trial judge it should be noted that the record shows that when this demurrer was argued Bowline v. Gries was cited and relied on by respondent (*as it still is*) and presumably his ruling was based on that case, where a similar question was involved. The trial court did not then have the benefit of the discussion in Kelly v. Hill, since that case was not decided until several months later.

If the complaint when amended alleges the matters suggested above, showing the grain elevator to be designed for a use which is incidental to farming or agriculture, a denial thereof will raise a clear-cut issue on that question which can then be decided, as it should be, on the merits rather than by a ruling on demurrer.

There is no reason to discuss any other points.

The judgment is reversed and the cause remanded with the direction to the Superior Court to enter an order permitting the plaintiff to amend his complaint within a reasonable time to be fixed by said Court.

NOURSE, P. J., and DOOLING, J., concur.

Carl M. FRAENKEL, doing business as The Matthis Company, Plaintiff and Appellant, v. J. G. TRESCONY and Marie G. Trescony, Defendants and Respondents.

Carl M. FRAENKEL, doing business as The Matthis Company, Plaintiff and Appellant, v. Lucio ECHENIQUE, Patricia Echenique, Ricardo Echenique, Francis D. Echenique and Luis Echenique, individually and doing business as Echenique Co., Defendants and Respondents.

Carl M. FRAENKEL, doing business as The Matthis Company, Plaintiff and Appellant, v. ANSBERRY CO., a corporation, and Adrian Ansberry, Defendants and Respondents.*

Civ. Nos. 14962–14964.

District Court of Appeal, First District, Division 2, California.

Oct. 10, 1952.

Rehearings Denied Nov. 8, 1952.

Hearing Granted Dec. 8, 1952.

Jack Flinn, San Francisco, Carroll F. Jacoby, San Francisco, for appellant.

John W. Hutton, King City, for respondents.

PER CURIAM.

The facts and issues in these proceedings are similar to those involved in the case of Fraenkel v. Williamson, Cal.App., 248 P.2d 531. For the reasons therein stated the judgment in each of the three above-entitled causes is reversed and the cause remanded with the direction to the Superior Court to enter an order permitting the plaintiff to amend his complaint within a reasonable time to be fixed by said Court.

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* Subsequent opinions 256 P.2d 573, three cases.

113 Cal.App.2d 409

KIRKPATRICK v. SMITH et al.

Civ. 18979.

District Court of Appeal, Second District, Division 3, California.

Sept. 30, 1952.

Action by Kenneth Kirkpatrick against Marshall Adams Smith and another for monies due under joint adventure contract for construction and sale of house. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment for plaintiff, and plaintiff appealed on question of amount due. The District Court of Appeal, Vallée, J., held that in arriving at loss sustained under contract it was proper to include not only monies advanced by parties, but agreed value of tangible asset contributed to venture by defendant.

Affirmed.

1. Joint Adventures ⟹4(1)

Unless agreement fixes a different ratio, joint adventurers participate equally in profits and losses, irrespective of any inequality in amounts each contributed to capital. Corporations Code, § 15018.

2. Joint Adventures ⟹4(2)

Under contract between joint adventurers for construction and sale of a house providing that sole compensation of party was his share of expected profits, and that in event of loss each party was to pay one-half thereof, formula for distribution was to be applied only in case of profit, and in arriving at losses sustained, it was proper to include monies advanced by parties and agreed value of land contributed by defendant. Corporations Code, § 15018.

◆

Warren White, Los Angeles, for appellant.

Roger W. Young, Long Beach, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment awarding him $2,734.27, with interest, in an action against his coadventurer seeking monies due under a contract. The joint venture was unsuccessful, and the amount awarded plaintiff represents his share of the distributable proceeds after deduction of the loss sustained.

On November 12, 1947, plaintiff and defendant Marshall Adams Smith entered into a written contract to construct a house upon land owned by defendant, which, upon completion, was to be sold and the profits shared equally between them. Plaintiff, a contractor, was to supervise and direct its construction, and defendant was to have charge of its sale. The agreed value of the land was $8,500. A loan was secured upon the land, and the proceeds used in constructing the house. It was agreed that if the proceeds were insufficient to complete the house, each of the parties would pay half of the amount necessary therefor. During the course of construction, plaintiff advanced $7,204.61, and defendant advanced $7,983.58, toward construction costs.

Paragraph 6 of the contract provides:

> "Neither party hereto shall be entitled to any wages or remuneration for services rendered hereunder, his sole compensation being his share in the expected profits, and in the event of loss the parties hereto shall each pay, and each hereby agrees to pay, one-half thereof. * * *"

Paragraph 8 provides that the proceeds derived from the sale of the property be used and divided as follows:

> "First: to pay the costs and expenses of sale;
>
> "Second: to pay the balance then due on said loan if the same has not been assumed by the buyer;
>
> "Third: to repay to each party all advances made in connection with the erection and construction of said residence, on account of loan payments, interest thereon, taxes and other items necessary and paid by the parties and not repaid from the proceeds of said loan;
>
> "Fourth: to pay to first party [defendant] the sum of $8,500.00, as and for the land above mentioned; and
>
> "Fifth: the balance shall be divided equally between the parties; *provided,* however, that if said balance shall be

> less than $2,000.00, then and in that event the sum to be paid first party for said land shall be reduced by such sum that the amount paid second party [plaintiff] as his share of the proceeds from this venture shall be the sum of $1,000.00."

The property was sold for $32,000, a loss of $8,940.68. After repayment of the loan and miscellaneous expenses, the net proceeds from the sale amounted to $14,747.51, which sum has been retained by defendant. Plaintiff sued to recover $7,204.61, the amount advanced by him for construction costs, and an additional $1,000 alleged to be the minimum profit to which he was entitled under the contract.

In construing the contract, the trial judge stated there was no conflict between paragraphs 6 and 8, and that the former was controlling; that paragraph 6 not only provided each party pay half of any loss, but also that neither party should be paid for "services rendered hereunder, his sole compensation being his share of the expected profits"; that paragraph 8 provided for the distribution of the profits, and that it was apparent therefrom the parties intended to include the agreed value of the land as a reimbursable item before dividing the profits, and there was no reason why it should not be included in computing the loss. Accordingly, he found that a total of $23,688.19 was expended in cash and property on behalf of the joint venture; defendant contributed $16,483.58, consisting of $7,983.58 cash and real property of the agreed value of $8,500; plaintiff contributed $7,204.61 cash; the venture sustained a loss of $8,940.68 and each party must bear half thereof, or $4,470.34. He concluded that plaintiff is entitled to $2,734.27 and defendant is entitled to retain the balance of $12,013.24.

Plaintiff urges that the trial court erred in computing the proportionate shares of the loss each party was to bear, arguing that paragraph 6 contains general provisions, while paragraph 8 contains specific ones in that it "sets out a step by step formula" to be followed in the event of a sale, and, being a specific provision, is controlling; that there was a sale, and under the "step by step formula" of paragraph 8 he is entitled to the $7,204.61 advanced by him before deduction of the $8,500. With this we cannot agree.

[1] The liability of a joint adventurer for a proportionate part of the losses sustained by a joint venture is, of course, affected by the terms of the agreement between the partners. Unless their agreement fixes a different ratio, however, it is the general rule that they participate equally in the profits and losses, irrespective of any inequality in the amounts each contributed to the capital employed in the venture, with the losses being shared by them in the same proportions as they share the profits. Campagna v. Market Street Ry. Co., 24 Cal.2d 304, 308, 149 P.2d 281; Griggs v. Clark, 23 Cal. 427, 429; Irer v. Gawn, 99 Cal.App. 17, 24, 277 P. 1053; Arnold v. Humphreys, 138 Cal.App. 637, 643, 33 P.2d 67; Parker v. Trefry, 58 Cal.App.2d 69, 75, 136 P.2d 55; Martter v. Byers, 75 Cal.App.2d 375, 383, 171 P.2d 101; Fitzgerald v. Provines, 102 Cal.App.2d 529, 536, 227 P.2d 860; 14 Cal. Jur. pp. 760, 762, secs. 2, 3. The principle is codified in section 15018 of the Corporations Code, as follows: "The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules: (a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits. * * *"

[2] We find nothing in the terms of the contract which takes the case out of the general rule. The parties agreed to share equally not only the profits but the losses. There is no inconsistency between paragraphs 6 and 8. Clearly paragraph 8 pertains to and provides only for the distribution of profits. By its express terms, profits were to be measured only after repayment of all advances made by the partners in-

cluding the agreed value of the land contributed by defendant. It is difficult to see how paragraph 8 permits of any other construction in view of the language of subparagraph "Fifth" that the "balance" be divided equally between the parties. The fact that the items are numerically set out is of no significance when the paragraph is read as a whole. Since there was no profit, but a loss, paragraph 8 is not controlling. By the terms of the contract, the losses were to be borne equally by the partners, no contingency being made for reducing the agreed value of the land contributed by defendant as was done in paragraph 8 in the event the "expected" profits did not exceed $2000. In arriving at the loss sustained, it was proper to include not only the monies advanced by the parties but the agreed value of the tangible assets contributed to the venture by defendant.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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113 Cal.App.2d 587

CITY OF INGLEWOOD v. O. T. JOHNSON CORP. et al.

Civ. 19129.

District Court of Appeal, Second District,
Division 2, California.

Oct. 8, 1952.

City of Inglewood, a municipal corporation, brought eminent domain proceedings against the O. T. Johnson Corporation and A. P. Johnson Company. The proceeding was abandoned before time of trial had been fixed. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered an order disallowing certain costs and disbursements incurred by defendants in connection with their preparation to defend the proceeding and defendants appealed. The District Court of Appeal held that defendants were not entitled to have allowed as costs expenses they incurred in having a map made and survey taken, but were entitled to have taxed as costs outlays they made for counsel fees for filing and prosecuting proceeding in District Court of Appeal to review and annul action of Superior Court in making orders for immediate possession of property to be condemned.

Judgment affirmed as modified.

1. Eminent Domain 🔑265(5)

Where information sought in eminent domain proceeding by map and survey which defendants had made and taken, could have been obtained by presenting a demurrer to complaint, and proceeding was abandoned before time of trial had been fixed, defendants were not entitled to allowance of cost of map and survey as being under statute necessary expenses incurred in preparing for trial. Code Civ.Proc. §§ 1255a, 1244, subd. 5.

2. Eminent Domain 🔑265(5)

Purpose of statute providing that upon abandonment of condemnation proceeding judgment shall be entered awarding defendants costs and disbursements, including necessary expenses incurred in preparing for trial, is to recompense defendant for all expense which defendant is impelled to incur by reason of condemnor's instituting action and his subsequent failure to carry it through to conclusion, thereby depriving defendant of any award for his property. Code Civ.Proc. § 1255a.

3. Eminent Domain 🔑265(5)

Where defendants in eminent domain proceeding paid counsel fees for filing and prosecuting proceeding in District Court of Appeal to review order for immediate possession of property to be condemned, and proceeding was abandoned by condemnor, defendants were entitled to have such outlay taxed as costs under statute, as against contention that proceeding for writ of review was collateral to condemnation proceeding and that defendants could not recover expenses of such phase of litigation. Code Civ.Proc. § 1255a.

4. Eminent Domain 🔑265(5)

Where defendants in eminent domain proceeding paid counsel fees for filing and prosecuting proceeding in District Court of Appeal to review order for immediate possession of property to be condemned, and proceeding was abandoned by condemnor, and only testimony on value of legal services rendered, which defendants sought to have allowed as costs, was that such services were of specified reasonable value, court, in absence of contradictory evidence, should have made finding based upon such evidence, time necessarily consumed by defendants' counsel, experience and learning of defendants' counsel, importance of matter, and value of land involved. Code Civ. Proc. § 1255a.

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Cosgrove, Cramer, Diether & Rindge, Leonard A. Diether, Los Angeles, for appellants.

Clyde Woodworth, City Atty., Inglewood, Robt. E. Rosskopf, Sp. Counsel, Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendants appeal from an order disallowing certain costs and disbursements incurred by them in connection with their preparations to defend an eminent domain proceeding initiated by respondent. The action was abandoned before a time of trial had been fixed.

Shortly after the filing of the complaint which sought to condemn certain lands of defendants for a water well with the right to remove water therefrom, the lower court on the ex parte application of respondent made two orders enabling respondent to enter into immediate possession of the realty. On appellants' petition for a writ of review, this Court annulled such orders. O. T. Johnson Corp. v. Superior Court, 103 Cal. App.2d 278, 229 P.2d 849. Abandonment of the proceedings having been declared, a judgment of dismissal was entered. Appellants thereupon filed their memorandum of costs and disbursements totalling $2,750.19. Included in such sum was $2,500 for attorney's fees and $245.19 for "Services of Engineering Service Corporation, Los Angeles, in making survey and map of property sought to be condemned in order to plead to complaint."

These two items were forthwith attacked by respondent and upon the hearing of its motion to tax costs, the trial court disallowed the cost of the survey and map and allowed only $750 for attorney's fees, concluding that appellants were not entitled to reimbursement for the expense of legal services incurred in the proceeding before the District Court of Appeal.

It is appellant's contention on this appeal that they are entitled to the sums now in dispute by virtue of section 1255a[1], Code of Civil Procedure. Such statute provides that upon abandonment of a condemnation proceeding "a judgment shall be entered * * * awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees may be claimed in and by a cost bill * * *" The only limitation on this right granted the defendants is that "said costs and disbursements shall not include expenses incurred in preparing for trial where the said action is dismissed forty days prior to the time set for the trial of the said action."

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[1] Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendants and filing in court a written notice of such abandonment; and failure to comply with such section 1251 of this code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided, however, that upon judgment of dismissal on motion of plaintiff, defendants, and each of them, may file a cost bill within thirty days after notice of entry of such judgment; that said costs and disbursements shall not include expenses incurred in preparing for trial where the said action is dismissed forty days prior to the time set for the trial of the said action.

Pursuant to such section it was determined by the court below that the expense of the map and survey "was not necessary to enable defendants to plead to the complaint" but on the contrary was incurred in preparation for trial only, and hence was not allowable for the reason that a day was never fixed for a hearing of the controversy. Such determination was correct. Appellants argue that the survey and map were necessary because it could not be ascertained from the complaint (1) whether the real property described therein was within the city limits of Inglewood, or (2) whether such property was a separate parcel or only a portion of a larger parcel of realty owned by defendants.

[1] The answer to the first contention is that the complaint specifically alleged the property as "located in the City of Inglewood" and, further, set forth a complete legal description by metes and bounds with specific reference to section, range and township. Also, the absence of a declaration showing that the interest sought to be condemned was a separate parcel of part of a larger parcel could have been cured by means of a demurrer. Such an allegation is essential to a complaint in condemnation. Code Civ.Proc., sec. 1244, subd. 5. In fact appellants did interpose a demurrer on this ground, among others, and respondent's counsel confessed the demurrer to be well taken. It is true that the evidence introduced by appellants conclusively shows their need of a correct map of the premises under condemnation. Attorney Cosgrove testified that the complaint did not disclose whether the property was a separate parcel or a portion of a larger area; that it does not condemn a parcel, but condemns "a water right"; that it was "to take *whatever water* they could get at that point for municipal purposes, which would be part and parcel of the surrounding ground." The only evidence offered by respondents on the question was the conclusion of Mr. Rosskopf that there was no necessity for the preparation of a survey and map of the property to enable defendants to plead to the complaint. By virtue of their uncontradicted evidence appellants assert that because they acted in good faith in causing the survey and map to be made, Metropolitan Water District v. Adams, 23 Cal.2d 770, 773, 147 P.2d 6, they are entitled to have their disbursements therefor taxed as costs. But because the needed information could have been obtained by presenting a demurrer the court below was without error in declining to tax the expense of the map as costs.

Quite a different situation is presented by the court's refusal to tax as costs the outlay of appellants for counsel fees in filing and prosecuting a proceeding in the District Court of Appeal to review and annul the action of the Superior Court in making its orders for the immediate possession of the property to be condemned.

[2, 3] Respondent contends that the proceeding for the writ of review was "entirely independent of and collateral to" the condemnation proceeding and therefore the expense of such phase of the litigation cannot be recovered. Such contention is erroneous. Section 1255a places no limitation upon the extent of the expenses recoverable for legal services. On the contrary, the purpose of the statute is to recompense the defendant for all expense which he is impelled to incur by reason of the condemnor's instituting the action and his subsequent failure to carry it through to conclusion, thereby depriving defendant, at the least, of any award for his property. City of Los Angeles v. Abbott, 217 Cal. 184, 200, 17 P.2d 993.

Respondent's demand for an order for immediate possession of the property was part and parcel of the condemnation action. The complaint set forth the City Council's directive to the City Attorney to take steps to obtain immediate possession. The complaint prayed for such possession and pursuant thereto respondent proceeded to obtain the necessary orders. This was an integral part of the proceeding. Certaintly, the statute contemplates that a defendant will take every reasonable and necessary step to protect his property rights. If in so doing he must initiate an original proceeding in an appellate court, he should be reimbursed for such expense when the condemnor frivolously, or otherwise, abandons the proceedings. Such expense proximately and directly results from the plaintiff's action and both the letter and spirit of the statute concerned establish his right to be made whole.

When the owner of property in a condemnation proceeding is forced to expend moneys to protect his property rights against a municipality, it is fair to require the repayment of such expenditures. McPherson v. City of Los Angeles, 8 Cal.2d 748, 752, 68 P.2d 707.

[4] Respondents have cited decisions listed in the annotation found in 31 A.L.R. 359–361 holding the contrary. But they come from other jurisdictions, do not involve facts akin to those here involved, and do not attempt to interpret such language as is found in section 1255a, supra. The only testimony in the record on the value of the legal services rendered for appellants in effecting the annulment of the orders of the superior court by the District Court of Appeal is that such services were of the reasonable value of $1,000. In the absence of contradictory proof, the court below should have made a finding as to the reasonable sum to be allowed for appellant's counsel based upon the last mentioned testimony, the time necessarily consumed by appellants' counsel in the performance of their task, as well as their experience and learning, the importance of the matter, and the value of the land to be condemned. The only proof found in the record as to the value of appellants' land is the affidavit of respondent's special counsel, Robert Rosskopf, to the effect that its fair market value was appraised at $3,500.

It is therefore adjudged that the order retaxing costs be modified as follows: Strike the fifth sentence in the order beginning with "The court further finds," and the balance of the order, and in lieu thereof substitute the following:

In order to fix the reasonable value of attorneys' fees to be allowed appellant, the court finds that the reasonable market value of appellants' property at the time of the filing of the action was $3,500; the time expended by appellants' counsel in their defense of the action and in obtaining a writ of review in the District Court of Appeal was ninety-two hours; that the reasonable value of services rendered by appellants' counsel in the defense of the action is $750; that the reasonable value of services rendered by appellants' counsel in prosecuting the proceedings for review in the District Court of Appeal is $1,000.

It is therefore ordered and adjudged that the costs are retaxed in the sum of $1755.

As so modified, the judgment is affirmed.

McCOMB and FOX, JJ., concur.

39 Cal.2d 635

ATHA v. BOCKIUS et al.

S. F. 18445.

Supreme Court of California, in Bank.
Oct. 9, 1952.

Action by Dorothy E. Atha against E. H. Bockius, and others for conversion of an automobile. The Superior Court, San Francisco County, Edward P. Murphy, J., rendered judgment for plaintiff, and defendants appealed. The Supreme Court, Shenk, J., held that defendants were estopped by their lack of diligence from asserting their lien under Texas mortgage on automobile as against subsequent innocent purchaser of automobile under California registration.

Judgment affirmed.

Edmonds, J., dissented.

Prior opinion, 232 P.2d 312.

1. Chattel Mortgages ⟹87

A chattel mortgage on automobile executed and recorded in Texas in accordance with law of that state is entitled under doctrine of comity to recognition and enforcement in California, notwithstanding statutory provisions for registration of liens in California. Vehicle Code, §§ 146 et seq., 195, 196, 198.

2. Chattel Mortgages ⟹87

Recordation under California statute of chattel mortgage on automobile executed and recorded in Texas was not a prerequisite to recognition of validity of mortgage in California. Vehicle Code, §§ 146 et seq., 195, 196, 198.

3. Chattel Mortgages ⟹87

The comity doctrine as to recognition in California of chattel mortgages on automobiles executed and recorded in other states is subject to the principle that where one of two innocent persons must suffer by the act of a third, the loss must be borne by the person by whose negligence it happened. Civ. Code, § 3543.

4. Chattel Mortgages ⟹136

A foreign mortgagee who learns of removal of mortgaged automobile into another state but through sheer inertia fails to take steps seasonably to assert his claim is deemed to have waived his lien under comity rule as against subsequent innocent purchasers or encumbrancers. Civ.Code, § 3543.

5. Chattel Mortgages ⟹139

That Louisiana registrations, which did not include the listing of prior liens, were considered dangerous risks was not sufficient in itself to establish as matter of law bad faith or negligence of Texas mortgagee in making a loan on the security of a chattel mortgage on automobile registered in Louisiana.

6. Chattel Mortgages ⟹136

Where automobile mortgaged in Texas under Louisiana registration was removed to California without mortgagee's knowledge or consent, mortgagee upon learning of removal owed a duty to prevent loss to possible subsequent innocent purchasers or encumbrancers by seasonably asserting rights under mortgage and existence of a prior lien under California registration of same automobile did not excuse delay in pursuing mortgagee's rights. Civ.Code, § 3543.

7. Estoppel ⟹114

Where complaint in action for conversion of an automobile relied on plaintiff's title to automobile and answer set up defense of a prior lien under chattel mortgage on automobile executed and recorded in another state, such new matter in answer must be deemed controverted and plaintiff without pleading equitable estoppel could rely on lack of diligence of mortgagees as estopping them from asserting their lien as against subsequent innocent purchaser. Civ.Code, § 3543; Code Civ. Proc. § 462.

8. Chattel Mortgages ⟹157(2)
Estoppel ⟹116

In action for conversion of an automobile by out-of-state mortgagee, defendants made out a prima facie case by showing existence of a valid lien on automobile with no facts to indicate negligence and plaintiff then had the burden of proving that defendants were estopped from asserting such lien as against a subsequent innocent purchaser. Civ.Code, § 3543.

9. Chattel Mortgages ⚷136

Where automobile registered both in California and Louisiana and mortgaged in Texas under Louisiana registration was removed from Texas without mortgagee's knowledge or consent and mortgagee after tracing mortgagor to California did not repossess automobile until six months later after it had been sold under California registration to innocent purchaser for value without notice and prior mortgage lien under California registration had been satisfied by purchaser and discharged, Texas mortgagee was estopped by such lack of diligence from asserting its lien as against purchaser. Civ.Code, § 3543; Vehicle Code, §§ 130, 150.

◆

Healy & Walcom and Leo J. Walcom, San Francisco, for appellants.

Park Chamberlain, San Francisco, for respondent.

SHENK, Justice.

The plaintiff, purchaser of an automobile registered in California, brought this action against the defendants for damages for conversion by virtue of their repossession of the automobile under a Texas chattel mortgage. She recovered judgment for the value of the vehicle and the defendants appealed.

The appeal is taken on an agreed statement which shows the following events:

In 1944 in Florida the plaintiff's brother, Cecil B. Mark, bought a 1941 Ford automobile for which he paid part cash and executed a purchase money mortgage for the balance. He obtained a Louisiana registration and license plates and removed the vehicle to Los Angeles. There, on June 18, 1945, he procured a loan from Vine-Sunset Loan Company and executed a chattel mortgage as security. The proceeds of that loan were used to discharge the Florida mortgage. Mark concurrently obtained a California registration and certificate showing himself as registered owner and Vine-Sunset as legal owner. In November 1945 and again on January 30, 1946, the Vine-Sunset transaction was refinanced and in each instance a new chattel mortgage was executed to the same lender.

In September 1946 Mark drove the automobile to Texas. Without notification or cancellation of the California registration, he procured another Louisiana registration as of September 28, 1946. On October 1, 1946, on the strength of the Louisiana registration and a Texas address, he obtained a loan from Government Employees Finance Company of Texas executing to it a chattel mortgage on the automobile which was recorded in the county of his Texas residence. After making some payments on that loan he returned to California and replaced the California license plates. On February 14, 1947, he secured a loan from Remedial Loan Company in San Francisco by executing to it a chattel mortgage. With these proceeds Vine-Sunset was paid and Remedial became the legal owner on the title certificate.

In April, 1947, Government Employees Finance Company of Texas traced Mark to California and notified the defendants to search for and repossess the car. On August 26, 1947, Mark sold the automobile to the plaintiff who became the registered owner with Remedial as the legal owner. The plaintiff subsequently paid the Remedial Loan. In October 1947 the agents of the Texas company located and repossessed the car, and it was removed to Texas where it was sold. The plaintiff brought the action against the Employees Finance Company of Texas and its California agents. The defendants resisted recovery by the plaintiff on the ground that she was not a bona fide purchaser and that the Texas company's lien was prior and superior.

The trial court found that the defendants seized the vehicle without lawful right; that the plaintiff was the bona fide purchaser and owner of the car without notice or knowledge of the Texas mortgage, without notice or knowledge of Mark's schemes to defraud, and that she did nothing to defraud the defendants or any creditors of Mark; that there was no valid mortgage agreement in existence binding on her, and that her right was superior. The court concluded that the seizure by the defendants was an unlawful conversion and that the plaintiff was entitled to judgment for the reasonable value of the property plus interest and costs.

The contention that the Texas mortgage was invalid under the law of Texas finds no support in the record. It is shown that the mortgage was executed and recorded in accordance with the law of Texas and in the absence of other considerations would be enforceable in that state.

[1] Under the law of comity the Texas mortgage if valid there would be entitled to recognition and enforcement here unless by statute there is an exception to the operation of the comity doctrine in respect to foreign liens on motor vehicles. In Mercantile Acceptance Co. v. Frank, 1928, 203 Cal. 483, 265 P. 190, 57 A.L.R. 696, following the comity rule, it was held that the statutes of this state did not preclude recognition of a foreign mortgage on motor vehicles as against subsequent purchasers for value without notice and that in the absence of a clear prerequisite for the filing of foreign mortgages on vehicles, an otherwise valid foreign mortgage would be recognized. The court noted with citation of authorities that the general acceptance of the comity rule in the absence of clear regulation to the contrary was based on the great mobility of chattels such as automobiles, the consequent ease of transportation and the opportunity for fraudulent practices. The court also observed that Texas and Louisiana were among four states that did not accept the comity rule. See also Beale, 40 Harv.Law Rev. 809–810, discussion of the "Texas rule". In Bank of Atlanta v. Fretz, 1950, 148 Tex. 551, 226 S.W.2d 843, however, it is disclosed that in 1939 in the interest of harmony and fraud prevention Texas enacted a certificate of title law similar to the California statute, whereby it was held to have accepted the majority rule of comity. As in the Mercantile Acceptance Co. case the comity rule was held to apply where the local statute requiring the filing and recordation of mortgages did not clearly refer to foreign liens. For extensive discussion and comparison of various statutes see Article, The Impact of Automobile Certificate of Title Laws on Ownership and Encumbrance, 36 Minn.Law Review, 77, Dec.1951; article, Horse and Buggy Lien Law and Migratory Automobiles, by Fairfax Leary, Jr., 96 University of Pennsylvania Law Review 455, 1948; cf. Kelley Kar Co. v. Finkler, 1951, 155 Ohio St. 541, 99 N.E.2d 665; W. H. Applewhite Co. v. Etheridge, 1936, 210 N.C. 433, 187 S.E. 588; Armitage-Herschell Co. v. Muscogee Real Estate Co., 1904, 119 Ga. 552, 46 S.E. 634.

The Mercantile Acceptance Co. case has been followed in this state. Deposit Guaranty State Bank v. Hessel Motor Car Co., 1928, 90 Cal.App. 428, 265 P. 954; Motor Acceptance Co., Inc., v. Finn, 1932, 124 Cal.App. 766, 13 P.2d 761. Since therefore the statute is deemed to apply to transactions within the state except as expressly otherwise provided, see also, Ragner v. General Motors Acceptance Corp., 1947, 66 Ariz. 157, 185 P.2d 525; Goodrich, Conflicts of Laws, 3rd Ed., sec. 157, at p. 482; 11 Am.Jur. p. 360, sec. 75; and cases cited, the statutory provisions do not preclude recognition of the Texas mortgage unless amendments to that end have been enacted since the decision in the Mercantile Acceptance Co. case.

The plaintiff relies in part on Section 195 of the Vehicle Code which provides that no chattel mortgage on a vehicle registered thereunder, irrespective of whether the registration was effected prior or subsequent to the execution of the mortgage, is valid as against creditors or subsequent purchasers or encumbrancers until compliance with requirements for filing and concurrent registration showing the lienholder as legal owner. The Mercantile Acceptance Co. case determines that such requirements cover domestic contracts unless otherwise specified. The additions and amendments involved do not cover or refer to foreign mortgages so as to indicate a legislative rejection of the comity rule as it applies to the facts of this case. Compliance with provisions for registration of foreign vehicles and the mailing of notice of the filing of an application for registration of an out of state vehicle to the state of former registration would not elicit information concerning the Texas mortgage.

Provisions for constructive notice as to filed mortgages and for full faith and credit as to valid foreign certificates of title and liens do not support the plaintiff's contention that the comity rule is inoperative here. There is no expression nor a clear implication in the enactments that non-disclosure of the Texas mortgage would affect the foreign mortgagee's rights as against a subsequent purchaser. The amendments relate solely to the same or similar provisions which were held in the Mercantile Acceptance Co. case not to provide specifically for recordation of such a foreign mortgage as a prerequisite of validity as against subsequent purchasers or holders of a security interest. In fact the statute contains no provision for the possible recordation of the Texas mortgage under the facts involved. Section 146 et seq. of the Vehicle Code supply the method for registration of vehicles previously registered in another state and the means whereby concurrently liens created in such other state may be disclosed with requirement for their recognition by the department. Section 195 also refers to mortgages filed concurrently with the application for registration. Section 196 provides for constructive notice of mortgages deposited with an application for registration. Section 198 states that the method so provided for giving constructive notice of a chattel mortgage on a vehicle registered under the code is exclusive.

[2] The legislative failure for a period of twenty-three years to deal with the obvious omission indicates approval of the operation of the comity rule as declared in the Mercantile Acceptance Co. case. Therefore recordation of the Texas mortgage under the statute was not a prerequisite to recognition of its validity here. The trial court's findings and judgment are not supported by any statutory requirement for recordation.

It is assumed that the foregoing statutory provisions were complied with when the vehicle was originally imported into this state under the Louisiana registration, a California registration obtained and the Florida mortgage discharged by application of the proceeds from the Vine-Sunset loan. As the authorities and texts hereinabove cited also indicate, in the absence of an applicable statutory provision, the problem as to which of opposing victims of a defrauder must bear the loss depends on other considerations. See, also, Yarwood v. De Lage, Ohio App.1949, 91 N.E.2d 272; Morris Plan Bank of Knoxville, Tenn. v. Terrell, 1948, 5 Terry 533, 44 Del. 533, 62 A.2d 452; Commercial Credit Co. v. American Mfg. Co., Tex.Civ.App.1941, 155 S.W.2d 834.

[3] There is nothing in the comity doctrine, however, to preclude application of the universally accepted principle, incorporated in section 3543 of the Civil Code, that when one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must bear the loss. The court in Mercantile Acceptance Co. v. Frank, supra, 203 Cal. 483, 492, 265 P. 190, 194, referred to this principle as a necessary consideration in the following language: "There may be cases in which the owner of a chattel mortgage has not acted with due diligence in following and reclaiming the property which is the subject of his mortgage, or he may be estopped on account of his acts and conduct in reference to the mortgaged chattels from recovering them after their purchase by persons having no knowledge of the mortgage lien, but the complaint in this case shows no facts which would indicate that plaintiff's rights are subject to either of these defenses."

[4] The principle was stated in Morris Plan Bank of Knoxville, Tenn. v. Terrell, supra, 62 A.2d 452. Under circumstances similar to those involved here it was held that a foreign mortgagee who learns of the removal of the car into another state but through sheer inertia fails to take steps seasonably to assert his claim is deemed to have waived his lien under the comity rule as against subsequent innocent claimants.

In invoking the application of the principle to the facts of this case the plaintiff contends that the Texas mortgagee was negligent in making the loan on the Louisiana papers; also that it was lacking in diligence after tracing Mark and the car to California in not acting promptly in the pursuit of its rights; and that either its negligence in making the loan or its lack of diligence in pursuing the right was the responsible factor in bringing about the loss. If the record shows the Texas mortgagee to have been lacking in diligence in either respect, it would not be entitled successfully to invoke the comity doctrine.

[5] The agreed statement on which this appeal is presented recites an opinion given by Remedial's loan manager that finance companies considered Louisiana registrations, which did not include the listing of prior liens, to be dangerous risks. On this record that opinion or practical consideration should not alone be deemed sufficient as matter of law to support the assertion of the mortgagee's bad faith or negligence in making the loan. The contention is supportable only if there was sufficient to put the lender on notice regarding possible existing liens. The statement does not show actual knowledge of a California registration. At that time any Florida record would not show a lien in that state. A possible requirement for a Texas registration based on Louisiana papers would reveal nothing further. We are not persuaded that the requirements of reasonable diligence placed the burden on the Texas mortgagee to examine the records in some forty-eight states with the only alternative a refusal of the loan. In this connection reasonableness demands the balancing of considerations between requirements for caution and those relating to keeping open the channels of trade. Under the particular facts of this case compliance with a requirement, had there been one, of either Louisiana or Texas that registration papers show the Texas mortgage would not give notice of that lien to a subsequent purchaser under the existing California certificate. Cf. Rice Street Motors v. Smith, 167 Pa. Super. 159, 74 A.2d 535. And as we have seen so long as California adheres to the comity doctrine, on the facts here there was no provision pursuant to which the Texas mortgage could have been recorded in order to provide constructive notice to a subsequent purchaser or encumbrancer in this state.

It is not questioned that at the time of the Texas loan Vine-Sunset had a lien against the vehicle in California and that Mark still had a disposable equity. Since the statement of facts on appeal does not indicate that the Texas lender had knowledge of that lien or of the California registration its initial bona fides is assumed. Whatever doubt may be cast thereon is in any event disposed of by the conclusion that after tracing Mark to California the Texas mortgagee did not proceed with diligence to locate the car and pursue the lien right to the end that a possible subsequent innocent purchaser would not be victimized.

After Mark's default under the Texas mortgage and in April 1947 the Texas mortgagee traced him to California where it requested agents to locate the car and repossess it. Consequently it was surmised that Mark was in California in possession of a car on Louisiana papers which did not register the Texas mortgage. This would reasonably suggest that action be taken promptly in order to protect a subsequent innocent purchaser or encumbrancer in California.

[6] The fact of the Florida lien discharged by proceeds originating from the California Vine-Sunset loan could well have aroused the suspicion of Mark's spurious activities in California. Subsequently on Mark's return to California the Remedial Loan Company had succeeded to Vine-Sunset's lien interest. Therefore in April 1947, when Mark was traced to California, that lien interest conceivably had precedence over the Texas mortgage. The record does not show affirmatively whether the defendants made a prompt or any investigation of a possible registration of the vehicle in California. Indexes of ownership and motor number are kept available to public inspection, sections 130, 150, Vehicle Code. If an affirmative showing would disclose that they had investigated the registration records and discovered the prior California lien, that discovery could well have been the provocation for failure to repossess until the time when the precedence of the Texas lien would be established by the discharge of the Remedial loan. However, the existence of the prior lien would not excuse the delay in pursuing the right since the mortgagee's duty was

not only to protect its own lien but also to prevent loss to possible subsequent innocent purchasers or encumbrancers. In the light of the circumstances which were known to or were discoverable by them, it was foreseeable that the existing lien might be discharged on the creation of a new interest. It was not until four months after the Texas mortgagee followed Mark to California and notified agents to locate and repossess the car that the transfer to the plaintiff and the consequent discharge of the Remedial loan took place. Thereafter the defendants repossessed the car. They do not show that they were prevented from early discovery of the California registration and the location of the car by consulting the public records. That such a course was open to them may not be questioned. They may not assert inactivity as diligence merely because there was no statutory provision showing another possible course of action.[1]

[7] In their answer alleging the superiority of the Texas lien right under the comity rule, the defendants in addition alleged that the plaintiff, the sister of Mark, had taken the transfer of Mark's interest collusively, that Mark was the real owner of the vehicle, and for that reason also the plaintiff's right was inferior to the Texas mortgage. The plaintiff was not required to plead the defense of equitable estoppel. Her complaint relied on her title to the automobile and the comity doctrine was brought into the case by the answer. In this state of the pleadings, the new matter in the answer must be deemed controverted, Code Civ.Proc. § 462, and there was no need for the plaintiff to plead lack of diligence on the part of the defendants, since estoppel was relied upon as a defense to matter set up in the answer. General Motors Acceptance Corp. v. Gandy, 200 Cal. 284, 294, 253 P. 137; Buford v. Florin Fruit Growers' Ass'n, 210 Cal. 84, 91, 291 P. 170. The question of the mortgagee's diligence was presented to the trial court. The sufficiency of the showing thereon is argued on the appeal. Thus the trial and the appeal were prosecuted on the correct theory of the requirement of diligence under the comity rule.[2]

[8, 9] In accord with the conclusion that the comity doctrine is subject to the application of the principle of section 3543 of the Civil Code, the right of the foreign mortgagee relying upon that doctrine must be denied whenever it is shown by the party relying upon equitable estoppel that the foreign mortgagee did not act with due diligence in following and reclaiming the mortgaged property. Mercantile Acceptance Corp. v. Frank, supra, 203 Cal. 483, 492, 265 P. 190. Thus in the present case the out-

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1. Since the events herein section 132 of the Vehicle Code has been amended to provide that in proper cases, on the filing of a request by a law enforcement agency or of a judicial restraining order, department action on transfers may be deferred.

2. The Respondent's Brief, Point Two, is headed: "As between respondent and appellants, appellants must bear this loss because it happened by appellants' and their principal's negligence." Subheading 1 deals with the Texas Company's claimed negligence in making the loan. Subheading 2 deals with the claim of failure to request the Department of Motor Vehicles at Sacramento to block a transfer. The context points out the failure to notify the department under section 132 of the Vehicle Code (shown to have become effective after the events), or to take any action to protect the lien and possible innocent purchasers. The plaintiff relies on section 3543 of the Civil Code and Morris Plan Bank of Knoxville, Tennessee v. Terrell, 5 Terry 533, 44 Del. 533, 62 A.2d 452. The defendants assert that the plaintiff relied solely on her brother and placed no reliance on any acts or representations of the defendants which would amount to an estoppel. In a "Supplementary Brief" filed in the District Court of Appeal the plaintiff again argues the evidence claimed to show the defendants' lack of diligence in pursuing the property and states that the point was presented to the trial court in written form substantially as in her brief, that at no point did the defendants complain of the inclusion of the diligence point, the facts bearing on which were included in the Agreed Statement on Appeal, and that it was clear that the diligence point was understood by all parties to be a part of the case. In the petition for hearing the plaintiff reiterates her contention of lack of due diligence on the part of the defendants.

of-state mortgagee made out a prima facie case by showing the existence of a valid lien with no facts to indicate negligence. The burden of proving the defense of equitable estoppel then fell on the plaintiff. That burden was met by evidence that the defendants had traced Mark to California in April of 1947, that they did not repossess the car until six months later, that in the meantime and four months after the defendants traced Mark to California the plaintiff's interest was created, that by judicial notice the records at Sacramento disclose the ownership and possible location of automobiles registered in this state and thereby facilitate a recovery before the rights of innocent persons intervene. The defendants failed to controvert this prima facie showing by the plaintiff. All of the facts material to the issue of their negligence are presumed to be in the record. Rule 52, Rules on Appeal. That record does not affirmatively state what they actually did in their search for the swindler except to say that they were hunting for Mark in California and that they had no actual knowledge of his or the car's presence in the state until approximately two weeks before the seizure. The record does not state that they made any examination whatsoever of the public records in Sacramento or that the records, if examined, would not have revealed the existence of the prior California lien and possible location of the car. They did not show what other steps, if any, were taken to find Mark. The record thus provides the inferences which support the trial court's finding and conclusion that the plaintiff's right was superior to that of the Texas mortgagee. In this state of the record it is clear that the doctrine of equitable estoppel precluded the defendants' reliance on the comity rule and that the judgment in favor of the plaintiff must be affirmed.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concur.

CARTER AND SPENCE, JJ., concur in the judgment.

EDMONDS, Justice (dissenting).

I join in the holding that the record includes no evidence of negligence on the part of the Texas company either in making the loan or in failing to notify the Department of Motor Vehicles of its claim. I also concur in the conclusion that the rule of comity first stated in Mercantile Acceptance Co. v. Frank, 203 Cal. 483, 265 P. 190, 57 A.L.R. 696, has not been abrogated by statute and that it should be reaffirmed. However, I do not agree that Atha has met her burden of proving the defense of equitable estoppel or that the record shows any basis for holding that the defendants' superior rights have been defeated by such an estoppel.

The judgment is affirmed upon a theory which was neither briefed by the parties nor discussed by them in oral argument. Despite implications to the contrary in the opinion, Atha made no contention by her pleadings, proof, briefs, or oral argument which in any way questioned the diligence of the Texas company's efforts to locate and repossess the automobile.[1] She admits that for some months the Texas mortgagee was searching for the car. The only question concerning diligence which she has raised is whether the failure of the out-of-state lender to prevent a transfer by filing some kind of notice with the Department of Motor Vehicles constituted negligence. Her contention upon this phase of the case is, in her own words, "The Government Employees Finance Company was negligent in not properly notifying the Department of Motor Vehicles at Sacramento that a transfer should be blocked." But as correctly stated by Mr. Justice Shenk, "there was no provision pursuant to which the Texas mortgage could have been recorded in order to provide constructive notice to a subsequent purchaser or encumbrancer in this state."

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[1] The footnote summarization of the briefs, included in the majority opinion, refutes the implication of the statement to which it makes reference. Atha's only charges of negligence dealt with the making of the loan and the failure to notify the Department of Motor Vehicles to block a transfer. There is no support in the cited section of the respondent's brief for the statement that, "The context points out the failure * * * to take any action to protect the lien and possible innocent purchasers." The sole lack of diligence presented by the respondent's brief is that "the failure of Appellants or their principal, * * * to take the simple step of blocking a transfer, was sheer negligence". This is also the only question of diligence urged by the Supplementary Brief. The point is there stated: "Furthermore, if the mortgagee had pursued its rights with due diligence, the Department would have stood ready to block further transfers at his request. See Vehicle Code, Sec. 132." Likewise, the petition for hearing attacked only "the conduct of the agents (defendants) in not notifying Sacramento that transfers should be blocked". Nowhere in any of the briefs is there a claim of a lack of diligence in the admitted efforts to locate and repossess the automobile.

The majority hold that there was a "delay in pursuing the right" of the company to repossess the automobile. The opinion states: "It was not until four months after the Texas mortgagee followed Mark to California and notified agents to locate and repossess the car that the transfer to the plaintiff and the consequent discharge of the Remedial loan took place. Thereafter the defendants repossessed the car * * *. They may not assert inactivity as diligence merely because there was no statutory provision showing another possible course of action."

Rather than showing "delay" or "inactivity", the facts agreed upon by the parties are that the company requested the individual defendants to endeavor to find Mark and the automobile and they "proceeded to do so". According to the agreed statement, the defendants "were hunting for Mark and the car in California for over six months before the seizure". Moreover, the Texas company and its agents "had no actual knowledge of Mark's or the car's presence in California until approximately two weeks before seizure". Correctly summarized, the record shows no basis whatever for a conclusion that was either "delay" or "inactivity" on the part of the Texas company or its California representatives.

The majority opinion correctly states: "The record does not show affirmatively whether the defendants made a prompt or any investigation of a possible registration of the vehicle in California." However, to present the situation of the parties accurately, it should be added that the record contains no evidence which would support the trial court's finding that Atha was a bona fide purchaser. Upon the appeal, the parties do not question either the diligence of the search or Atha's standing as a purchaser in good faith without notice of the Texas lien. Obviously they did not consider it necessary to extend the agreed statement beyond those facts essential to the points which they presented. In fact, Atha stresses in her briefs that evidence to cover all points which she raised was "meticulously included" in the agreed statement. The parties rest their case upon two points: whether the rule of comity may be applied to give the foreign mortgagee a superior right and whether, if applied, the right was defeated either by negligence in making the loan or by failing to file some notice with the Department of Motor Vehicles.

If the Texas company's superior right is to be cast aside because it did not include in the agreed statement facts showing the diligence of its search, Atha likewise cannot prevail because she failed to include facts showing that she did not know of the prior recorded mortgage when she purchased the automobile from her brother. The logical conclusion which should be drawn from the reasoning of the majority opinion is that the Texas company was not required to present evidence of diligence because Atha failed to make out a prima facie case showing that she was a bona fide purchaser. Unless she was such a purchaser, she was not an "innocent" person entitled to the protection of the defense of equitable estoppel.

Certainly the parties should be able to rely with safety upon the accepted rule that "(a)n appellate court decides only the issues presented by the parties." Hampton v. Superior Court, 38 Cal.2d 652, 656, 242 P.2d 1, 3. Also, when an appeal is upon a settled statement, "it shall be presumed in the absence of proceedings for augmentation that it includes all matters material to a determination of the points on appeal."

Rule 52, Rules on Appeal. The record contains all matters material to the determination of the points raised by the appeal. However, where, as here, the decision is based upon issues other than those presented by the appeal, it should not be presumed that the settled statement includes all matters material to a determination of such additional points.

The burden rested upon Atha, as the party relying upon equitable estoppel as a defense to the Texas company's claim, to prove satisfactorily all of the necessary elements of her alleged defense. "The existence of an estoppel is a question of fact, and the settled rule as to the proof of equitable estoppel is that the burden rests upon the party asserting such estoppel to prove all the elements constituting it 'by evidence having some reasonable tendency to establish the fact.' * * *

"As a rule, manifestly, an equitable estoppel must be proved by oral testimony, hence the rule that certainty is essential to all estoppels is peculiarly applicable to estoppels *in pais*. The estoppel must be so established as to leave nothing to surmise or questionable inference." General Motors Acceptance Corp. v. Gandy, 200 Cal. 284, 295, 297, 253 P. 137.

Atha failed to meet her burden because she offered no evidence of a lack of diligence in searching for the automobile. Cf. Garrett v. Cook, 89 Cal.App.2d 98, 104, 200 P.2d 21. In addition, she cannot now rely upon estoppel because the trial court failed to make any finding of, or base its decision on, an estoppel. Cf. Judelson v. American Metal Bearing Co., 89 Cal.App.2d 256, 266, 200 P.2d 836; Arp v. Blake, 63 Cal.App. 362, 369, 218 P. 773. Nor did it find facts from which an estoppel necessarily follows. Cf. Corp. of America v. Durham, etc., Co., 50 Cal.App.2d 337, 342, 123 P.2d 81; Zenos v. Britten-Cook Land, etc., Co., 75 Cal.App. 299, 308, 242 P. 914; Fritz v. Mills, 12 Cal.App. 113, 117, 106 P. 725. It found only that Atha's right was superior. From this finding, it concluded that the taking was an unlawful conversion.

The majority agree that "the out-of-state mortgagee made out a prima facie case by showing the existence of a valid lien with no facts to indicate negligence." According to them, "The burden of proving the defense of equitable estoppel then fell on the plaintiff. That burden was met by evidence that the defendants had traced Mark to California in April of 1947, that they did not repossess the car until six months later, that in the meantime and four months after the defendants traced Mark to California the plaintiff's interest was created, that by judicial notice the records at Sacramento disclose the ownership and possible location of automobiles registered in this state and thereby facilitate a recovery before the rights of innocent persons intervene. The defendants failed to controvert this prima facie showing by the plaintiff."

But this is merely paying lip service to the rule of burden of proof without requiring Atha to prove any portion of her defense. Under the rule as stated, Atha need not show that she was a bona fide purchaser. She is not required to present any evidence that the Texas company did not pursue its right with diligence, or that its failure to do so was the responsible factor in bringing about her loss. Nor need she prove that there was any means which, if utilized, would have disclosed the ownership and location of the vehicle, thereby facilitating its recovery. According to the majority, she may admit that the search was made without success for a considerable period of time and then wait for the defendants to prove that it was diligently conducted. This, in effect, reverses the burden of proof, requiring the Texas company to prove that it was diligent despite the fact that Atha made no effort to show that its search was not conducted with diligence.

Certainly a lack of due diligence is not shown by the mere fact that the search was not successfully completed before Atha's interest arose. According to the agreed statement, agents of the Texas company spent approximately five and one-half months tracking down the swindler and his automobile before they even could ascertain definitely that he was in California. After they learned that the car was in California, it took them two more weeks to find it. From all that appears, the elusive Mark never has been found. Possibly, had the automobile not finally come into the possession of a purchaser, it would not yet have been discovered, despite the most diligent efforts of highly skilled "skip-state" tracers.

As a practical matter, the mere passage of time, without more, cannot be said to constitute a showing of negligence. An automobile is an exceptionally mobile chattel. In the hands of a swindler, and Mark is characterized as such a person in the record, with skill it can be hidden indefinitely from creditors, no matter how diligently they may search. Diligence should not be defined in terms of skill. The simple showing that the defrauder managed to outwit the defrauded for a period of time does not indicate that the party defrauded was not exerting every effort to recover his property.

Atha presented no "evidence * * * that by judicial notice the records at Sacramento disclose the ownership and possible location of automobiles registered in this state and thereby facilitate a recovery before the rights of innocent persons intervene". Obviously, if the records of the Department of Motor Vehicles disclose any such facts, they must do so by statute or departmental rule, and not by judicial notice. It is not the function of the courts to create legislation by judicial notice. Moreover, neither in the record nor the briefs does Atha even remotely ask the court to take judicial notice that, by statute, such facts are disclosed by the records of the department.

Of course, the court will take judicial notice of the fact that the Department of Motor Vehicles is required by the Vehicle Code to maintain certain records. Code Civ.Proc., § 1875. These records disclose, among other things, the ownership of the vehicle and the address of the owner as they are declared by the applicant for registration. Veh.Code, § 143. They also indicate, with an exception not here material, that the vehicle was located within the state when the application for registration was made. Veh.Code, § 143.5. The records of such information are open to public inspection. Veh.Code, § 130.

However, the court cannot take judicial notice that the records of the department disclose the "possible location of automobiles registered in this state and thereby facilitate a recovery" of them. Insofar as automobiles in general are concerned, there is absolutely no provision in the Vehicle Code requiring disclosure of the day to day location of each automobile registered in California. Such requirement would be impossible of administration. If we turn our attention to an individual automobile, and this case is not concerned with automobiles in general although the circuitous language of the majority would so indicate, the records for it conceivably might suggest its possible location. Atha should have offered evidence that the department's record for this particular automobile contained Mark's actual address during the period of search, and further that the automobile actually was garaged at that address during some or all of that time. This would have constituted proof that a search of the records might have facilitated recovery of the automobile. By such evidence, Atha could have established a prima facie case indicating lack of due diligence. But the record contains no evidence whatever upon this point. There is nothing to show what information, if any, concerning Mark's address was contained in the records of the department, let alone whether such information was accurate.

In the absence of evidence, the court cannot assume that Mark conscientiously kept the department informed at all times of his whereabouts. The record clearly shows that the converse was true. He deliberately withheld from the department any notice of his presence in Texas and his second automobile registration in Louisiana. Even if we assume that the department records showed some address for Mark, in the absence of additional evidence that the automobile could have been found at that address there is a total failure of proof that a search of the records would have facilitated its recovery.

That the majority refuse to apply the rule of burden of proof which they state is clear. On the contrary, they require the defendants to controvert a prima facie showing which never was made. Their position becomes obvious from the circumlocution in which they are forced to indulge. Atha, they say, need only suggest that the ownership and possible location of "automobiles" is disclosed by records of the Department of Motor Vehicles. However, the Texas company is to be limited to the facts of this case and may not indulge in such easy generalities. It must, according to the majority, prove that the department's records would not have revealed the possible location of this particular automobile. In addition, although Atha offered no evidence of a lack of diligence, or of procedures which might have resulted in a more speedy discovery of the vehicle, the Texas company must prove what steps it took to locate Mark. It must do this even though Atha admits that it was hunting for Mark during the entire period and despite the fact that she has never contended that its search was not diligent. Otherwise stated, the Texas company is saddled effectively with the burden of proof which, it is admitted, a mortgagee should not, and does not, have.

According to the majority, the record "provides the inferences which support the trial court's finding and conclusion that the plaintiff's right was superior to that of the Texas mortgagee." However, the basis for the entire opinion is that the record does not support the trial court's findings and conclusions, but rather shows that the right of the Texas company was superior and was defeated by the doctrine of equitable estoppel. With the exception of the quoted sentence, which is inconsistent with everything else in the opinion, the majority set aside the findings of the trial court because they are not supported by the evidence. Without making any new findings, and without pointing to any evidence of a lack of due diligence from which an estoppel properly could be found, they conclude that the record shows an estoppel. There is no basis whatever for the affirmance of the judgment upon that ground.

The majority apparently rely upon the rule that: "It is * * * immaterial that the theory upon which the judgment may be affirmed is not identical with that relied upon by plaintiffs or by the trial court, since plaintiffs are required only to plead and prove facts sufficient to justify relief, and the trial court's judgment must be affirmed if the findings, supported by the evidence, are sufficient to warrant the relief granted on any legal theory." Sears v. Rule, 27 Cal.2d 131, 140–141, 163 P.2d 443, 448. However, in this case there are no findings sufficient to warrant the relief granted. Nor is there any evidence of lack of diligence from which this court could find an estoppel. Although an appellate court may make additional findings to affirm a judgment, such findings must be based upon evidence. Code Civ.Proc. § 956a. "[T]he facts proved must be such that an estoppel is clearly deducible from them. Estoppels are not favored." Wheaton v. North British & M. Insurance Co., 76 Cal. 415, 429–430, 18 P. 758, 765. Here there has been no proof of facts constituting an estoppel and none has been found.

At the request of the District Court of Appeal upon the hearing before it, the parties filed supplemental briefs raising, for the first time, the question of whether Atha might be subrogated to the rights of the Remedial Loan Company in such manner as to defeat in part the superior right of the Texas company. This question was neither pleaded nor tried by the parties. The record does not show either the nature of the transaction whereby Atha acquired her interest from Mark or the amounts of the various mortgages and payments involved. There is thus no evidence which would warrant the appellate court in making additional findings for the purpose of affirming the judgment for Atha in part.

Because the evidence is insufficient to warrant a recovery by Atha upon any of the legal grounds advanced by the parties upon trial or appeal, or even upon the new theory which is the basis of the decision, I would reverse the judgment.

39 Cal.2d 598

ELI v. MURPHY et al.

S. F. 18647.

Supreme Court of California, in Bank.
Oct. 7, 1952.

Action by James Eli, a minor, by Rosetta Calloway, his guardian ad litem, and others, against Leo J. Murphy, James D. Murphy, and California Motor Transport Company for personal injuries. The Superior Court, Santa Clara County, John D. Foley, J., entered judgment on verdicts for plaintiffs. Thereafter, trial court granted motions of two plaintiffs for new trial on issue of damages alone, and defendant California Motor Transport Company, Ltd., appealed from the judgment and from order granting a new trial on issue of damages alone. The Supreme Court, Traynor, J., held that motor transport company licensed by Public Utilities Commission and engaged in transporting freight on public highways was engaged in a business attended with considerable risk and would be liable to passengers of automobile struck from behind by tractor and semi-trailer under contract to transport freight for motor transport company, notwithstanding that owner and driver of tractor and semi-trailer were independent contractors.

Order granting limited new trial to two plaintiffs affirmed, judgment for other plaintiffs affirmed.

Prior opinion, 242 P.2d 902.

1. Master and Servant 🔑317

An individual or corporation carrying on activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.

2. Automobiles 🔑194(1)

Highway common carriers may not insulate themselves from liability for negligence occurring in the conduct of their business by engaging independent contractors to transport freight for them.

3. Automobiles 🔑194(2)

Motor transport company licensed by Public Utilities Commission and engaged in transporting freight on the public highways could not delegate duty under franchise to safeguard public and would be liable to passengers of automobile struck from behind by tractor and semi-trailer which was under contract to transport freight for motor transport company, notwithstanding that owner and driver of tractor and semi-trailer were independent contractors. Public Utilities Code, §§ 213, 761, 762, 768, 1062.

Clark & Heafey, Edwin A. Heafey, Oakland, Rankin, Oneal, Luckhardt, Center & Hall, San Jose, Augustin Donovan and Louis B. DeAvila, Oakland, for appellant.

James F. Boccardo, Jean M. Blum, San Jose, and Edward J. Niland, Santa Clara, for respondents.

TRAYNOR, Justice.

Plaintiffs were seriously injured when the automobile in which they were riding was struck from behind by a tractor and semitrailer, driven by defendant James D. Murphy, and owned by defendant Leo J. Murphy, Jame's father and employer. At the time of the accident, the equipment was being used to transport freight from Los Angeles to Oakland under a contract between defendant California Motor Transport Company, a highway common carrier licensed by the Public Utilities Commission, and Leo J. Murphy. Plaintiffs brought this action against James and Leo Murphy and the California Motor Transport Company, hereinafter called C. M. T., for damages for their personal injuries. The trial court instructed the jury that if it should find James liable to plaintiffs, it should also find against Leo and C. M. T. The jury returned verdicts in favor of the five plaintiffs totalling $35,500 against all defendants. Judgment was entered on the verdicts, but thereafter the trial court granted the motions of two of the plaintiffs for a new trial on the issue of damages alone. Neither of the Murphys has appealed, but C. M. T. has appealed from the judgment and from the order granting a new trial on the issue of damages alone. The only question presented is whether the trial court erred in instructing the jury that C. M. T. was liable for the negligence of the driver of the tractor and semitrailer.

C. M. T. contends that under the terms of its contract with Leo J. Murphy, the latter was an independent contractor, and that it is therefore not liable for the negligence of Murphy's employee. Plaintiffs, on the other hand, contend that under both the common law and certain regulations of the Public Utilities Commission, C. M. T., as a highway common carrier, could not delegate its duties to an independent contractor so as to escape liability for their negligent performance.

[1] The common law principle upon which plaintiffs rely has been enunciated in section 428 of the Restatement of Torts,[1] and has frequently been applied to impose liability upon franchised common carriers who have engaged independent contractors to transport goods over the public highways. Venuto v. Robinson, 3 Cir., 118 F.2d 679, 682–683; War Emergency Co-op. Ass'n v. Widenhouse, 4 Cir., 169 F.2d 403, 406–407; Cotton v. Ship-By-Truck Co., 337 Mo. 270, 85 S.W.2d 80, 84; see also, Brown v. L. H. Bottoms Truck Lines, Inc., 227 N.C. 299, 42 S.E.2d 71, 76; Costello v. Smith, 2 Cir., 179 F.2d 715, 717, anno., 16 A.L.R.2d 960, 961, note 2; Restatement in the Courts, Torts, § 428. We have concluded that it is applicable here.

[2, 3] C. M. T., operating as a highway common carrier, is engaged in a "business attended with very considerable risk" Venuto v. Robinson, supra; Barry v. Keeler, 322 Mass. 114, 76 N.E.2d 158, 164; Hodges v. Johnson, D.C., 52 F.Supp. 488, 490, and the Legislature has subjected it and similar carriers to the full regulatory power of the Public Utilities Commission to protect the safety of the general public. Public Utilities Code, §§ 213, 761, 762, 768, 1062. The effectiveness of safety regulations is necessarily impaired if a carrier conducts its business by engaging independent contractors over whom it exercises no control. If by the same device it could escape liability for the negligent conduct of its contractors, not only would the incentive for careful supervision of its business be reduced, but members of the public who are injured would be deprived of the financial responsibility of those who had been granted the privilege of conducting their business over the public highways. Accordingly, both to protect the public from financially irresponsible contractors, and to strengthen safety regulations, it is necessary to treat the carrier's duties as nondelegable. Liberty Highway Co. v. Callahan, 24 Ohio App. 374, 157 N.E. 708, 711; Stickel v. Erie Motor Freight, Inc., 54 Ohio App. 74, 6 N.E.2d 15, 17; see also, Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 604–605, 110 P.2d 1044, and cases cited.

C. M. T. contends, however, that Gaskill v. Calaveras Cement Co., 102 Cal.App.2d 120, 226 P.2d 633, establishes the rule in this state that a carrier is not liable for the conduct of an independent contractor engaged to transport freight over the highways. In that case, however, both the defendant and the independent contractor stood on an equal footing as contract carriers operating under permits from the Public Utilities Commission. Such carriers are not required to secure certificates of public convenience and necessity and they are not subject to the safety regulations the commission may establish for highway common carriers. They are entitled to permits as a matter of right on complying with the statutory provisions. Public Utilities Code, § 3572. Thus the carriers in that case were engaged in a business open to all, and accordingly, the principle enunciated in section 428 of the Restatement of Torts was inapplicable.

The Legislature has, however, classified highway common carriers such as C. M. T. apart from others, and by so doing has indicated special concern with the safety of their operations. As pointed out by the Public Utilities Commission, "Under Sec. 42 of the Public Utilities Act, the Commission is given power to issue rules and regulations requiring every public utility to maintain and operate its system in such manner as to promote and safeguard the health and safety of its employees, customers and the public. In several instances, the provisions concerning the safety of operations, as set forth in the Vehicle Code, are inapplicable to carriers coming within this Commission's safety jurisdiction. We have been mindful of the great number of traffic accidents on our highways resulting in death and injury to persons and damage to property.

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[1] "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity."

"It is our conclusion that any trucking company, upon becoming a public utility under the Public Utility Act, should be expected to exhibit a high degree of performance in the field of safety and should expect to be required to observe rigid safety rules and regulations." General Order No. 99, 51 Cal.P.U.C. 66, 68–69.

In view of the more extensive and regular operations of highway common carriers as compared with others, the Legislature could reasonably conclude that the safety of their operations is of special importance and legislate accordingly. Highway common carriers may not, therefore, insulate themselves from liability for negligence occurring in the conduct of their business by engaging independent contractors to transport freight for them.

The conclusion we have reached makes it unnecessary to resolve the conflicting contentions of the parties with respect to General Order No. 93–A and Emergency Resolution No. 16 of the Public Utilities Commission.

The order granting the limited new trial to plaintiffs James Eli and Alfred L. Jackson is affirmed. The judgment for the other plaintiffs is affirmed.

We concur:

GIBSON, C. J., and SHENK, EDMONDS, CARTER and SPENCE, JJ.

SCHAUER, J., concurs in the judgment.

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113 Cal.App.2d 575

AGNEW v. FOELL et al.

Civ. 18915.

District Court of Appeal, Second District, Division 2, California.

Oct. 8, 1952.

Rehearing Denied Oct. 24, 1952.

Hearing Denied Dec. 4, 1952.

Action by Frances Agnew against George T. Foell, and others, for alleged fraud. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained judgment for defendants.

Affirmed.

1. Appeal and Error ⚿931(1), 989

Reviewing court can consider only evidence favorable to trial court's findings and in so doing should consider every reasonable inference drawn from the evidence in support of the findings.

2. Appeal and Error ⚿1010(1)

Reviewing court cannot disturb trial court's findings when thev are supported by substantial evidence.

3. Fraud ⚿7

Where bank manager to whom vendor had been referred by real estate broker had conferred with vendor on two occasions and had advised vendor to give broker an exclusive listing and had advised that now was a proper time to sell, bank manager did not act in a fiduciary capa and vendor had no basis for fraud action for alleged breach of fiduciary relationship.

4. Fraud ⚿50

Fraud is never presumed, and burden of proving fraud rests on one asserting it.

5. Fraud ⚿58(1)

In action by vendor against real estate broker and bank manager for alleged fraud for allegedly advising vendor to sell house for $12,000, evidence established that house at time of sale had value of $12,000 or less.

6. Fraud ⚿11(1)

Even if real estate broker and bank manager who allegedly advised vendor to sell house for $12,000 when it was allegedly worth $13,500 had advised vendor who had placed deed in escrow that vendor was legally bound to proceed with sale, advice was in accordance with Civil Code and stare decisis, and not basis of recovery for fraud.

7. Fraud ⚷11(1)

A legal opinion by a layman cannot constitute the basis of recovery for fraud.

8. Fraud ⚷11(1)

Even if bank manager had made statements that vendor who objected to sale after deed had been placed in escrow with bank could not withdraw deed from escrow and that when vendor dealt with such bank, vendor did not need an attorney, the statements were mere opinions and not basis for relief from sale on ground of fraud.

9. Fraud ⚷58(1)

In action by vendor against real estate broker and bank manager for alleged fraud for allegedy advising vendor to sell house for $12,000 when house was allegedly worth $13,500, evidence sustained verdict for broker and manager.

10. Evidence ⚷145

In action by vendor against real estate broker and bank manager for alleged fraud for allegedly advising vendor to sell house in 1943 for $12,000 when house was allegedly worth $13,500, evidence of price of sale of realty in 1945 and 1946 introduced to demonstrate that real estate value trends were upward was too remote to be relevant and was properly excluded.

11. Appeal and Error ⚷1058(1)

Even if trial court had erred in excluding evidence of sale value of house in 1945 and 1946 as compared with value at time of sale in 1943, when fact that trend of realty value was upward had already been established, evidence was merely cumulative and its improper exclusion would constitute harmless error.

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Cuthbert J. Scott, Los Angeles, for appellant.

Ogden, Crocker & Steelman, Los Angeles, for respondents Foell.

Irsfeld & Irsfeld, James B. Irsfeld, Jr., Los Angeles, for respondent W. P. Ralston.

MOORE, Presiding Justice.

Appellant is displeased with a judgment denying her relief in an action for damages resulting from respondents' alleged misstatements which she asserts induced her to sell certain realty at less than its reasonable market value.

The property involved is on Ramage street in West Hollywood. Appellant completed the purchase thereof early in 1943 for a total cash outlay of $5,000, assuming a mortgage of $2,500. At that time she had known Messers Foell and Ralston about six years. The former was a licensed real estate broker; the latter was manager of a branch bank in Hollywood where for some years appellant had done her banking. After a long and protracted discussion of the sale of the property, on her own volition she finally on July 22, 1943, decided to list it with Foell for sale at $12,000. On receipt of her letter he replied that it would be "well sold if we could get $12,000." A sale was made on August 14, 1943, and an escrow was opened with another branch of the same bank. It was promptly advertised by the buyer who resold it for $13,500. Appellant at once concluded that she had been swindled and sought the advice of Ralston as to whether she could get released from the transaction. She testified that he advised her she would have to complete the sale; that if she tried to withdraw she would be sued. However, she had already signed amended escrow instructions and the sale was on its way to final consummation.

Appellant deems herself aggrieved, claiming that (1) Mr. Foell was her confidential agent, (2) he and Mrs. Foell told her the value of income-bearing real estate is ascertained by multiplying the gross income by "four and not over five"; (3) they had full knowledge of the properties on Ramage street and the fair market value of her place was $12,000; (4) it could not be sold for more than that sum and it would be for her best interest to sell for $12,000. She made similar charges against Ralston who, she claims, was subservient to Foell for the purpose of gaining the latter's assistance in selling certain properties. Other alleged misrepresentations attributed to Ralston are: (1) it would be to appellant's best interest to give Mr. Foell an exclusive agency to sell at $12,000; (2) income from a trust deed at six per cent would be better than ownership of the realty.

[1, 2] Following a trial the court made findings adverse to all the claims of appellant and in favor of respondents. They cannot be disturbed if substantial evidence is found in support of them. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. Respondents are entitled to every reasonable inference, Drabkin v. Bigelow, 59 Cal. App.2d 68, 74, 138 P.2d 750, and the appellate court can consider only evidence favorable to the judgment. Wood v. Samaritan, 26 Cal.2d 847, 849, 161 P.2d 556.

[3–5] Appellant contends that the trial court ignored the fact that a confidential relationship existed between herself and Messers Foell and Ralston. By reason of such relationship she argues that a presumption of unfair dealing was present and that it was not overcome. That there was no substantial evidence of a fiduciary relationship as to Ralston will readily be seen. She was advised by Foell to talk with Ralston. The latter visited her once while she was confined to a hospital; he accompanied her once to an X-ray laboratory; he advised her to give Foell an exclusive listing and that it was time to sell. Such evidence is insufficient proof of a fiduciary relationship. It is a presumption that a person is innocent of crime or wrong and that private transactions have been fair and regular. Code Civ.Proc., sec. 1965, subds. 1, 10. Fraud is never presumed. The burden of proving it rests on him who asserts it. Code Civ.Proc., sec. 1963; Dorn v. Pichinino, 105 Cal.App. 2d 796, 801, 234 P.2d 307. While appellant now makes no claim of any representation of Foell as to depreciation of her property, yet he testified that in computing its value by means of its replacement value, he gave consideration to its age and depreciation. In this he was supported by expert witnesses. There was no contradictory testimony. The value of the property at the time of the sale was established by four witnesses at $12,000 or less.

[6–9] Respondents expressly denied having advised appellant that she was legally bound to proceed with the sale. But if they had given her such advice, it would have been in accordance with the Civil Code and stare decisis. In the absence of a mutual rescission, there was no basis for appellant's release from her sale. Furthermore, a legal opinion by a layman cannot constitute the basis of recovery for fraud. Finch v. McKee, 18 Cal.App.2d 90, 93, 62 P.2d 1380; McDougall v. Roberts, 43 Cal.App. 553, 557, 185 P. 483. Ralston denied having stated to appellant that she could not withdraw from the escrow or that when she dealt with the bank he managed she did not need an attorney. Even so, such statements are opinions and are not a basis for relief on the ground of fraud. Finch v. McKee, supra. It is, therefore, to declare the obvious that if the charges of overreaching are actionable, the findings as to both Ralston and the Foells are supported by substantial evidence and accordingly they cannot be set aside. Dorn v. Pichinino, supra, 105 Cal. App.2d 807, 234 P.2d 307.

[10, 11] Appellant also urges error in the exclusion of evidence offered by her, to wit, (1) the property was resold in May, 1945, for $16,000 and (2) in May, 1946, for $20,000. Such evidence was not introduced to show value in 1943, but to demonstrate that the trend of real estate values was consistently upward. Such evidence was too remote to be relevant; but if it were admissible, it had already been established by the uncontradicted testimony of Mr. Foell. Hence, even assuming, arguendo, that the evidence was otherwise properly admissible, it was merely cumulative and its exclusion was harmless error. Nulty v. Price, 202 Cal. 279, 283, 260 P. 291; Black v. Black, 91 Cal.App.2d 328, 336, 204 P.2d 950.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

113 Cal.App.2d 549

GROUP PROPERTY, Inc. v. BRUCE.

Civ. 4509.

District Court of Appeal, Fourth District, California.

Oct. 6, 1952.

Group Property, Incorporated, brought action against Dr. Lyman W. Bruce for declaratory relief and to compel defendant to execute and deliver a conveyance of realty, on ground that plaintiff had exercised option in lease to purchase realty. The Superior Court of San Diego, Joe L. Shell, J., entered interlocutory and final judgments, and defendant appealed. The District Court of Appeal, Griffin, J., held that defendant had waived breach of lease by plaintiff, and that plaintiff was therefore entitled to exercise option to purchase realty.

Attempted appeal from interlocutory judgment dismissed, and final judgment affirmed.

1. Landlord and Tenant 🔑92(4)

Where no demand was made by landlord on tenant to perform provisions of lease requiring tenant to make certain improvements each year, with intention on part of landlord to declare breach of lease by tenant, until tenant gave landlord written notice of exercise of option in lease to purchase leased realty, and landlord had continued to accept rent during all of such period, there was a waiver by landlord of breach, and landlord could not successfully contend that tenant's right to exercise option to purchase had terminated because of breach.

2. Declaratory Judgment 🔑347

In action by tenant against landlord for declaratory relief and to compel landlord to execute and deliver conveyance of leased realty in accordance with provision in lease giving option to purchase, evidence sustained finding that tenant had given landlord timely notice of exercise of option before tenant was served with notice by landlord of forfeiture of lease because of breach thereof by tenant.

3. Contracts 🔑318

Generally, forfeitures are not favored.

4. Contracts 🔑318

Any inconsistent act, dealing or expression of intention, by speech or conduct, not to require the doing of a thing, suffices to prevent predication of any forfeiture claim for failure to do such thing.

5. Landlord and Tenant 🔑92(4)

Where tenant acted on statement of landlord that it was not necessary for tenant to make yearly expenditure for premiums as required by lease, and that tenant could take care of matter in some other manner, and, when tenant sought to exercise option in lease to purchase leased premises, landlord attempted to declare a forfeiture because of failure of tenant to make yearly expenditures for improvements landlord was in no position to declare a forfeiture, and lease was therefore effective so that tenant could exercise option to purchase.

6. Corporations 🔑409

Where articles of incorporation of corporation made certain individual authorized manager to supervise and direct corporation's business, which was the leasing, purchasing, and selling of realty, such individual had authority to act for corporation in exercising corporation's option in lease to purchase leased premises.

7. Landlord and Tenant 🔑92(4)

Fact that tenant on May 1, paid landlord rentals for the month of May, did not show an abandonment by tenant of right to exercise option in lease to purchase leased realty later on during the month of May.

8. Landlord and Tenant 🔑92(4)

Where lease gave tenant option to purchase leased premises, and tenant, after tender of purchase price to landlord and after bringing action against landlord to compel conveyance, gave landlord certain checks, which landlord contended were for subsequent rental and showed an abandonment on part of tenant of right to exercise option to purchase, but landlord refused to cash checks, there was no abandonment, as a matter of law, on part of tenant.

9. Abandonment 🔑5

Abandonment is never presumed, but must be made to appear affirmatively by party relying thereon.

10. Declaratory Judgment 🔑342

In action by tenant against landlord for declaratory relief and to compel landlord to execute and deliver a conveyance of realty in accordance with provision in lease giving tenant option to purchase realty, burden was on landlord to prove landlord's assertion that tenant had abandoned right to exercise option.

11. Landlord and Tenant 🔑92(1)

Where tenant notified landlord orally that tenant was exercising option to purchase leased premises, and within reasonable time sufficient offer and tender were made, but landlord again refused to accept offer and tender, and it was apparent that a tender would have been refused under any conditions, no advantage could be claimed by landlord in declaratory judgment action, on ground that tender was not properly and timely made immediately following exercise of right to purchase.

12. Appeal and Error 🔑66

Where interlocutory judgment was entered on December 20, 1951, ordering defendant to comply with decree for specific performance of provision in lease giving plaintiff option to purchase leased realty, and defendant refused, and on January 14, 1952, a final decree was entered declaring plaintiff owner of realty and quieting plaintiff's title thereto on payment of amount stated, interlocutory judgment was not appealable and attempted appeal therefrom would be dismissed.

McInnis & Hamilton, San Diego, for appellant.

Edgar B. Hervey, Thomas P. Golden, San Diego, and Henry F. Walker, Los Angeles, for respondent.

GRIFFIN, Justice.

Plaintiff corporation brought this action against defendant for declaratory relief and asked that defendant be ordered to execute and deliver a conveyance of certain real property and that it be required specifically to perform an option agreement to purchase (included in the provisions of the term of a lease of the property) whereby defendant agreed to sell the property to plaintiff under certain specified conditions.

The material portions of the lease may be thus summarized. Defendant leased to plaintiff, from May 1, 1949, to May 1, 1952, at $500 per month net, several lots on which a substantial building had been previously erected. Defendant acknowledged rent of the first and the last two months of the lease. In paragraph 6 lessee agreed to "spend on the buildings at least $3,333.00 during each year of the term of this lease, and lessee agrees to submit to lessor factual proof of such expenditures for improvements at the end of each calendar year. Any amount expended above said sum in any year shall be credited on the obligation for the succeeding year or years." It was agreed that plaintiff was not delinquent in any rent payment. Paragraph 13 provides that should lessee fail "to pay the rent herein reserved * * * or fail to faithfully perform or observe any other covenant or condition of this lease on its part within ten (10) days after written notice of the breach thereof, then the lessor may, at its option, and at any time during such default or defaults enter upon and repossess the whole of the demised premises * * * and at its option either (1) terminate this lease * * * or (2) * * * re-rent the demised premises * * *" Paragraph 14 provides: "An option is hereby given to lessee to purchase the demised premises at any time during the term of this lease for the sum of Eighty-five Thousand Dollars ($85,000.00), payable Thirty Thousand Dollars ($30,000.00) down and the balance of Fifty-five Thousand Dollars ($55,000.00) to be paid at the rate of Five Hundred Fifty Dollars ($550.00) or more a month, which amount shall include interest at the rate of five per cent (5%) per annum on unpaid balance * * * and any rentals paid to that time in excess of such interest shall be applied as a part of the down payment of the purchase price * * *. In the event it is not the intent of the lessee to exercise his option to purchase, he will notify the Lessor at least ninety (90) days prior to the expiration of this three year lease."

The evidence shows that a few days prior to May 7, 1951, Mr. Parmer, president of plaintiff corporation, and a majority stockholder therein, brought a copy of the lease to Mr. Hervey, plaintiff's attorney, who was employed and authorized by plaintiff, through Mr. Parmer, to exercise the option and open an escrow for the purchase by plaintiff of the property. Some time prior to April 5, Parmer had talked to defendant and told him it looked as though plaintiff might have some one who would buy the property from plaintiff; that a verbal sixty days option had been given to the Elks Lodge and that plaintiff would have to wait until the sixty days had expired before working out any different plans. On May 7, Mr. Hervey phoned defendant and, according to his testimony, told defendant that he was calling as plaintiff's attorney; that "we wanted to exercise our option to purchase" or "we wished to exercise their option"; and asked when defendant would meet with him and open an escrow and deposit the funds called for by the contract; that defendant replied he was busy at the moment; that he would think it over and call him later. (It should be here noted that the lease makes no provision for a written notice to exercise the option).

Instead of calling back, defendant apparently went to his attorney about giving plaintiff notice of default and declaration of forfeiture. Such a notice was prepared on May 9. This notice reads in part: "You are hereby required, within ten days after service of this notice on you, to comply with paragraph 6 of the lease herein referred to by expending the sum of $6,666 on the buildings at the demised premises and improve the same, which expenditure of said sum is the amount called for in paragraph 6 of said lease, to wit: $3,333 for the calendar year May 1, 1949 to April 30, 1950, and $3,333 for the calendar year May 1, 1950, to April 30, 1951. You are further notified that the undersigned does hereby elect to declare a forfeiture of the lease under which you hold possession of the above described premises." The original and some duplicate copies of the notice were signed by both defendant and his counsel and were served on May 9, 1951, on Mr. Byrnes, a director of plaintiff corporation, who on the same day delivered it to the secretary of the corporation and the latter delivered it to Mr. Harvey within 48 hours. A similar notice was served on the secretary of the corporation tion and the latter delivered it to Mr. Hervey, as claimed agent for plaintiff and the Elks Lodge, opened an escrow with the title company, deposited $34,000 therein with instructions to pay defendant the amount necessary to exercise the option upon receipt of a deed from defendant. On May 14, plaintiff, through its attorney, Mr. Hervey, served on defendant and his counsel a written notice that plaintiff lessee "does hereby exercise the option". Therein he computed the down payment as $25,000, and added $6,666 as the claimed amount not expended by plaintiff lessee under the provisions of paragraph 6 in relation to improvements. On July 10, an additional sum of $47,000, plus $550 was deposited in the escrow and defendant was notified of the fact. This notice was accompanied by a copy of the escrow instructions. Demand was made for a deed from defendant to plaintiff. This sum of money was obtained, by personal notes of Mr. Hervey and others, from a bank, and was accompanied by an offer of full compliance with all provisions of the lease and option. Defendant refused to comply. He relies first upon his notice of forfeiture, and argues that it shows, as a matter of law, that it, *ipso facto*, terminated all of plaintiff's rights and operated as a forfeiture of the option to purchase the property upon plaintiff's failure to make improvements to the extent of $6,666, as provided in paragraph 6 of the lease.

Plaintiff seeks to avoid this claimed forfeiture by reason of the fact that defendant never claimed a forfeiture at the end of the respective years when the improvements were to have been made, and the further claim is made by plaintiff that defendant especially agreed and acquiesced in the nonexpenditure during these two years, accepted rent for the periods involved, and expressly waived any right to a forfeiture by reason thereof.

The trial court, in effect, held in accordance with the facts related and particularly found that on May 7, 1951, plaintiff, through its attorney, orally notified defendant "that plaintiff elected to purchase the real property", and on May 14 served defendant with a written demand for performance; that the consideration named in the option was fair and reasonable; that plaintiff was able and willing to pay the purchase price; that plaintiff performed all of the provisions of the lease except it did not pay for improvements in the sum of $3,333 during the first or second years, as provided in the lease; that on May 14, 1951, plaintiff offered to pay $6,666 in excess of the purchase price provided in the lease; that defendant never gave any written notice of breach of the lease prior to May 9, 1951; that the option given to plaintiff to purchase was duly accepted and exercised by plaintiff on May 14, 1951, at a time when plaintiff's rights under said option had not been terminated; that plaintiff paid into escrow $79,665.32, after deducting the difference between the total interest due from the total rent paid, and is entitled to conveyance of the property in fee from defendant, and it ordered a decree of specific performance.

An interlocutory judgment was accordingly entered on December 20, 1951, ordering defendant to comply therewith within ten days. Defendant refused and on January 14, 1952, a final decree was entered declaring that plaintiff was the owner of the property and quieting plaintiff's title thereto upon the payment of the amount stated.

The main question involved is whether under the claimed waiver, plaintiff was, in fact, in default, under paragraph 6 of the lease and, if so, whether defendant gave timely notice of such default and notice to quit before plaintiff elected to exercise the option. In reference to the improvements, plaintiff conceded they were not all made during the years involved. Defendant stated he never gave any oral or written notice of such claimed breach prior to the written notice herein mentioned. However, he did state that he discussed the fact that the improvements had not been made with Mr. Parmer; that he never made demand that he comply but that Mr. Parmer invited defendant to lunch and told him he realized plaintiff was partially in default in this respect and that defendant need not worry because plaintiff intended to live up to its agreement; that defendant told Parmer that plaintiff's integrity was "all right, you go ahead. It is all right"; that in one of these discussions defendant said it was his understanding that plaintiff "would either do the work or pay the cash"; that one of these conversations was at the end of the first year and the other just when it was whispered around that the Elks intended buying the building, i. e., about thirty days prior to May 1, 1951; that the reason for not allowing plaintiff to exercise its option was because the price of the property had gone up and he thought plaintiff was an opportunist in not making the improvements as time went along; that if plaintiff had offered defendant $6,600 at the time, he would have taken it rather than require him to do the work.

[1, 2] Mr. Parmer testified he told defendant, in one of these conversations, that he had given the real estate agent for the Elks an oral sixty-day option to purchase the property; that if the Elks cared to buy it, plaintiff company "will exercise its option, will purchase the property from Dr. Bruce, and sell the property to the Elks Club"; that if the Elks did not take it, he would be glad to work out some plan to operate the property with defendant; that Parmer informed defendant that he originally intended leasing the property to a labor union which was to conduct a hospital for its members and make about $10,000 in improvements on the property; that this proposition fell through and plaintiff was left with the lease and that he rented out quarters at a loss of about $200 a month; that no added improvements to the building were therefore necessary and that he then told defendant

that if plaintiff turned back the lease to defendant at the end of its term he would pay to defendant in cash the remaining amount due, as provided in paragraph 6, and if plaintiff purchased the property under the option during that time, it would not be necessary for plaintiff to make those payments; and that defendant at least acquiesced in this suggestion. Apparently, no demand was made upon plaintiff to perform with the intention of declaring a breach, until the written notice in dispute was sent. Defendant continued to accept rent during all of this period. It therefore sufficiently appears that there was a waiver of such breach during the period in question. There is sufficient evidence to support the finding that plaintiff indicated his desire to exercise the option before being served with notice of forfeiture. Under paragraph 13 the notice of forfeiture was not self-operating as of the date of service. It gave notice that plaintiff was "required, within ten days after service of this notice * * * to comply with paragraph 6 * * * by expending the sum of $6,666 on the buildings". In the meantime, the written notice of the option was given, the escrow opened, and a deposit was made while the lease was in effect. Had plaintiff failed to exercise its option or to comply within the ten-day period, another question might be here presented.

Defendant cites considerable authority, such as Zucco v. Farullo, 37 Cal.App. 562, 174 P. 929, to the effect that if the lessee has violated the conditions of the lease which could not afterward be performed, it was not necessary to include in the notice a demand for performance before forfeiture could be effected. It is apparent here that defendant had waived the breach and had tacitly, at least, consented to the proposition that if the option was to be exercised, payment for improvements was to be waived or paid in cash. Payments for rent were received after full knowledge of the claimed breach. Payment in cash for the purchase of the property was tendered before the ten-day period expired. Surely, some timely notice to place plaintiff in default, after the long and continuous waiver existed, was required, or was necessary by the terms of paragraph 13.

In Kern Sunset Oil Company v. Good Roads Oil Company, 214 Cal. 435, 6 P.2d 71, 80 A.L.R. 453, the lease provided that lessees should drill two wells each year until 16 wells had been drilled. Up to that time it had drilled only 13 wells. For nearly five years lessor, with full knowledge of the facts, accepted the regular monthly royalty payments without complaint. Later, a notice of breach of the terms of the lease was served and royalties were thereafter accepted. The court held that under these facts the lessor waived the breach of the lessees and said (quoting from the syllabus):

> "The theory upon which the courts hold that acceptance of rent after the breach of the covenants of a lease, with knowledge of all the facts surrounding such breach, constitutes a waiver of such breach, is that by acceptance of the rent under these circumstances the lessor recognizes the existence of the lease and that it is inconsistent and not permissible for a party to recognize the existence of a lease and accept benefits under it and at the same time claim that it is forfeited and seek to recover the fruits of the forfeiture."

See, also, McGlynn v. Moore, 25 Cal. 384, where it is said (quoting from syllabus):

> "If the lessee covenants in the lease to build within a given time on the demised premises, the covenant is not a continuing covenant; and if the lessee fails to build, the receipt of rent by the lessor, accruing after the end of the time given, is a waiver of the forfeiture."

See, also, Bedford Investment Co. v. Folb, 79 Cal.App.2d 363, 180 P.2d 361; Miller v. Reidy, 85 Cal.App. 757, 260 P. 358; Julien v. Gossner, 103 Cal.App.2d 338, 229 P.2d 786.

Defendant knew that plaintiff had breached the lease in reference to the first and second years' improvement money for many months and continued to accept rents under the lease thereafter. Under ordinary conditions, it would therefore appear that there was sufficient evidence of waiver, were it not for the portion of the lease (paragraph 13) which provides that "the Lessor may, at its option, *and at any time during such default or defaults* enter upon and repossess the whole of the demised premises by summary proceedings or otherwise, and at its option either (1) terminate the lease and all rights of the Lessee therein and in and to the demised premises * * *". By the terms of paragraph 13 plaintiff had ten days in which to correct the default before the lease was terminated, during which period plaintiff gave written notice of its election to exercise the option. The lease was still in effect during that period unless, as contended by defendant, the service of the notice to perform automatically terminated the lease as of that time under section 1161 of the Code of Civil Procedure under the theory that demand would be impossible, useless, and is accordingly excused See, Schnittger v. Rose, 139 Cal. 656, 73 P. 449; Prichard v. Kimball, 190 Cal. 757, 214 P. 863.

[3–5] It is the general rule that forfeitures are not favored, and any inconsistent act, dealing, or expression of intention, by speech or conduct, not to require the doing of a thing, suffices to prevent predication of any forfeiture claim for lack of the doing of such thing. Here plaintiff proceeded and acted upon defendant's statement that it was all right to go ahead without making the yearly expenditure and plaintiff could take care of this in some other manner, such as by expending the whole sum in the third year or by payment in cash. Clearly, defendant was in no position to declare a forfeiture based on that to which he had consented and agreed, and particularly so where the provisions of the agreement required that the lessor give the lessee ten days written notice of its breach. We do not deem the service of the notice in the instant case to have terminated the lease *ipso facto* as of that date, and conclude that the lease was still effective during the ten-day period which permitted the plaintiff to exercise its option to purchase.

In support of the judgment it should also be noted that the court specifically found that plaintiff "elected to purchase the real property" under the option, on May 7, when defendant was orally notified by Mr. Hervey of this fact. This was before any written notice of forfeiture had been served by defendant. Considering the evidence pertaining to the entire transaction leading up to the declaration of the forfeiture, there is sufficient evidence to support this finding, even though the written notice of election to exercise the option was not given until May 14, 1951.

[6] The next argument is that plaintiff corporation, as such, did not in fact or in law exercise its option to purchase and that it paid no money of its own toward the purchase price; that it made no demand for title in the escrow instructions and that strangers to the lease attempted to exercise the option without right. Defendant contends that neither Mr. Parmer nor Mr. Hervey were authorized by the plaintiff corporation to exercise the option and accept title or dispose of the property to the Elks Lodge since the corporation record showed no authority to do so. Mr. Parmer definitely testified that he authorized Mr. Hervey to act for the plaintiff corporation in all the dealings indicated. The treasurer of the corporation verified the complaint in which this authorization was alleged. Under the Articles of Incorporation Mr. Parmer was the authorized manager "to supervise and direct the business of the corporation". The business of the corporation was the leasing, purchasing and selling of property. The lease and option agreement was apparently duly executed and authorized by the corporation. The authority of Mr. Parmer to act for the corporation in the exercise of the option cannot now be questioned by the defendant under the holding in Jeppi v. Brockman Holding Company, 34 Cal.2d 11, 16, 206 P.2d 847, 9 A.L.R.2d 1297. It can fairly be said that it was plaintiff corporation, through its authorized agent, who was acting in reference to the exercise of the option and the demand for a deed; that

the money placed in escrow was subject to its instructions; and that there was a mutuality of obligation between the plaintiff and defendant upon which the court had the authority to compel specific performance by the defendant.

The last argument is that the plaintiff abandoned its option to purchase by reason of the purported payment of rental to the landlord after plaintiff exercised its option to purchase the property and that there was no timely tender of the purchase price, citing such cases as Mariposa Commercial & Mining Co. v. Peters, 215 Cal. 134, 142, 8 P.2d 849; Knowles v. Murphy, 107 Cal. 107, 40 P. 111; Downer v. Buehrle, 90 Cal. App.2d 719, 203 P.2d 795; and 15 Cal.Jur. p. 639, sec. 46.

[7] The record shows that plaintiff paid defendant $500 on May 1, 1951, for rental for the month of May. This was before the option had been exercised and before any notice of forfeiture was served. No abandonment of right could be claimed in this respect. However, it does appear that about June first, after the tender of the purchase price, plaintiff sent a $500 check and a check for $140 to defendant but defendant refused to cash them. The testimony on this subject is the statement of Dr. Bruce:

> "Q. (By Mr. Hervey) In addition to the rentals that had been paid and which you said you have received to and including the month of May, 1951, you also received another check for $500 from the plaintiffs which you have not yet cashed, that is true, isn't it? A. Well, I have two checks that I haven't cashed * * *.
>
> "Q. In the amount of $500 each? A. No, one is 500 and the other is 140.
>
> "Mr. McInnis: 140?
>
> "By Mr. Hervey: Q. So you have received in addition to the rentals you have spoken about $640 additional, is that correct?
>
> "Mr. McInnis: That is objected to as not proper examination. He says he has checks, he hasn't received the rentals.
>
> "Mr. Hervey: He testified he received the rentals up to and including the month of May, 1951. I understand that to be correct.
>
> "By Mr. Hervey: Q. That is true, isn't it? A. I think so.
>
> "Q. In addition to that you have received two checks, one for $140 and one for $500? A. That is right.
>
> "Q. Those last two checks you have not cashed? A. That is right."

[8–10] From this evidence defendant argues that plaintiff paid or offered to pay rental, after the time plaintiff claimed it exercised its option to purchase. It is not clear as to the nature of these proffered payments. The option provides that in case the option is exercised, interest at 5 per cent shall be paid by plaintiff on the purchase price from the date of the inception of the lease, and any rentals paid to that time, in excess of such interest, shall be applied as a part of the down payment. Plaintiff argues that the evidence does not show that they were payments on subsequent *rental.* This point was raised for the first time on appeal and there is no finding on the subject. However, the checks were not accepted by the defendant and there could be no abandonment, as a matter of law, predicated upon this testimony. Abandonment is never presumed, but must be made to appear affirmatively by the party relying thereon. See, Moon v. Rollins, 36 Cal. 333, 340; Pidgeon v. Lamb, 133 Cal.App. 342, 348, 24 P.2d 206; Weideman v. Staheli, 88 Cal.App.2d 613, 616, 199 P.2d 351; and Turner v. Markham, 155 Cal. 562, at pages 572–573, 102 P. 272, at page 276 where it is said:

> "Abandonment is governed by intent, and the intention to abandon must be established by declaration or by conduct. * * * Here clearly there was no abandonment, but rather positive evidence of a prosecution to completion of the oral agreement."

So it is in the instant case. Plaintiff informed defendant on May 7, that it was exerising its option and wanted the defendant to appear at the title company so that an escrow could be opened by them for that purpose. Defendant, stating that he would think it over and call back, immediately went to his attorney and caused the latter to prepare and serve the May 9th notice. Plaintiff then gave the May 14th notice after the opening of the escrow and the deposit of an amount in excess of that required for any down payment under the option provisions. The complaint in this action was filed and the defendant verified the answer to the original complaint on May 25, 1951, six days *before* the two checks were sent to defendant. It does not therefore appear that plaintiff had abandoned its claimed right to exercise its option. The action was diligently begun and prosecuted. Considering plaintiff's activities, the notices given, the principal proceedings had, and the entire evidence in the cause, they fully support the conclusion that there never was and never had been any intention on the part of plaintiff to abandon the exercise of its option to purchase. The burden was on defendant to prove the elements of this assertion which he makes on this appeal. In this, defendant has failed. Swigert v. Stafford, 85 Cal.App.2d 469, 472, 193 P.2d 106.

[11] As to the second contention that plaintiff failed to make timely tender of the purchase price, this fact is not borne out by the evidence. Defendant was notified orally that plaintiff was exercising its option and defendant was asked that he meet plaintiff's agent at the title company to open the escrow and arrange for the necessary deposit of funds and the deed. Apparently defendant did not act on the suggestion, and within a reasonable time a sufficient offer and tender was made, and under the interlocutory judgment defendant was again given the opportunity to accept the offer and tender as made, but again refused to do so. It is apparent from the facts related that a tender would have been refused under any conditions. No advantage can now be claimed by defendant on the ground that a tender was not properly and timely made immediately following the exercise of the right to purchase. Dowd v. Clarke, 54 Cal. 48; Penilla v. Gerstenkorn, 86 Cal.App. 668, 670, 261 P. 488.

[12] The attempted appeal from the interlocutory judgment is dismissed. Krotzer v. Clark, 178 Cal. 736, 174 P. 657. Judgment affirmed.

BARNARD, P. J., and MUSSELL J., concur.

113 Cal.App.2d 687

PEOPLE v. STEWART.

Cr. 856.

District Court of Appeal, Fourth District, California.

Oct. 16, 1952.

Defendant was convicted in the Superior Court, Kern County, Warren Stockton, J., of first degree burglary, and he appealed. The District Court of Appeal, Griffin, J., held that the evidence sustained the conviction.

Affirmed.

1. Criminal Law 🔑1159(5)

Where circumstances in particular case and conduct of accused reasonably indicates that his purpose in entering house was to commit theft, either petty or grand, or any felony, verdict of guilty of crime of burglary will not be disturbed on appeal.

2. Burglary 🔑29

Burglarious intent could be reasonably and justifiably inferred from unlawful and forcible entry alone.

3. Burglary 🔑10

Fact that house was temporarily unoccupied at time of entry, due to visit by its occupants to another city, would not reduce burglary offense to that of second degree.

4. Burglary 🔑8

To constitute burglary it is not necessary that theft or felony be actually committed, forcible entry with felonious intent to commit theft being sufficient even though burglar voluntarily abandons his unlawful purpose; and therefore, where defendant entered inhabited dwelling house with burglarious intent and in nighttime, it would be immaterial whether larcenous taking occurred during day or night. Pen. Code, §§ 459, 460.

5. Burglary ⚿41(1)

First-degree burglary conviction was sustained by evidence. Pen.Code, §§ 460, 1097.

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John M. Nairn, Bakersfield, for appellant.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was convicted by a jury of first-degree burglary on December 24, 1951. The action was consolidated for trial with another action in which defendant was accused and found guilty of violating sec. 4532 of the Penal Code in escaping from a road camp. No appeal is being prosecuted from the judgment in the latter case.

It is claimed that the evidence is insufficient (1) as to the establishment of defendant's intent to commit theft at the time of entry into the building; (2) to show that the burglary was committed in the nighttime; and (3) to show burglary of the first degree. He cites such cases as People v. Golembiewski, 25 Cal.App.2d 115, 76 P.2d 717; People v. Gibson, 107 Cal.App. 76, 289 P. 937; and sec. 1097, Penal Code.

On the night of December 23, about 10:30, defendant, an escapee from the road camp, met a soldier at a bar in Lamont. Defendant was driving a blue Kaiser car but had no money. They discussed the possibility of picking up some girls. After visiting several of the bars, they proceeded to Maricopa Farms, because defendant said he knew a girl, Myrtle Dawn, who lived there. They first visited with some neighbors of the Dawns. Defendant told the soldier he was going down to his "buddy's" or "brother's" house, i. e., the "Gates" cabin, to get some clothes, etc. They arrived there about 1 a. m., and found the front door padlocked and the house was in complete darkness. Defendant tore off the padlock and entered. He immediately went to the gas range and fried some potatoes and other food, ate, and went to bed. The next morning they went to a neighboring home. Defendant drove away in his car and disappeared for a while. He reappeared in the afternoon and later disappeared sometime between 5 and 7 p. m. During the interval the soldier had been warned to be careful and not to associate with defendant. The soldier did not see the defendant again until about 9:30 p. m., at which time he drove up in his car and had three or four pints of gin and some money on his person. Defendant tried to persuade the soldier to go along with him but the soldier refused. Defendant departed alone about 11 p. m.

The evidence further shows that Mrs. Gates had known defendant in the past; that he had stayed at their home for about one week in October; that on December 23, she and her family left their family home locked and were visiting some friends in Bakersfield; that someone phoned her on December 26 and told her that her home had been broken into. She testified she never gave defendant permission to enter her home at any time. On her return she found that a radio, musical powder box, two towel sets and some robes had been taken. Some of the articles were from a locked cedar chest that had been broken into.

On December 24, about noon, defendant went to his parked car, brought the powder box into the home of Myrtle Dawn, and gave it to her for a Christmas present. On December 26, when the neighbors discovered the house had been broken into and was in shambles, a new lock was placed on the door and the owner was notified. On December 24, between 8 and 9 p. m. defendant went to a bar several miles from there and asked for a bottle of gin on credit, which was refused. He returned to his car and brought in a bundle of towels taken from the Gates home and exchanged it for a pint of gin. The owner of the bar reported defendant's car number to the sheriff.

At the trial defendant denied being an escapee, denied being at the Maricopa Farms on any of the occasions mentioned, and denied ever seeing the soldier or the five other witnesses who testified as to his presence near the scene of the burglary on the occasions mentioned. He claimed he was in Oklahoma until December 24, and that on that evening he was in Earlimart, playing for a dance; that the blue Kaiser car he was driving when apprehended in Fresno belonged to a "kid" whom the "law picked up at Fresno"; and that he asked the defendant to keep his car until "he got out". He admitted a prior conviction of felony for theft of an automobile in New Mexico, and that he served five years sentence therefor; and that he was subsequently committed to San Quentin from Kern County, California, for escaping from a county hospital while in custody.

[1-5] The jury returned a verdict of guilty on both counts within one-half hour after retirement. Complaint is made that the jury did not have sufficient time to fully consider the facts and apply the law as given by the court. Disregarding defendant's testimony, which the jury had the right to do, there was no conflict in the evidence and the jury properly determined that a burglary had been committed.

There was no question about defendant breaking and entering an inhabited dwelling in the nighttime, in violation of sections 459 and 460 of the Penal Code. As to what defendant's intentions were at the time of the breaking and entering was an open question for the determination of the jury. People v. Kittrelle, 102 Cal.App.2d 149, 156, 227 P.2d 38; People v. De Soto, 33 Cal.App.2d 478, 92 P.2d 466. Where the circumstances of a particular case and the conduct of the accused reasonably, indicate that his purpose in entering is to commit a theft, either petty or grand, or any felony, a verdict of guilty of the crime of burglary will not be disturbed on appeal. People v. Kittrelle, supra. The forcible and unlawful entry into the unoccupied home at an unusual hour under the pretense that it was his brother's or buddy's home, and that he wished to get some clothes of his that he apparently falsely claimed were in there, the immediate commission of petty theft by helping himself to the owner's food, the familiarity of the accused with the burglarized premises, the dealing with the stolen property as his own, eating the food, giving the musical powder box to a girl friend, and the exchange of the towels for gin, which property was taken at some undisclosed time, the giving of false testimony on the witness stand, and his failure to explain his actions or intent at the time he forcibly entered the premises, are all circumstances which could be considered by the jury in inferring that the defendant, upon breaking and entering into the Gates home, did so with the intent to commit theft. People v. Carroll, 79 Cal.App.2d 146, 179 P.2d 75; People v. Pineda, 41 Cal.App.2d 100, 106 P.2d 25. The burglarious intent could be reasonably and justifiably inferred from the unlawful and forcible entry alone. People v. Fitch, 73 Cal.App.2d 825, 827, 167 P.2d 211.

The fact that the house was temporarily unoccupied at the time, due to the visit by the occupants to another city, would not reduce the offense to that of second degree. People v. Allard, 99 Cal.App. 591, 279 P. 182. Defendant's reliance on the time of the larcenous taking of the various articles does not aid his cause since the crime of burglary does not require that a theft or felony be actually committed. The forcible entry with the felonious intent to commit theft is sufficient even though, after the entry, the burglar voluntarily abandons his unlawful purpose. People v. Shaber, 32 Cal. 36; People v. Novo, 12 Cal.App.2d 525, 55 P.2d 915, 56 P.2d 560. The crime of burglary was completed and consummated the minute the defendant entered the Gates residence with intent to commit theft. There is sufficient evidence to show that defendant entered an inhabited dwelling house; that such entry was with burglarious intent and was made in the nighttime. Therefore, it is burglary in the first degree, as defined in section 460 of the Penal Code.

Judgment affirmed.

BARNARD, P. J., concurs.

113 Cal.App.2d 567

PEOPLE v. JONES.

Cr. 851.

District Court of Appeal, Fourth District, California.

Oct. 7, 1952.

Defendant was convicted of unlawfully possessing hypodermic syringe and needles and unlawfully having possession of a narcotic. The Superior Court of Tulare County, Glenn L. Moran, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Griffin, J., held that conviction of defendant for violation of statute which had been repealed at time of alleged commission of offense and incorporated into another statute was erroneous.

Reversed in part, and remaining portion of judgment and order denying new trial affirmed.

1. Criminal Law 🔑15

In prosecution for unlawfully possessing hypodermic syringe and needle without proper written order where section of Health and Safety Code under which defendant was prosecuted had been repealed and portions of it carried into section of Business and Professions Code, conviction predicated upon violation of section of Health and Safety Code was erroneous. Health and Safety Code, § 11476; Business and Professions Code, § 4163.

2. Poisons 🔑9

In prosecution for illegal possession of marijuana, evidence supported finding that substance found in container on defendant's premises was marijuana.

3. Criminal Law 🔑1169(1)

Poisons 🔑9

Where defendant was acquitted on charge of illegally giving away a narcotic substance, but was convicted on other counts for unlawfully aiding in concealing and withholding stolen property, possessing dangerous weapon, possessing hypodermic syringe and needles, and possessing a narcotic, and evidence was that if defendant had used narcotic at rate prescribed by his physician there would have been more tablets left than were found by police, testimony of witness that defendant had told him that he had given some tablets away was properly admitted and not prejudicial with respect to other counts.

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A. A. George, Fresno, R. D. Love, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Alberta Gattone, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

The information charges defendant in counts one and two, with violating section 496 of the Penal Code in this, that on December 7, 1951, he knowingly and unlawfully aided in concealing and withholding stolen property from the owner, i. e., a moving picture projector and an electric adding machine, knowing them to have been stolen. In count three it is charged that he possessed metal knuckles, in violation of the dangerous weapons control law. Penal Code Appendix, Part 3, sec. 1, page 691, Gen.Laws, Act 1970, § 1, in count four with violating section 11476 of the Health and Safety Code in unlawfully possessing hypodermic syringe and needles without a proper written order, in count five with unlawfully having in his possession a narcotic, to wit, marijuana, in violation of section 11500 of the Health and Safety Code, and in count six with unlawfully giving away a narcotic substance, "codeine" without a written prescription. Defendant entered a plea of not guilty. A trial by jury resulted in a verdict of guilty on counts one to five, and not guilty on the sixth count.

Defendant's counsel raises no question as to the sufficiency of the evidence as to counts one, two, and three. The main attack is directed toward counts five and six.

The first proposition is that certain tests conducted by the chemist upon the substance found in the container on defendant's premises, as charged in count five, were insufficient as a matter of law to support a finding that the substance was marijuana, and that therefore the judgment on the fifth count should be reversed.

The next contention is that the evidence failed sufficiently to establish the corpus delicti as to the offense charged in count six before allowing a witness to testify that when the witness asked the defendant what became of the remainder of certain codeine tablets found in a box in defendant's home that defendant told him "that he (defendant) had given them to several fellows that he thought needed it"; and that even though he was acquitted on this count, the so-called admission of defendant so prejudiced him in the eyes of the jury that he did not have a fair trial on the remaining counts.

A brief relation of the facts shows that the defendant Joel Dane Jones, who also used the name James E. Brewer and various other pseudonyms, owned a pawn shop in Visalia. He and his wife lived in the rear of the premises. On December 6, 1951, defendant, together with a Mexican boy, walked into a drugstore in Visalia. The defendant made a purchase of some cough medicine containing codeine. In signing the register defendant gave his name as James Brewer. The Mexican boy remained near a motion picture projector which was on the counter. At the time, he was wearing a sports jacket draped over his right shoulder so his right arm was completely hidden. Immediately after the defendant purchased the medicine the two walked out of the store. The clerk noticed that the motion picture projector was gone. She took down the license number of the automobile in which defendant and the Mexican boy were riding. The following day the police, with a search warrant, entered the premises of the defendant and found in the bathroom shower the motion picture projector which had been stolen (as charged in count one of the information). They also found upon the premises and under the bed the electric adding machine (described in count two of the information). It was identified by a witness as having been stolen from a stationery store in Hanford. During the search the officer found in a box in the bureau in the bedroom seven pairs of brass knuckles (as charged in count three). Other items of property shown to have been stolen from business houses around Hanford were found. They also found on the shelf in the kitchen two tobacco cans. One of them contained fragments of marijuana (as charged in count five). Under the floor in the clothes closet was found a wicker basket containing an improvised hypodermic syringe, two hypodermic needles, a steel wire gadget used to clean the needles, and several small boxes such as are used for doctor's prescriptions, one of them containing 40 codeine tablets. The officers examined the arms of the defendant and found scars and scabs of the type left by the use of a hypodermic needle.

[1] As to count four, it is pointed out by the attorney general that at the time of the alleged commission of the offense of unlawful possession of a hypodermic syringe and needle without a permit, section 11476 of the Health and Safety Code, under which defendant was prosecuted, had been previously repealed. Stats. 1947, p. 2156, chap. 931, sec. 42. Portions of that section were carried into the Business and Professions Code, Division 2, chap. 9, sec. 4163, page 300. A conviction of a misdemeanor predicated upon a violation of this section as of December 7, 1951, was erroneous and accordingly must be reversed.

As to count five, although the quantity of alleged marijuana was not of great volume, apparently there was sufficient to procure a sample from which the chemists made their analysis and test. A duly qualified expert testified that although he could not obtain any substance out of one can there were traces of marijuana in the other; that he made a microscopic and chemical test; that these tests were reliable and that in his opinion the one can contained marijuana; that the entire amount taken for the test was probably less than a quarter of a grain but that he only needed one-half of that amount.

[2] It is defendant's position that the so-called "Duquesnois" test, made by the expert, would not differentiate between marijuana and other herbs. The witness testified that the microscopic and chemical test used in the instant case was the official

test accepted by the State Division of Narcotic Enforcement and also the Federal Bureau of Narcotic Enforcement, and that in his opinion the substance was marijuana. On the face of the evidence there is no basis for defendant's contention that there was not sufficient evidence to submit the question of fact to the jury. This evidence, when considered in connection with the defendant's statement that about four or five weeks prior to the time of his arrest some Mexican fellow had brought in a pound of marijuana and had canned it up in his place of business and that if there were some it was probably some that he left, shows corroboration of the experts' testimony. Defendant offered no evidence to controvert the testimony of the expert relating to the contents of the can. We see no merit to the contention.

[3] As to count six, since defendant was acquitted of the charge, it does seem that he should not now be heard to complain to any great extent. There was evidence that defendant was in possession of one box containing 40 codeine tablets which were apparently obtained by a doctor's prescription. There is also evidence of the presence of five other boxes containing prescription numbers beginning as of the date of August 3, 1951, and ending on December 4, 1951, with directions that the person named on the box take "two at bedtime" or "one or two every four hours". The doctor who furnished the prescription testified as to the dates and amounts of codeine furnished to defendant beginning January 1, 1951, and ending January 29, 1952. The attorney general properly argues that since the prescription for the box of 60 codeine tablets was filled on December 4, 1951, and the arrest was made on December 7, and since the use of 20 capsules would average 6⅔ grains per day, and since his previous average was only 3 tablets or 2.4 grains per day, defendant, if he followed his average use of the drug, would not, himself, use 20 capsules and accordingly it might be reasonably inferred that he disposed of some tablets to others. His statement in reference to giving them away to others was properly admissible under the circumstances. People v. Corrales, 34 Cal.2d 426, 210 P.2d 843; People v. Ives, 17 Cal.2d 459, 110 P.2d 408. We do not believe the admission of this testimony was prejudicial or that it would have influenced the jury in respect to the conviction on the remaining counts. No prejudicial error appears.

That portion of the judgment referring to count four is reversed The remaining portion of the judgment and the order denying a new trial are affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

113 Cal.App.2d 622

BERESFORD et al. v. PACIFIC GAS & ELECTRIC CO. et al.

Civ. 8288.

District Court of Appeal, Third District, California.

Oct. 9, 1952.

Action by Harold K. Beresford and others against Pacific Gas and Electric Company, Public Utilities California Corporation, and others, for damages sustained by fire alleged to have occurred as result of defendants' negligence. Defendant Public Utilities Corporation moved to dismiss plaintiffs' appeal from order of Superior Court, Tehama County, granting a non-suit as to said defendant. The District Court of Appeal, Peek, J., held that fact that defendant electric company served and filed notices to prepare transcript on its appeal from judgment against it on the merits, and thus complied with requirements of Rules on Appeal, did not relieve plaintiffs from necessity of complying with such rules on their appeal from judgment of non-suit entered in favor of defendant utilities corporation, since the two judgments were separate, and separately appealable.

Motion granted.

1. Appeal and Error 🔑347(1)

Where order of non-suit was entered in clerk's minutes on November 30, 1951, but was not entered in permanent minute book until December 3, 1951, latter date was date of entry for purpose of appeal, and appeal from such order, filed on February 1st, 1952, was filed within 60-day period allowed by rule. Rules on Appeal, rules 2(b)(2).

2. Appeal and Error ⚿595

That a defendant served and filed notices to prepare transcript on its appeal from judgment against it on the merits, and thus complied with requirements of Rules on Appeal, did not relieve plaintiffs from necessity of complying with such rules on their appeal from non-suit entered in favor of another defendant in same action, since the two judgments were separate, and separately appealable. Rules on Appeal, rules 4(a, c), 5(a, c), 11.

◆

L. C. Smith, Redding, Rawlins Coffman, Red Bluff, for appellant.

Peters & Peters, Chico, Samuel Vartan, San Francisco, for respondent.

PEEK, Justice.

This is a motion by defendant Public Utilties California Corporation (hereinafter referred to as P.U.C.Corp.) to dismiss an appeal by plaintiffs from an order of the trial court granting said defendant's motion for a non-suit.

From a certificate of the County Clerk of Tehama County and the affidavits of the parties, it appears that plaintiffs sought damages from defendants for the destruction of certain property of plaintiffs by fire alleged to have occurred by reason of defendants' negligence. According to the clerk's certificate, on November 30, 1951, defendant P.U.C.Corp. moved for a non-suit which motion was granted, and an "Order Granting a Non-suit as to said defendant was entered on the said 30th day of November, 1951 in the Clerk's Minutes of said Court. Said Order did not contain a direction that a written order or judgment be filed." However, on December 5, 1951 a formal written judgment of non-suit was prepared by the attorneys for P.U.C.Corp. signed by the trial judge and served on plaintiffs. The trial continued as against defendant Pacific Gas and Electric Company (hereinafter referred to as P.G.&.E. Co.) and resulted in a verdict in favor of plaintiffs; the judgment upon said verdict being entered on January 1, 1952. On January 11, 1952, defendant P.G.&.E.Co. filed its notice of intention to move for a new trial. No motion for a new trial following the order of non-suit or other action was taken by plaintiffs until February 1, 1952, more than sixty days after the original minute order, when they filed their notice of appeal from the order granting the non-suit. On March 4, 1952 the motion for a new trial made by P.G. &.E.Co. was denied and on March 13, 1952 said defendant filed its notice of appeal from the judgment in favor of plaintiffs. Plaintiffs, since the filing of their appeal from the order of non-suit, have neither filed the required notice to prepare transcript or notice designating papers, records, etc. nor any stipulation to prepare an agreed statement or notice of intention to propose such a statement nor any proposed narrative statement, nor have they requested any extension of time for the preparation of the record, However, on March 13, 1952, P.G.&.E.Co. filed a notice to prepare transcripts and the court is informed that the same has now been prepared.

At the time the case was argued before this court on September 4, 1952 questions were raised by counsel and the court concerning the particular wording of Rule 2 (b)(2) of Rules on Appeal, which section specifically provides in the portion thereof pertinent to the problem now confronting the court, that "The date of entry of an appealable order which is entered in the minutes shall be the date of its entry in the permanent minutes * * *". The questions raised related to whether or not a reference in the clerk's certificate that the order was entered in the "Clerk's Minutes of said Court" referred to the rough minutes or the permanent minutes. Under the circumstances the court deemed it proper to allow the parties time to show by affidavit the true date of entry in the permanent minutes of the order of November 30, 1951.

Pursuant thereto we are now in receipt of two conflicting affidavits. The first by the P.U.C.Corp. which sets forth a telephone conversation between R. H. Boding, a deputy clerk assigned to the court during the trial and said defendant's counsel. Said affidavit shows that in response to a question by counsel for movant as to "when you actually entered in the permanent minutes the non-suit order" Boding replied, "Well, I enter those orders and all minute orders in the register of actions right away. Then we enter or rather transcribe the orders into the minute book. It is all done the same day as a rule." Boding was then asked by counsel if that was done in this particular case and he replied, "I am sure that order would be put in the minute book on the same day because that case was long drawn out and we had little else on during that time and I was not behind at all in my work. I am sure of that."

In opposition thereto appellant filed an affidavit of Alice E. Davis, County Clerk, wherein she averred: "* * * that all of the work of the County Clerk's office and that of the Clerk of the Superior Court is done by myself or under my immediate direction and supervision by duly appointed deputies". That during her entire tenure of office there has been an established practice in the preparation of the permanent minutes of the court, which is as follows:

> "The Clerk or Deputy Clerk attending proceeding[s] of the Superior Court makes informal notation of the proceedings of the Court; that the Clerk or Deputy Clerk, following the close of the Court session, then types up said temporary notes, in this case in duplicate, on loose sheets of paper; that one set of typewritten notes is taken to the court room in the event the proceedings are continuing the following day, and the other set is left in my office to be transcribed by other deputies or office typists into the *permanent* minute book; that this work of typing into the *permanent* minutes is done at the earliest practicable time, and in any event, within one week following the proceedings of Court."

In her affidavit she goes on to say that from her examination of the record relating to the minutes of the proceedings on November 30, 1951 she observed the following:

> "Informal minutes were taken during the course of the day by Deputy Clerk R. H. Boding. Court convened at 10:10 A.M. and recessed for the week end at 3:50 P.M. During the course of the trial that day, numerous notations were made, all as appears on the *permanent* minutes. Following the recessing of Court at 3:50 P.M., Deputy Clerk R. H. Boding typed up his notes on loose sheets of paper, in duplicate. Those work sheets are presently stapled to his informal notes among my files. A review of the *permanent* minutes for Friday, November 30th, Saturday December 1st, and Monday December 3rd, reveals the following: That at 12:48 P.M., November 30th, Deputy Clerk R. H. Boding served as Clerk in a divorce proceeding entitled 'Roberts v. Roberts'. That those minutes were inserted in the *permanent* minute book ahead of the minutes of the Beresford case for that day; that on Saturday, December 1st, Deputy Clerk R. H. Boding served as Clerk to the Court in numerous matters before the Court. All such matters were written up and set forth in the *permanent* minutes prior to the writing up of the *permanent* minutes of the subject case for Monday, December 3, 1951.
>
> "That the *permanent* minutes of the subject case for Monday, December 3, 1951, were written prior to the permanent minutes of the regular law and motion calendar of Monday, December 3, 1951.
>
> "That the regular Court work of the Superior Court of the State of California in and for the County of Tehama (other than the subject case being tried with the Honorable Ben R. Ragain presiding), did not convene on Monday, December 3, 1951 until 1:30 P.M. From that fact it is apparent that the work load in my office Monday

morning, December 3rd, was light and gave ample opportunity for the transcribing of the minutes of the proceeding of November 30th into the *permanent* minute book that morning, to-wit, Monday, December 3, 1951. This conclusion is further substantiated by the fact that on Saturday, December 1st, which was a three hour working day, there was a sufficiently heavy work load to make it difficult, if not impossible, for the typing of the *permanent* minutes of November 30th on that day.

"It is therefore my conclusion, predicated upon the above facts, that the *permanent* minutes of the proceedings of the subject case were not written up in the *Permanent* Minute Book, Volume 16, of the Minutes and Orders of the Superior Court of the State of California in and for the County of Tehama until Monday morning, December 3, 1951."

[1] It is readily apparent that we are now confronted with conflicting affidavits. The affidavit of the county clerk directly contradicts that of the deputy clerk, and in a sense also contradicts her original certificate which was filed by the P.U.C.Corp. in support of its motion to dismiss. Under the circumstances we are persuaded that the facts disclosed in the affidavit of the county clerk are decisive of the question as to when the order was entered in the permanent minutes. An analysis of the mechanics of the operation of the clerk's office as set forth in her affidavit relative to the entry of the orders of the court in the minutes and the fact that the order in the instant case was shown thereby to have been entered in the permanent minute book subsequent to a divorce proceeding which was heard on the same day, and the further fact that the minutes for the following day (December 1, 1951) also appeared in the permanent minutes prior to the entry of the order in this case, convinces us that the order in question was not entered in the permanent minutes until Monday, December 3, 1951. Such being the case the appeal from the order was timely filed within the sixty day period allowed under Rule 2(b) of Rules on Appeal.

As has been stated, the "rule was adopted to clarify a most uncertain and confusing condition of the law existing prior to the adoption of this rule in July, 1943." Pessarra v. Pessarra, 80 Cal.App.2d 965, 966, 183 P.2d 279, 280; See also 17 So. Cal.Law Rev. 79, but it is quite apparent from the facts in the present case, that the rule will continue to confuse until there is uniformity of procedure by the counties throughout the state.

The second basis urged for dismissal of appellant's appeal is their alleged failure to serve or file notices to prepare either a reporter's or clerk's transcript or to otherwise take any steps to perfect such appeal as provided in Rules 4(a),(c) and 5(a) and (c) of the Rules on Appeal. See Heatly v. Heatly, 83 Cal.App.2d 677, 189 P.2d 748.

It is not denied by appellants that they have failed to file either of the notices required by said rules. Appellants' sole argument in opposition to the movant's contention is that since the P.G.&.E.Co. did so serve and file notice to prepare transcripts, under Rule 11 this was sufficient for them also.

[2] The compliance with said rules by P.G.&.E.Co. in its appeal from a judgment against it, made on the merits of the case, cannot be considered as relieving appellants from the necessity of complying therewith in their appeal from the non-suit entered against them in favor of P.U.C. Corp. Rule 11 refers only to those cases "Where several parties appeal from the same judgment or any part or parts thereof".

The judgment in favor of P.U.C.Corp. is an entirely separate judgment and hence is separately appealable. Rocca v. Steinmetz, 189 Cal. 426, 208 P. 964; Howe v. Key System Transit Co., 198 Cal. 525, 529, 246 P. 39; Young v. Superior Court, 16 Cal.2d 211, 215, 105 P.2d 363; Weisz v. McKee, 31 Cal.App.2d 144, 147, 87 P.2d 379, 88 P.2d 200; Huntoon v. Southern T. &.C.Bank, 107 Cal.App. 121, 131, 290 P. 86.

It necessarily follows that although plaintiffs' appeal from the order granting the defendant corporation's motion for a non-suit, was timely, their failure to comply with the cited Rules on Appeal necessitates the granting of defendant's motion to dismiss.

The motion to dismiss is granted.

SCHOTTKY, J. pro tem., and VAN DYKE, J., concur.

SMITH v. SMITH. *

Civ. 19040.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1952.

Hearing Granted Dec. 4, 1952.

Proceeding by wife for modification of interlocutory decree of divorce which had granted her token alimony of $1.00 a month to require that she be paid $100.00 a month for her support. The Superior Court of Los Angeles County, Mildred L. Lillie, J., denied the modification, and wife appealed. The District Court of Appeal, Fox, P. J., held that where wife, in suit for divorce, had sought approval by court of property settlement agreement under which she had exercised her right to waive all support and maintenance, court, in granting interlocutory decree, was not empowered to add a provision for even token alimony.

Order affirmed.

1. Husband and Wife 🔑278(1)

Property settlement agreements are sanctioned by the Civil Code and occupy a favored position in the law and are valid and binding on the court, and are not tainted by fraud or compulsion or in violation of the confidential relationship of the parties. Civ.Code, §§ 158, 159.

2. Divorce 🔑200, 236

Because public policy requires the protection of the wife, the court may award her necessary alimony in a divorce action, but discretion to do so does not empower the trial court to modify valid agreements of the parties pertaining to the division of their property, nor may court purport to approve agreement and at the same time order payment of support and maintenance contrary to its terms. Civ.Code, § 139.

3. Divorce 🔑236

Where wife, in suit for divorce, sought approval of property settlement agreement under which she had exercised her right to waive all support and maintenance, court was not empowered to add a provision for even token alimony, which would change basically the agreement of the parties.

4. Divorce 🔑255

In proceeding for modification of interlocutory divorce decree which had granted token alimony of $1.00 per month, to require payments of $100 per month, where examination of original file disclosed that judgment, which was ambiguous on its face in that it granted alimony but purported to approve property settlement agreement in which alimony was waived was in fact based on such agreement, defense on ground that terms of agreement were not subject to modification was not collateral attack on judgment.

Jesse Blattel, Beverly Hills, for appellant.

Erb, French & Picone, Beverly Hills, for respondent.

FOX, Justice.

The parties were formerly husband and wife. They separated, however, in May, 1946. A property settlement agreement was executed by the terms of which the wife waived all right to alimony. She then commenced an action for divorce, the complaint reciting the execution of the agreement, and praying that it be approved by the court, except the provision re alimony. She further prayed for token alimony. Defendant was personally served with summons and complaint, but defaulted. An interlocutory decree of divorce was granted plaintiff in January, 1947. The court approved the property settlement agreement but added a provision requiring defendant to pay plaintiff $1.00 per month for her support until further order of the court. In November, 1951, plaintiff sought a modification of the interlocutory decree praying that she be awarded $100 per month for her support. The court, in effect, sustained an objection to the introduction of any evidence and denied plaintiff's motion for modification. It is from this order that plaintiff appeals.

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* Subsequent opinion 254 P.2d 1.

[1, 2] Property settlement agreements are sanctioned by the Civil Code, secs. 158 and 159 and occupy a favored position in the law of this state. Hill v. Hill, 23 Cal.2d 82, 89, 142 P.2d 417. A property settlement agreement, therefore, that is not tainted by fraud or compulsion and is not in violation of the confidential relationship of the parties "is valid and binding on the court." Adams v. Adams, 29 Cal.2d 621, 624, 177 P.2d 265, 267; Verdier v. Verdier, 36 Cal.2d 241, 247, 223 P.2d 214; Viera v. Viera, 107 Cal.App.2d 181, 183, 236 P.2d 632. Public policy requires the protection of the wife, hence in a divorce action the court may award her necessary alimony, Civ.Code, sec. 139. "Such discretion, however, does not empower the trial court to modify valid agreements of the parties pertaining to the division of their property. The court cannot * * * purport to approve the agreement and at the same time order payment of support and maintenance contrary to its terms." Adams v. Adams, supra, 29 Cal.2d 627, 177 P.2d 269.

[3] Here plaintiff alleged the execution of the property settlement agreement, and sought its approval by the court. Thus since there was no attack upon the agreement it was binding upon the parties and "stood in the way * * * of any judgment for plaintiff's support contrary to or inconsistent with its provisions, and the court could not properly ignore its existence." Majors v. Majors, 70 Cal.App.2d 619, 626, 161 P.2d 494, 497; Patton v. Patton, 32 Cal.2d 520, 524, 196 P.2d 909; Verdier v. Verdier, supra, 36 Cal.2d 247, 223 P.2d 217, 218. The court cannot, as was attempted here, approve the agreement and at the same time order payment of alimony contrary to its terms. Adams v. Adams, supra, 29 Cal.2d 627, 177 P.2d 268, 269; Verdier v. Verdier, supra, 36 Cal.2d 247, 223 P.2d 217, 218. Therefore, the court was not empowered to add a provision for even token alimony for that would be changing basically the agreement of the parties, Adams v. Adams, supra, 29 Cal.2d 625, 177 P.2d 267, 268, since plaintiff had waived all support and maintenance, which she had a right to do. Adams v. Adams, supra, 29 Cal.2d 626, 177 P.2d 268; Patton v. Patton, supra, 32 Cal.2d 523, 196 P.2d 910.

[4] Plaintiff, however, contends this is a collateral attack on a final judgment. The answer to this contention is found in Tuttle v. Tuttle, 38 Cal.2d 419, 240 P.2d 587. In that case the decree included certain provisions regarding the property of the parties and required the husband to make monthly payments to the wife of a specific amount for eight years. Before the expiration of that time she moved to modify the final decree so as to increase the amount of the monthly payments to her. The court determined the payments to her were not alimony but an integral part of the settlement of their property rights and therefore denied her motion. It is pointed out, 38 Cal.2d at page 421, 240 P.2d at page 589, that the trial court had jurisdiction to determine whether the decree was based on a property settlement agreement with payments provided as a phase of property adjustment and therefore not subject to modification, or was based upon support provisions of the agreement and therefore subject to modification. The court thereupon concluded, 38 Cal.2d at page 422, 240 P.2d at page 590, that Mr. Tuttle was not making a collateral attack upon the decree but was relying upon it and "the record in the original proceeding which clarifies its provisions." So, here the trial court's examination of the original file disclosed that the judgment which was ambiguous on its face was, in fact, based on the property settlement agreement and was

therefore not subject to modification, Puckett v. Puckett, 21 Cal.2d 833, 840, 136 P.2d 1; Fields v. Fields, 94 Cal.App.2d 56, 58, 209 P.2d 977, hence the denial of plaintiff's motion.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.

113 Cal.App.2d 561

CLAYCOMB et al. v. CARONNA et al.

Civ. 4506.

District Court of Appeal, Fourth District, California.

Oct. 7, 1952.

Action by Frank E. Claycomb and another against Leonard Caronna and another who, in contracting to sell land to plaintiffs, allegedly represented that trees and other improvements which were owned by third persons were part of the land being sold. The Superior Court of San Diego County, L. N. Turrentine, J., denied defendants' motion for change of place of trial to Los Angeles County where they resided, and defendants appealed. The District Court of Appeal, Griffin, J., held that counts for money had and received and for fraud and misrepresentation and in effect, for adjustment of balance due on a promissory note and a trust deed, were triable in Los Angeles County, and that a fourth count for the quieting of title did not entitle plaintiff to retain the action in San Diego County.

Order reversed.

1. Pleading 🔑111.38
Venue 🔑21

The normal right of a defendant is to have an action tried in the county of his residence, and in order to have cause tried elsewhere, plaintiff must bring himself clearly within terms of some statutory exception and is required to frame his complaint to show clearly that he is entitled to retain the trial of the action in the county in which it was commenced.

2. Venue 🔑7

Actions on contract, except as provided by statute, are personal actions triable in the county of defendant's residence.

3. Venue 🔑21

Ordinarily, an action for money had and received is triable in the county of defendant's residence.

4. Venue 🔑21

In action against defendants who, in contracting to sell land, allegedly represented that trees and other improvements belonging to third persons were a part of such land, count for money had and received which did not indicate that plaintiffs were within any statutory exception was triable not in San Diego County, where the land was located and the contract negotiated, but in Los Angeles County where defendants resided. Code Civ.Proc. § 395 (1).

5. Venue 🔑8

An action the gravamen of which is fraud is triable in the county of the residence of the defendant, and mere fact that, incidentally, rights in real property may be involved, does not change the rule.

6. Venue 🔑8

In action against defendants who, in contracting to sell land, allegedly represented that trees and other improvements belonging to third persons were a part of such land, count for damages for fraud and false representations which did not request cancellation of instruments or contracts involving title to real property would involve only question of payment of money and was triable, not in San Diego County where land was located and contract was negotiated, but in Los Angeles County where defendants resided.

7. Venue 🔑4

An action for the cancellation of a security is not necessarily local where no interest in real property is determined or affected.

8. Venue 🔑5(1)

In action against defendants who, in contracting to sell land, allegedly represented that trees and other improvements belonging to a third person were a part of such land, count requesting that defendants be restrained from assigning a note and trust deed and that the instruments be delivered to court only in order that plaintiffs might adjust balance due on them, would not involve interest in real property and would merely amount to reduction of plaintiffs' obligation and, therefore, was triable not in San Diego County where land was located and contract was negotiated, but in Los Angeles County where defendants resided. Code Civ.Proc. § 395(1).

9. Venue ⚿16½

In action against defendants who, in contracting to sell land, allegedly represented that trees and other improvements belonging to a third person were a part of the land being sold, quiet title count which might alone be triable in San Diego County where land was located and contract was negotiated, rather than in Los Angeles where defendants resided, did not entitle plaintiff to retain in San Diego County an action involving three other counts which could result only in money judgment. Code Civ.Proc. §§ 392, 395(1).

◆

David Press, Pasadena, for appellants.

Procopio, Price, Cory & Schwartz, San Diego, for respondents.

GRIFFIN, Justice.

Plaintiffs brought this action on August 14, 1951, against defendants who then resided in Los Angeles County. The complaint concerns a transaction between plaintiffs and defendants, who were all at that time residing in San Diego County. Plaintiffs agreed to and did purchase from defendants a two and one-half acre piece of property. The sale was completed on May 2, 1946.

In Count one plaintiffs allege that defendants became indebted to plaintiffs for money had and received for the use and benefit of plaintiffs in the sum of $7,000; that said sum is due and unpaid and that defendants refuse to pay it.

The second count alleges an agreement wherein the defendants agreed to sell to plaintiffs and plaintiffs agreed to purchase from defendants certain real property then and there owned by defendants, which said real property defendants then and there falsely and fraudulently represented to plaintiffs, in certain particulars, to be improved by certain described trees and other improvements; that defendants falsely and fraudulently represented that those trees and improvements were upon a portion of the described real property mentioned in the deed when in fact they were located on a 20-foot strip of adjoining property owned by a third person; that in reliance upon said false and fraudulent representations, plaintiffs agreed to purchase the property for $11,000 and defendants agreed to execute their grant deed conveying it to plaintiffs; that $3,000 was paid in cash and the unpaid balance of the purchase price was evidenced by a promissory note secured by a trust deed dated May 6, 1946; that $1,152.08 was paid thereon by plaintiffs; that plaintiffs did not discover the true facts regarding the false representations until November, 1950; that by reason of the false and fraudulent representations "plaintiffs have been damaged in the sum of $7,000.00."

As a third cause of action plaintiffs incorporated the provisions of the second cause of action and alleged that they feared defendants might transfer and assign the promissory note and trust deed to an innocent purchaser and therefore plaintiffs' only manner of recovery would be to "adjust the balance due on said promissory note and trust deed by the amount of plaintiffs' judgment obtained herein."

The fourth cause of action is in the ordinary form of quiet title pleading. The prayer for relief is that on the first and second causes of action plaintiffs recover "damage in the sum of $7,000.00" and on the third cause of action that defendants be restrained from transferring the note and trust deed and that they be required to deliver the promissory note and trust deed to the court, and that the same be cancelled. On the fourth cause of action plaintiffs prayed that defendants be required to set forth the nature of their claims to the property described; and for a declaration that defendants have no interest therein.

Defendants moved for a change of venue to Los Angeles County under the provisions of section 395 of the Code of Civil Procedure, and cite such cases as Postin v. Griggs, 66 Cal.App.2d 147, 151 P.2d 887; Hays v. Cowles, 60 Cal.App.2d 514, 516, 141 P.2d 26; Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 274 P. 977; Terry v. Rivergarden Farms Co., 29 Cal.App. 59, 154 P. 476.

It is plaintiffs' contention that the circumstances of this case clearly bring it within the purview of section 395, subdivision (1) of the Code of Civil Procedure that:

> "* * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action * * *."

Plaintiffs contend that the present action arises out of an ordinary written contract betwen the parties for the sale and purchase of real property; that the defendants were the sellers and plaintiffs were the buyers; that the contract was made and entered into by the parties in the county of San Diego; that it pertained to the sale of land located therein and that it was in every respect to be performed in San Diego County by all the parties; that the facts shown indicate that all of the causes of action of the complaint require a trial in the county where the suit was filed; and that under section 395, supra, the defendants were not entitled to a change of venue to the county of their residence.

[1] It is fundamental law that the normal right of a defendant is to have an action tried in the county of his residence. In order to have the cause tried elsewhere, the plaintiff must bring himself clearly within the terms of some statutory exception. A pleader is required to frame his complaint to show clearly that he is entitled to retain the trial of the action in the county in which it was commenced. Bybee v. Fairchild, 75 Cal.App.2d 35, 170 P.2d 54; Lyons v. Brunswick-Balke-Collender Co., 20 Cal.2d 579, 127 P.2d 924, 141 A.L.R. 1173; Neet v. Holmes, 19 Cal. 2d 605, 613, 122 P.2d 557.

[2-4] Count one does not set forth where, when, or how the defendants became indebted to plaintiffs. There is nothing alleged in this cause of action that indicates that it pertains to a local action which should be tried in San Diego County. Actions on contract, except as provided by statute, are personal actions triable in the county of defendant's residence. Ordinarily, an action for money had and received is triable in the county of defendant's residence. Sexton v. Simondet, 97 Cal.App.2d 894, 218 P.2d 1021. Accordingly, since plaintiffs have made no showing that would bring them within any exception, that count should be tried in the county of defendants' residence.

[5, 6] Count two is based on fraud and misrepresentation concerning certain real property in San Diego County. The sale was consummated in 1946. Plaintiffs only seek damages for fraud and false representation and a judgment by default, entered upon such count would not, in any manner, involve the title to the property, but would only involve the question of payment of money. No cancellation of instruments or contracts involving the title to real property is sought. An action, the gravamen of which is fraud, is triable in the county of the residence of the defendant, and the mere fact that, incidentally, rights in real property may be involved, does not change the rule. Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 274 P. 977; Postin v. Griggs, 66 Cal.App.2d 147, 149, 151 P.2d 887. The case of Kaluzok v. Brisson, 27 Cal.2d 760, 167 P.2d 481, 163 A.L.R. 1308, clearly establishes the fundamental law particularly

applicable to the facts in the instant case wherein it is said, quoting from the syllabus:

> "Where a vendee induced to enter into a contract by fraud of a vendor elects to sue for damages, he seeks an affirmance of the transaction and restitution to the extent of the damages suffered on account of the fraud.
>
> "The right of a plaintiff to have an action tried in a county other than that of defendant's residence is exceptional, and if plaintiff would claim such right he must bring himself within the exception.
>
> "An action for damages for fraud in the sale of real property does not come within the purview of Code Civ.Proc., § 392, subd. 1, providing that the county in which realty is situated is the proper forum for the determination in any form of a right or interest in the realty, and the action must be tried in the county of defendants' residence as required by Code Civ.Proc., § 395, subd. 1, since title to the realty would not be affected if the cause should proceed as on a default."

[7, 8] Such is the situation here. A judgment by default, entered upon counts one and two, would result in nothing but a judgment for damages for fraud. Count three is a mere personal action to restrain the defendants from assigning the note and trust deed, and it prays that defendants deliver them to the court and that they be canceled. The grounds of cancellation are not set forth, and it is apparent by count two that plaintiffs are electing to stand upon their contract of purchase and only seek damages by way of fraud. An action for the cancellation of a security is not necessarily local where no interest in real property is determined or affected.

From a reading of the third cause of action it affirmatively appears that the only purpose suggested by that count is that in case a judgment is obtained against the defendants, the plaintiffs might adjust the balance due on the promissory note and trust deed. A judgment determining this fact would not involve a determination of interest in real property. It would merely amount to a reduction of the obligation represented by the promissory note. In Kaluzok v. Brisson, supra, 27 Cal.2d at page 764, 167 P.2d at pages 482, 483, a similar claim to that made by plaintiffs was rejected.

[9] The last cause of action, standing alone, might be held to constitute a local action but plaintiffs, by including such count in their main cause of action, cannot retain jurisdiction in San Diego County merely by such a pleading. The rule is set out in Hays v. Cowles, 60 Cal.App.2d 514, 516, 141 P.2d 26, 27, and supported by other cases therein enumerated:

> "By an unbroken chain of decisions beginning with Smith v. Smith, 88 Cal. 572, 26 P. 356, it has been definitely established that section 392 upon which respondent here relies is effective only when real property or the title thereto is the exclusive subject matter of the action, and that when a cause of action for relief *in personam* also is joined, the defendant is entitled to have the cause transferred to the county of his residence." And, citing from Smith v. Smith, supra, the court said: " 'The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides.' "

The court erred in refusing to grant the motion for change of venue.

Order reversed.

BARNARD, P. J., and MUSSELL, J., concur.

113 Cal.App.2d 717

WEICHMAN v. VETRI et al.

Civ. 18880.

District Court of Appeal, Second District,
Division 3, California.

Oct. 17, 1952.

Action for price of air conditioning system sold to defendant's alleged partner, and others, for use in cafe and for value of repairs to system. The Superior Court of Los Angeles County, Lawrence P. Scherb, J., entered judgment for defendant after default of judgment had been entered against others named as defendants, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that, where plaintiff's contention that, because defendant and partner owned liquor business adjoining cafe and because liquor could be legally sold only in hotel or cafe, defendant was partner in cafe business and therefore liable for debts involved, was rejected on former appeal, such former decision became law of case and was conclusive upon such claim.

Judgment affirmed.

Appeal and Error ⚷1097(1)

In action for price of air conditioning system sold to defendant's alleged partner for use in cafe and for value of repairs to system, where plaintiff's contention that, because defendant and partner owned liquor business adjoining cafe and because liquor could be legally sold only in hotel or cafe, defendant was partner in cafe business and, therefore, liable for debts involved, was rejected on a former appeal, the former decision was law of the case and conclusive upon such claim. Corporations Code, § 15017.

◆

George E. Stoddard, Hollywood, for appellant.

Victor J. Obegi and Jess F. High, Van Nuys, for respondent.

SHINN, Presiding Justice.

This case was before the court on a former appeal, 100 Cal.App.2d 177, 223 P.2d 288, when a summary judgment in favor of plaintiff was reversed.

In the first cause of action of the complaint it was alleged that William E. Vetri, James Severino, Anthony Rizzo and Braz Cox, purchased an air conditioning system from plaintiff's assignor and agreed to pay therefor $4,200, no part of which had been paid. Attached to the complaint was a copy of the written contract of purchase from one Pelton, doing business as Glendale Refrigeration Sales and Service. The second cause of action was a repetition of the first, with the additional allegation that defendants had become indebted to plaintiff's assignor for repairs in the sum of $81.91. The third cause of action alleged an account stated. Default judgment was entered against Vetri, but defendant Cox answered, denying all the allegations of the complaint. In a nonjury trial judgment was for defendant Cox and plaintiff appeals.

The contract was signed November 9, 1948, by the seller and by Vetri and Severino as buyers. The system was installed in a cafe then operated by Vetri. Cox was not connected with the business in any way. On the 18th day of August, 1949, an agreement was entered into between Vetri and Cox under which the latter was to provide not more than $6,500 to acquire an on sale liquor license and stock for the operation of a cocktail lounge in additions to the building occupied by the cafe, made necessary by the addition of the liquor business. Cox agreed to buy an on sale liquor license which it was agreed would remain his sole and separate property under all circumstances. The parties entered into a partnership in the liquor business, but the agreement provided that Cox should have no interest in the food and restaurant business and that he should not be liable in any manner for bills or obligations theretofore or thereafter incurred in connection with the restaurant business. Vetri was to operate the liquor business and Cox was not required to become active therein. The profits were to be divided, 45 per cent to Cox and 55 per cent to Vetri; losses were to be borne in the same proportions. Cox paid $5,600 for a liquor license; the business was operated for a few months, was discontinued, and Cox sold the license for $4,200. Upon dissolution of the partnership Cox paid Vetri $250 for his interest in the business and license.

Plaintiff's theory is that Cox became a member of an existing partnership which owned the restaurant business and thereby became liable for the existing debts of the partnership to the extent of the partnership assets under section 15017 of the Corporations Code which reads: "Liability of incoming partner. A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property." He claims the liquor license was an asset of the restaurant business and that Cox is accountable for $4,200, the amount for which it was sold.

There was no evidence that Vetri owned or operated the restaurant business in partnership with anyone else before he formed the partnership with Cox to run a liquor business, and no evidence that Cox became a partner in the restaurant business. The evidence which plaintiff relies upon to establish a partnership consisted of the application for a liquor license which was signed by Cox and Vetri, and which represented that the license would be used in a restaurant and that the business would be conducted under the name of "Vetri's Den." His argument is that inasmuch as intoxicating liquor may not be sold or consumed in a public barroom except in a "bona fide hotel, restaurant or cafe," a partnership in the liquor business was necessarily a partnership in the restaurant business, and that Cox therefore became a partner in that existing business. The same contention was advanced and rejected by the court on the former appeal. It was held that the application for a liquor license furnished no evidence whatever of a partnership in the restaurant business. The former decision is the law of the case and is conclusive as to the insufficiency of plaintiff's evidence. Steelduct Co. v. Henger-Seltzer Co., 26 Cal. 2d 634, 160 P.2d 804; 5 C.J.S., Appeal and Error, § 1821, p. 1267.

No evidence was introduced under the second or third causes of action. Cox admittedly is not liable on the contract sued on in the first cause of action.

Plaintiff sued on a contract to which Cox was not a party; it was not alleged that he became a partner in an existing partnership, nor even that he became a partner of Vetri in any business. Aside from the fact that plaintiff sued on one cause of action and sought to recover upon one that was not pleaded, there was a failure of proof of any liability of Cox to plaintiff's assignor.

The judgment is affirmed.

WOOD and VALLEE, JJ., concur.

113 Cal.App.2d 654

ADAMS v. ADAMS.

Civ. 4512.

District Court of Appeal, Fourth District, California.

Oct. 15, 1952.

Rehearing Denied Nov. 12, 1952.

Hearing Denied Dec. 11, 1952.

Action against plaintiff's minor daughter to quiet title to realty. The Superior Court of San Diego County, Dean Sherry, J., rendered a judgment adverse to plaintiff and plaintiff appealed. The District Court of Appeal, Mussell, J., held that finding that plaintiff had executed and delivered deed to realty involved to defendant was supported by substantial evidence.

Judgment affirmed.

1. Deeds 🔑207, 208(1)

In mother's action against her minor daughter to quiet title to realty, finding that plaintiff had executed and delivered deed to realty involved to defendant was supported by substantial evidence.

2. Appeal and Error 🔑1010(1)

Determination of trial court on questions of fact in quiet title action tried to court would not be disturbed on appeal where supported by substantial evidence.

3. Evidence 🔑269(3)

Where issue is execution and delivery of deed, intent of grantor may be shown by his declarations and conduct before, at time of, and after, alleged execution and delivery.

4. Appeal and Error ⇨925(2)

On appeal from judgment entered in quiet title action tried to court, Supreme Court would assume that agreement which was admitted into evidence was considered by trial court in connection with other evidence.

5. Evidence ⇨135(1)

Evidence of similar transactions had on or about same time is material where intent to commit fraud is involved.

6. Deeds ⇨58(1), 64

A deed to an infant requires no delivery to or acceptance by grantee, and delivery to a third person for benefit of infant is sufficient to vest title in infant.

7. Trial ⇨29(4)

In mother's action against her minor daughter to quiet title to realty, record established that trial court did not display a bias against plaintiff preventing plaintiff from having a fair trial.

◆

Quintin Whelan, San Diego, for appellant.

McInnis & Hamilton, William T. Fitzgerald, San Diego, for respondent.

MUSSELL, Justice.

This is an action to quiet title to real property in San Diego. It was brought by plaintiff against her minor daughter, who is the record owner by deed, from plaintiff to her, bearing date of July 9, 1942, signed and acknowledged June 9, 1942, and recorded September 16, of the same year.

The principal issues presented to the trial court were whether plaintiff had executed and delivered the questioned deed to her daughter. These issues were determined adversely to plaintiff's contentions and judgment was entered that plaintiff take nothing by her complaint. The stated grounds of appeal are, the insufficiency of the evidence to support the judgment, irregularities in the proceedings preventing plaintiff from having a fair trial, and bias of the trial judge.

In May, 1942, plaintiff and her husband, Ben F. Adams, lived with their minor daughter (defendant herein) on the real property involved. Domestic trouble arose which led to the preparation of a property settlement agreement. However, this agreement was not signed or executed until July 20, 1942. Adams testified that before the settlement agreement was signed he had a conversation with plaintiff in which they agreed that the daughter should have the home property; that plaintiff should have the furniture and that Adams would take a loan on the property; that the deed to the property would be taken in plaintiff's name at the escrow; that plaintiff would give the child a deed at that time to be held in escrow until after Adams had left and a divorce had been granted. Adams further testified that plaintiff executed the deed involved in his presence on June 9, 1942; that he left the deed with the title company to hold until after the divorce decree had been obtained; that he and plaintiff executed a trust deed on the property for $2,500, that he received the money thus obtained and later purchased the trust deed. The record shows that on or about May 20, 1942, Adams attempted to sell the property involved to Augusta and Regina Melzer. The Melzers were unable to obtain possession of the property and the sale was not consummated. The property settlement agreement was signed by plaintiff and Adams on July 20, 1942. On September 3, 1942, a decree divorcing plaintiff and Adams was granted and the agreement was made a part of the decree. On September 16, 1942, the deed involved was delivered to Adams by the escrow agent and he had it recorded on the same day.

Plaintiff testified that she lived in the house from June 9, 1942, until some time in 1946; that she discovered in 1943 that the property had been deeded to her daughter; that she did not execute or deliver a deed of the property to her daughter; that Mr. Adams made quite a number of real estate deals and that she signed blank deeds for him on many occasions. She stated that she signed the deed to her daughter but did not appear before a notary public to acknowledge her signature thereto. However, a notary public testified that plaintiff signed the deed in question in her presence and that it was notarized by her; that her notary records (which were produced and shown to her in court) contained an entry showing the deed from plaintiff to defendant on June 9, 1942.

[1, 2] There is substantial evidence to support the trial court's finding and conclusion that the deed under consideration was duly executed and delivered. These were questions of fact for the trial court and its determination cannot here be disturbed. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557.

[3–6] Plaintiff argues that the trial court failed to recognize and follow the well established principle of law that where the issue is the execution and delivery of a deed, the intent of the grantor may be shown by his declarations and conduct before, at the time of and after, the alleged execution and delivery. This argument is apparently based on the statement that the trial court questioned the materiality of the property settlement agreement and failed to consider it in rendering its decision. The agreement was admitted in evidence and we must assume that it was considered by the court in connection with all the other evidence, including the evidence of the acts and declarations of plaintiff concerning the execution and delivery of the deed. Plaintiff argues that the court failed to recognize or apply the principle of law that evidence of similar transactions had on or about the same time is material in cases where the intent to commit fraud is involved. Fraud was not alleged or proved and as stated by appellant in her opening brief, the only issues presented were whether plaintiff executed and delivered the deed to her daughter. A deed to an infant requires no delivery to or acceptance by the grantee. Delivery to a third person for the benefit of the infant is in all cases sufficient to vest the title. Turner v. Turner, 173 Cal. 782, 786, 161 P. 980.

[7] Finally, it is contended that the trial court displayed a bias against plaintiff preventing her from having a fair trial. We have reviewed the record in this connection and conclude that this contention is without merit. In view of the evidence supporting the trial court's conclusion that there was a valid execution and delivery of the questioned deed, it is not necessary to pass upon the question of the application of the statute of limitations presented by defendant in her amended answer.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

113 Cal.App.2d 578

PEOPLE v. ONE 1941 CHEVROLET COUPE, ENGINE NO. AA430562, SERIAL NO. 5AH0123201, 1948 LICENSE NO. 90D650.

Civ. 19005.

District Court of Appeal, Second District, Division 2, California.

Oct. 8, 1952.

Proceeding by the People of the State of California for forfeiture of One 1941 Chevrolet Coupe pursuant to narcotics provisions of Health and Safety Code, wherein Fred W. Gray Co., claimed interest in the vehicle as its legal owner. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment on verdict for plaintiff, and Gray Co. appealed. The District Court of Appeal, Moore, P. J., held that the claimant failed to establish that it had complied with the provisions of the Health and Safety Code by making a reasonable investigation of the moral attributes of the purchaser of the automobile before its interest was created.

Judgment affirmed.

1. Forfeitures 🔑5

One who claims interest in a vehicle which is subject to forfeiture under Health and Safety Code has burden of proving that such interest was created after a reasonable investigation into the moral attributes of the purchaser, and whether such investigation as was made was a reasonable one is a question of fact to be tested by the legal standards ordinarily applied. Health and Safety Code, § 11620.

2. Forfeitures ⚷5

Although reasonableness of investigation made by one who claims interest in vehicle which is subject to forfeiture under Health and Safety Code is to be determined by proof in each case, an investigation which reveals only that purchaser had good credit rating is not sufficient, and a sincere investigation should disclose home address of purchaser, his employer or place of business, the sources of his income, his family or social connections, and his standing in his community. Health and Safety Code, § 11620.

3. Forfeitures ⚷5

In proceeding for forfeiture of automobile under Health and Safety Code, lender which claimed interest in the vehicle as its legal owner failed to establish that it had complied with Code by making a reasonable investigation into the purchaser's moral attributes before creating its interest. Health and Safety Code, §§ 11613, 11620.

4. Forfeitures ⚷5

The "investigation" required by the Health and Safety Code of a vendor of automobiles, is a patient inquiry into, and an examination of, all reasonably available facts relating to moral responsibility of purchaser and evidence produced must be not only credible but also sufficient in quantity to satisfy a reasonably prudent person. Health and Safety Code, § 11620.

See publication Words and Phrases, for other judicial constructions and definitions of "Investigation".

5. Forfeitures ⚷5

The test of whether the claimant of an interest in an automobile which is subject to forfeiture under Health and Safety Code has met burden of proving that he made reasonable investigation of purchaser's moral attributes before creating his interest is the objective one of whether investigation unearthed facts which would under the circumstances satisfy a reasonably prudent person. Health and Safety Code, §§ 11613, 11620.

6. Forfeitures ⚷5

In proceeding for forfeiture of automobile under Health and Safety Code, question, put to claimant of interest after he had narrated extent of his investigation into moral attributes of purchaser, concerning what he found as result of said investigation, called for an irrelevant conclusion, and objection to it was properly sustained. Health and Safety Code, §§ 11613, 11620.

7. Evidence ⚷60, 69

Statutory presumptions that a person takes ordinary care of his own concerns and that the ordinary course of business has been followed and that the law has been obeyed, although classed as evidence, are not on that account alone admissible, and like any other evidence, they must meet the test of relevancy. Code Civ.Proc. § 1963, subds. 4, 20, 33.

8. Forfeitures ⚷5

In proceeding for forfeiture of automobile under Health and Safety Code, statutory presumptions that person takes ordinary care of his own concerns and that ordinary course of business has been followed were not relevant on issue of whether claimant of an interest had made a reasonable investigation of the moral attributes of its purchaser. Code Civ.Proc. § 1963, subds. 4, 20; Health and Safety Code, § 11620.

9. Forfeitures ⚷5

Health and Safety Code provision allowing claimant of interest in automobile which is subject to forfeiture to establish that he made a reasonable investigation of the purchaser before his interest was created does not place an affirmative duty upon the claimant to make an investigation and, hence, statutory presumption that law has been obeyed will not operate to assist claimant in establishing that the investigation made was reasonable. Code Civ.Proc. § 1963, subd. 33; Health and Safety Code, § 11620.

Macfarlane, Schaefer & Haun, E. J. Caldecott, Los Angeles, by E. J. Caldecott, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

One Mike Kaleel was the registered owner of the automobile here involved. Fred W. Gray, doing business as Fred W. Gray Co., was the legal owner. The latter had either sold the vehicle to Mike or financed his purchase, taking and reserving the legal title. In due season the coupe was seized by the narcotics enforcement officers and the required notices were served on both Kaleel and appellant. Health & Safety Code, sec. 11613. Kaleel answered but abandoned the contest. By appropriate pleadings, Mr. Gray challenged the People's asserted right to a forfeiture, contending he had complied with section 11620 of the Health and Safety Code[1] in that he had made "a reasonable investigation of the moral responsibility, character, and reputation of the purchaser". On the issue thus created a jury decided adversely to Fred Gray and judgment was entered forfeiting the car to the state. Appellant now contends that the evidence is insufficient to sustain the judgment. Also, he assigns as prejudicial (1) the exclusion of certain testimony offered by appellant and (2) the rejection of an offered instruction with respect to presumptions.

[1, 2] That the evidence justifies the implied finding that appellant did not make a reasonable investigation will presently appear. Whether it was reasonable is a question of fact to be tested by the legal standards ordinarily applied and the burden of proof rests upon the claimant to establish his rights. There is no formula for "a reasonable investigation". Whether the efforts of the claimant have met the lawful requirements is to be determined by the proof in each case. However, one rule has been developed, to wit, a good financial standing or an excellent credit rating of the registered owner is not sufficient. The law is not satisfied unless the investigation uncovers the "moral responsibility, character and reputation of the [purchaser]." People v. One 1941 Buick Club Coupe, 72 Cal.App.2d 593, 597, 165 P.2d 44, 49. A sincere investigation should disclose the home address of the prospective purchaser, his employer or place of business, the sources of his income, his family or social connections and his standing in his community. People v. One 1939 Buick 8 Coupe, 43 Cal. App.2d 411, 416, 110 P.2d 1013; People v. One 1940 Buick 8 Sedan, 70 Cal.App.2d 542, 550, 161 P.2d 264.

[3] Mr. Gray testified he had had financial transactions with Mr. Kaleel since 1942; received from the latter three or four references with whom he conferred as to Kaleel's moral responsibility. However, those early records had been destroyed and he could not remember any reference by name; could not recall the amount of his first sale to Kaleel or whether it was made by a conditional sales contract or by taking a chattel mortgage. Appellant testified to a number of other transactions with Kaleel from 1945 through 1948. During the latter year the last loan was made by appellant on the coupe here involved. He had engaged in other financial arrangements with members of Kaleel's family. While he could not testify that he had personally made the investigation in 1942, he admitted that no further inquiries were made with reference to subsequent loans and that neither Kaleel's residence nor place of employment was ever checked. There is a total absence of proof that appellant ever interviewed an intimate associate of Kaleel or anyone familiar with his moral behavior.

Mr. Karr, appellant's loan manager, could tell nothing more of an acquaintance with Kaleel than receiving and receipting for his payments. He had nothing to do with making the loans to Kaleel. He had experienced no difficulty in contacting Kaleel. Although Kaleel was engaged in the dry-goods business, no effort was made to ascertain whether that was the source of his income. No showing was made that any bank was consulted for the purpose of ascertaining whether Kaleel was in good faith operating the dry-goods business. In short, appellant produced no proof from which a jury of reasonably prudent persons could have determined whether Kaleel was a person of good moral character, no evidence that should have justified appellant as a reasonably prudent person in believing that Kaleel could be trusted to refrain from transporting narcotics in his automobile. Even though appellant had made a sufficient investigation of Kaleel in 1942, it would not necessarily have followed that for other transactions in 1948 he was relieved of the requirement to make a new investigation. Within six years one's moral outlook may change.

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[1] Section 11620 of the Health and Safety Code provides: "The claimant of any right, title, or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged."

[4] What the statute requires of the vendor of automobiles is an investigation, i. e., a patient inquiry into, and examination of all reasonably available facts (Webster's New International Dictionary) relating to the moral responsibility of a person who is about to drive a powerful means of transportation upon the streets and highways of the state. As a reasonably prudent person he must be convinced that such vendee is possessed of the requisite moral attributes. People v. One 1941 Buick Club Coupe, 72 Cal.App.2d 593, 600, 165 P.2d 44; People v. One 1939 Buick, 56 Cal.App.2d 163, 165, 132 P.2d 308. The evidence must be not only credible but also sufficient in quantity to satisfy a reasonably prudent person of the vendee's moral character.

[5, 6] In the course of Mr. Gray's examination, after he had narrated the extent of his investigation, the court sustained the prosecution's objection to the following question, to wit: "And what did you find as a result * * * of that investigation?" The court's ruling was correct. The question called for an irrelevant conclusion of the witness.

Under section 11620 the burden of proof is upon the lien claimant to place before the jury only the facts of the investigation which was made. What appellant concluded from his investigation is of no concern. In determining whether or not the burden of proof has been met the test is an objective one, to wit: did the claimant through his investigation unearth facts which would under the circumstances warrant a reasonably prudent person in believing the loan applicant was possessed of the requisite moral attributes. People v. One 1939 Buick, 56 Cal.App.2d 163, 165, 132 P.2d 308; People v. One 1941 Buick Club Coupe, supra. The vendor's actual conclusion from his investigation adds nothing to his defense which must stand or fall on a showing of the extent of the inquiry made.

Appellant insists that he was entitled to the benefit of three presumptions appearing in section 1963 of the Code of Civil Procedure: "That a person takes ordinary care of his own concerns"; subsection 4, "That the ordinary course of business has been followed"; subsection 20, "That the law has been obeyed"; subsection 33.

[7, 8] Such presumptions have no applicability to the instant case. Though presumptions are classed as evidence, Smellie v. Southern Pacific Co., 212 Cal. 540, 549, 299 P. 529, it does not follow that they are on that account alone admissible. Like any other evidence they must meet the test of relevancy. Whether appellant exercised ordinary care or whether the ordinary course of business was followed has no bearing on the issue of a reasonable investigation. People v. One Harley-Davidson Motorcycle, 5 Cal.2d 188, 189, 53 P.2d 970, 971, In that case the claimant argued that similar sales were made with the exercise of an equal or even less degree of care than which he exercised. The court observed, "the statute requires that a greater showing must be made by one who may be called upon to defend against the law relating to seizure and forfeiture of vehicles used in violation of the salutary provisions of the Narcotic Act."

[9] Neither has the presumption of subdivision 33 any application. The law does

not place an affirmative duty upon the lien claimant to make an investigation. There is no crime committed if the lien-holder fails to make an investigation. Only in the event he aims to protect his interest against a possible forfeiture is the lender obliged to conduct an inquiry. Hence, there is no room for the operation of the presumption that the law has been obeyed.

The order denying appellant's motion for a new trial being nonappealable is dismissed. The judgment is affirmed.

McCOMB and FOX, JJ., concur.

PEOPLE v. ROBERTS.[*]

Cr. 2815.

District Court of Appeal, First District,
Division 1, California.
Oct. 2, 1952.

Rehearing Denied Oct. 17, 1952.
Hearing Granted Oct. 30, 1952.

Prosecution for unlawful possession and sale of narcotics, and conspiracy to violate Health and Safety Code, § 11500. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Bray, J., held that information which charged conspiracy to violate Health and Safety Code, § 11500 was not insufficient because it did not specify particular portion or portions of that section claimed to be violated.

Affirmed.

1. Indictment and Information 🔑55

Sufficiency of information is not to be tested by rigorous rules of common law nor by rules existing prior to 1927 and 1929 amendments to statutes governing pleadings in criminal cases. Pen.Code, § 952.

2. Indictment and Information 🔑108

Information which charged conspiracy to violate section 11500 of Health and Safety Code was not insufficient for not specifying particular portion or portions of that section claimed to have been violated. Pen.Code, §§ 182, 952; Health and Safety Code, § 11500.

3. Indictment and Information 🔑111(1)

Information charging that accused unlawfully transported, sold, furnished or gave away heroin and had had heroin in his possession was not insufficient for failing to negative statutory exceptions permitting possession or sale of heroin, since statutory exceptions which exempt one from criminal liability are matters of defense. Health and Safety Code, § 11500.

4. Conspiracy 🔑47

Evidence sustained conviction for conspiracy to violate statute prohibiting possession, sale, transportation, furnishing, giving away or administering narcotics by unauthorized persons. Pen.Code, § 182; Health and Safety Code, § 11500.

5. Criminal Law 🔑37

Where informant took officer to alleged dope peddler, peddler allegedly secured dope from accused, and there was no evidence of persuasion on part of officer, officer's action did not constitute unlawful entrapment.

6. Criminal Law 🔑1028

In prosecution for unlawful possession and sale of heroin, accused who did not raise defense of unlawful entrapment at trial could not raise such defense for first time on appeal. Pen.Code, § 182; Health and Safety Code, § 11500.

7. Criminal Law 🔑37

Defense of entrapment is not available to accused who denies he committed the unlawful act in question.

8. Criminal Law 🔑37

Action of police officer, who was traveling incognito in attempt to obtain information to break dope ring, and who permitted woman to use narcotics rather than to reveal his identity by stopping her was not contrary to public policy and did not invalidate conviction of accused for possession and sale of narcotics.

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[*] Subsequent opinion 254 P.2d 501.

9. Criminal Law ⚿37

Even if police officer traveling incognito improperly permitted woman to use narcotics which accused had allegedly transported and sold, police officer's action would not be a defense to accused's earlier alleged violation.

10. Criminal Law ⚿673(4)

Admitting conversation witness had with codefendant outside presence of accused when court instructed jury that the conversation was limited to codefendant was proper.

11. Criminal Law ⚿1036(1)

Even if court's instruction to jury that conversation witness had with codefendant outside presence of accused was limited to codefendant was insufficient to remove prejudicial affect of the conversation, accused who had not objected at time could not object for first time on appeal.

12. Criminal Law ⚿388

Reception or rejection of evidence of experiments lies largely within discretion of trial court with limitation thereon that it must be shown that substantially same conditions existed and further that evidence shall be of such character to aid rather than confuse triers of fact with collateral matters.

13. Criminal Law ⚿388

For experiment to be admissible, the conditions of the experiment do not have to be identical with those existing at time of occurrence in question, but there must be a substantial similarity.

14. Criminal Law ⚿388

In prosecution for unlawful possession and sale of narcotics, exclusion of evidence of experiment involving attempt to show ability or inability of a witness to identify persons in automobiles traveling at speed of 20 miles per hour from varying distances was a proper exercise of trial court's discretion, when no positive offer to prove substantially similar conditions existing at time of occurrence in question was made. Pen.Code, § 182; Health and Safety Code, § 11500.

15. Criminal Law ⚿730(3)

In prosecution for unlawful possession and sale of narcotics, district attorney's question as to whether accused was known as a peddler of narcotics was not prejudicial and ground for reversal of conviction, when trial court sustained accused's objection and when district attorney made no further reference to the question.

◆

Mancuso, Herron & Winn, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Wallace G. Colthurst, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant Oliver Roberts and one Jackson Syas were charged in an information with (count 1) conspiracy to violate section 11500, Health and Safety Code; and (count 2) transporting heroin, (count 3) selling, furnishing and giving away heroin, and (count 4) having heroin in their possession (the last three in violation of said section). Both defendants were convicted on all four counts. Defendant Roberts appeals from the judgment and from an order denying him a new trial.

Questions Presented.

1. Sufficiency of the information. (a) Does a charge of conspiracy to violate section 11500 of the Health and Safety Code without specifying the particular portion or portions of that section claimed to be violated, state a crime? (b) In charging direct violations of specific portions of that section is it necessary to negative the exceptions therein set forth?

2. Sufficiency of the evidence.

3. Were the actions of the police officer contrary to public policy?

4. Alleged error in (a) admission of evidence and (b) in refusing evidence of a certain experiment.

5. Alleged misconduct of the district attorney.

1. Information. (a) Count 1.

Section 11500, Health and Safety Code, provides: "Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, or offer to transport, sell, furnish, administer, or give away, or attempt to transport a narcotic except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State." The first count charged appellant and Syas with "the crime of violating section 182 of the Penal Code a felony, committed as follows:" that the defendants "did willfully, unlawfully and feloniously conspire, combine, confederate and agree together to commit the crime of Felony, to wit: a violation of Section 11500 * * * Overt Act No. I That thereafter at and in the City and County of San Francisco, California, pursuant to the object of said conspiracy, the said defendant, Jackson Syas accompanied and was driven by the said defendant Oliver Roberts in a Cadillac Sedan along the 1200 block of Ellis Street * * * on or about April 3, 1951."

Appellant contends that as section 11500 may be substantially violated in several different ways, by (1) transporting, (2) selling, (3) furnishing, (4) administering, (5) giving away, or (6) attempting to transport a narcotic, a charge merely of conspiring to violate the section without stating which portion, denies the appellant his constitutional right to be informed of the nature and cause of the accusation against him. He further contends that his conviction under this count would not be a bar, under the same facts, to further prosecution for conspiracy to violate the section in a certain particular, such as conspiring to transport or conspiring to administer narcotics, or conspiring to do any of the many acts prohibited by the section. Hence he could be placed in double jeopardy.

[1, 2] Section 952 of the Penal Code provides that in charging an offense the information "may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." Here the information charged defendants with violating section 182 of the Penal Code (which makes it a crime for "two or more persons [to] conspire: 1. To commit any crime") by conspiring to commit the crime of violation of section 11500, Health and Safety Code. This is sufficient to give the appellant notice that he is being charged with the crime of conspiring to violate section 11500. The exact manner in which he violated it is a matter of proof and not of pleading. The intent of the Legislature in not requiring greater particularity in charging a public offense is shown by the last line of section 952. Although the charge of theft includes the common law offenses of theft, embezzlement and false pretenses, said line provides: "In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another." In People v. Yant, 26 Cal.App.2d 725, 80 P.2d 506, the contention was made that the wording of an indictment was insufficient to charge an offense "for the reason that as to the charge of conspiracy to commit the crime of grand theft, the pleading is destitute of any allegation as to the value of the property alleged to have been the subject of the proposed theft or the narration of any acts which would constitute grand theft." 26 Cal.App.2d at page 729, 80 P.2d at page 508. As to this contention the court said, 26 Cal. App.2d at page 730, 80 P.2d at page 508: "* * * the answer is that the purpose of an indictment or information is to inform the accused of the charge which he must meet at the trial. Under our system of procedure in criminal cases, as a part of the accusatory procedure, the law now provides that in every case the accused is entitled to a copy of the testimony given before the grand jury or the committing magistrate, as the case may be. Secs. 870, 925, Pen.Code. The former requirement that a pleading must set forth the particular circumstances of the offense charged, as now amended declares that it shall be sufficient if it charges 'in any words sufficient to give the accused notice of the offense of which he is accused'. Sec. 952, Pen.Code. The appellant herein was entitled simply to notice of the offense of which he was charged, but not to the par-

ticular circumstances thereof, such details being furnished him by the transcript of the testimony upon which the indictment was founded." The court further pointed out that by reason of the appellant's failure to demur to the indictment any objections as to any *uncertainty* in the indictment were waived. Pen.Code, § 1004. In our case, likewise, appellant did not demur to the information, although he did move to dismiss on the ground the complaint did not state a cause of action.

United States v. Bopp, D.C., 230 F. 723, 726, relied on by appellant, in which an indictment under the United States Criminal Code was held defective, is not applicable here. It held the federal rule to be that in charging an offense which includes generic terms, it is not sufficient to charge the offense in the same terms as in the definition, but "it must state the species, it must descend to particulars * * *." This case, like others cited by appellant, was decided prior to the liberalization of pleadings in criminal cases by statutory amendments. As said in People v. Curtis, 36 Cal.App.2d 306, 317, 98 P.2d 228, 233: "It is to be remembered that the sufficiency of the indictment is not to be tested by the rigorous rules of the common law, nor by the rules existent in this state prior to the 1927 and 1929 amendments to our statutes governing pleadings in criminal cases." As shown in the Yant case, supra, 26 Cal.App.2d 725, 80 P.2d 506, and as set forth in section 952, Penal Code, the rule of the Bopp case is not the rule in California. It is obvious that having been convicted of a conspiracy to violate section 11500, appellant could not again be convicted of a conspiracy to violate any specific portion of that section. His conviction is a bar to any further prosecution for conspiracy in connection with that section.

1. Information. (b) Counts 2, 3 and 4.

[3] These three counts charged both defendants with substantive violations of section 11500, count 2 charging they transported, count 3, sold, furnished and gave away, and count 4, had in their possession, a preparation of heroin in violation of the section. The section begins "*Except as otherwise provided* in this division, no person shall possess * * * a narcotic *except* upon the written prescription of a physician" etc.[1] Appellant's attack on the sufficiency of these counts is that they do not negative these exceptions. While appellant finds some support in 27 Am.Jur. 666 and cases cited from other jurisdictions, the California courts have definitely resolved this question contrary to appellant's contention in a number of cases, see 14 Cal. Jur. 52. Among others is People v. Bill, 140 Cal.App. 389, 35 P.2d 645, where the information charging violation of the Narcotic Drug Act did not negative the exceptions set forth in the act. The court held, based upon a number of California cases there cited, that it is not necessary for the prosecution to negative the exceptions. "The exception which exempts one from criminal liability for possessing narcotic drugs * * * is a matter of defense." 140 Cal.App.2d at page 392, 35 P.2d at page 647. It further held that from the allegation that the defendant was *unlawfully* possessed of the narcotic, it follows that the defendant did not hold a physician's prescription. It pointed out that whether a person comes within an exception to the statute which authorizes possession of the drug is a matter peculiarly within the personal knowledge of the defendant, and because of that fact and the extreme difficulty the prosecution would have to affirmatively prove the negative condition which exempts one from criminal liability under the statute, the law does not require either the allegation in the information of this exception nor affirmative proof thereof on the part of the prosecution. To the same effect, People v. Harmon, 89 Cal.App.2d 55, 200 P.2d 32; People v. Miles, 9 Cal.App. 312, 101 P. 525, cited by appellant, is not in point. There an information charging rape was held insufficient because there was no allegation that the victim was not the defendant's wife. Differing from our case, there such an allegation was a part of the definition of the crime. Moreover, in Peo-

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[1] Unless otherwise noted, all emphasis added.

ple v. Bonfanti, 40 Cal.App. 614, 181 P. 80, the Miles case was practically overruled, the court stating that under section 4½ of article VI of the Constitution (adopted subsequently to the decision in the Miles case) the failure in a charge of rape to allege that the victim was not the wife of the defendant did not justify a reversal of the conviction.

Appellant's answer to the above cases and others to the same effect is that as they are decisions of other divisions of this court, even though in some of them the Supreme Court denied petitions for hearing, we are not bound to follow them. It is sufficient for us to say that we believe the reasoning in them is sound and should be followed by us.

2. Evidence.

[4] Taking the evidence, and the reasonable inferences therefrom, most favorable to the prosecution, as we are required to do, the evidence establishes the following facts: Officer Duarte of the San Francisco police, assigned to undercover work with the narcotics squad, used an informer called "Hometown," whom he met through an inspector of the State Bureau of Narcotics Enforcement. About 9 p. m. on April 2, 1951, Hometown brought Syas to Duarte's car, which was parked on Webster Street between Post and Geary in the Fillmore district. Duarte asked Syas if he could fix him up with some "stuff." Syas, replying in the affirmative, got into Duarte's car, giving Duarte instructions to drive to and park opposite the "Town Club." Syas stated that $50 was the price for a spoon of "H" (heroin). Duarte gave him $50. Syas left the car, walked across the street to the front of the Town Club, met and talked to another man there. After movements of their hands, Syas returned. The other man walked towards Fillmore Street. Entering the car, Syas handed Duarte a napkin containing 4 bindles, a total of 10 grains of heroin. Syas then directed Duarte to drive Syas home. Hometown, Duarte and Syas entered it. There, in Duarte's presence, Syas, two women, and Hometown "took a fix" of the heroin, which Duarte "unwillingly" gave to one of the women from three of the four bindles. Syas and Hometown had made an agreement between themselves that the fix was to be Syas' pay for setting up the purchase.

On the following evening, April 3rd, about 9 p. m., Duarte and Hometown were parked at the corner of Webster and Geary. Hometown left. Later he returned and instructed Duarte to drive to Syas' home on Ellis Street to await Syas. Duarte parked his car on Ellis Street, facing east, near Syas' apartment. Shortly, a 1949 black Cadillac four-door sedan passed traveling west. Its headlights were on and it was going about 20 miles an hour. When the glare of the lights passed, Duarte recognized Syas seated in the front seat alongside the driver, the appellant, whom Duarte also recognized. The car was driven to the corner of Octavia where it made a "U" turn, came back and parked one vehicle behind Duarte's car on the same side of the street. Syas then came to Duarte's car, got in the back seat, handed Duarte four bindles of heroin and said "Give me the money, the man's back there waiting for it." Duarte gave Syas $50 for the heroin. As Duarte watched through his rear view mirror, Syas went back to the Cadillac, opened the door, leaned in, and conversed with the driver. Duarte saw both men move their arms. Then Syas pulled back out and closed the door. The Cadillac then started up and passed Duarte. As it passed him Duarte again identified appellant. Hometown and Duarte then walked up to Syas and they all went into the latter's apartment. On the way in, Syas told Duarte that "the man" was not yet ready to meet Duarte. Duarte, who knew appellant as Oliver Roberts, said, "You mean Oliver?" and Syas said, "Yes." In the apartment, Syas and Hometown and a woman each took a shot of the heroin purchased by Duarte. That same evening Inspector Noel saw appellant driving a black Cadillac on Fillmore Street in the general vicinity where Duarte placed him, on two occasions, one of which was about 9 p. m.

On the evening of April 26, 1951, Duarte, Hometown and another suspect, Briscoe, drove about the Fillmore district. In a nearby vacant lot Briscoe procured a small package of cocaine. Finally, on instructions of Briscoe, they parked on the north side of Haight Street near Steiner in front of 604 Haight. (Syas was not involved in the incidents of this evening.) Briscoe left. Shortly Duarte saw a black Cadillac coming down Haight Street, traveling east. As it passed Duarte recognized in it appellant and Briscoe. The Cadillac proceeded to Fillmore Street, turning right and leaving Duarte's sight. Soon it appeared again, traveling north on Steiner, turning right at Haight and going east on that street. It stopped and parked part way down the block. Briscoe left it, came to Duarte's car, got in the back seat and handed Duarte a bindle of cocaine, containing 11 grains. Duarte paid him $25 in marked state funds.

May 9th, Syas was arrested. To Inspector Noel he denied knowing appellant or having sold narcotics on April 3rd. Later he admitted to Noel that he knew appellant and that on April 2d and 3rd he made deliveries of packages for appellant but denied knowing they contained narcotics. (At the trial Syas denied making this admission.) He refused to answer further questions put to him by Noel without a guarantee of reward.

After his arrest and on May 15th appellant admitted to Noel that he had been in the Fillmore district on April 2d, 3rd and 26th and that on the 2d and 3rd he had been with Syas "or" Briscoe. Noel asked him concerning his sources of income and he replied that he made his money any way he could. Noel asked, "By selling narcotics?" and appellant did not answer.

On the stand, appellant denied that he saw Syas on April 2d or that Syas was in his car on April 3rd or at any time; denied seeing Duarte until his arrest or ever having seen Hometown. He admitted that on April 3rd he possessed a Cadillac sedan. He stated he was a property owner with a net income of $80 per month. He maintained his manner of living by playing poker. He did not know what "bindles" or "stuff" were, but he admitted he knew what "H" and "coke" were.

Syas testified that he and Hometown had made a deal whereby they were to deceive Duarte into thinking that he, Syas, was making the purchases testified to by Duarte, but that in fact the purchases were all made by Hometown. He claimed that the purchases of April 2d and 3rd were made by Hometown from one Sammie Love, and not from appellant; that Love had a black 1940 Cadillac four-door sedan. Syas denied that he made the statements concerning appellant testified to by Duarte.

The evidence is sufficient to support appellant's conviction. On the night of April 2d Syas first demonstrated his function as a purchaser of narcotics for Duarte. (Appellant was not involved in this transaction.) Syas directed Duarte where to drive, then after obtaining the necessary $50 from Duarte, proceeded across the street, met a man with whom he talked. There was a movement of hands and on returning to the car Syas gave Duarte a napkin containing four bindles containing 10 grains of heroin. The next evening, April 3rd, as Duarte was parked in front of Syas' apartment, appellant drove by with Syas seated alongside him. Appellant made a "U" turn and parked his Cadillac one vehicle behind Duarte. Syas then left the car, came to Duarte, gave him the four bindles, and received $50. Syas then returned to the Cadillac, opened the door, leaned in and had a short conversation with appellant. There was a movement of arms.

On April 26th a somewhat similar incident involving appellant occurred, but with another go-between, Briscoe. The latter was riding with appellant in apparently the same Cadillac. After parking about a block from Duarte's car Briscoe came to Duarte and gave him a bindle of cocaine for which he received $25. After his arrest appellant denied any connection with Syas or that Syas had ever ridden in his car. In his testimony he likewise made the same denial. A reasonable inference from the circumstances of April 3rd and 26th is that appellant was the source of supply for the go-between, and that Syas on the 3rd was obtaining the $50 for him.

The circumstances surrounding appellant's actions on those nights, taken alone, are not inconsistent with a reasonable inference of innocence and would not alone be sufficient to establish appellant's guilt. But appellant's denial in his statement to Noel and on the stand that he knew Syas or that Syas was ever in his car (facts which the jury must have found to be true) and that on the nights in question he was where two witnesses placed him, coupled with those circumstances, not only raises an inference of guilt but is entirely inconsistent with an inference of innocence. In other words, appellant's untrue denials plus the suspicious circumstances of the nights in question are only susceptible of one reasonable interpretation, namely, that he was associated with Syas in the transportation, possession and sale of narcotics. The facts that in each instance the money was marked and yet no attempt was made to arrest appellant while he had it, that the informers were not searched before contacting appellant, and that Hometown was not called as a witness, were matters for the jury to consider, but do not, as contended by appellant, make Duarte's story inherently improbable. Particularly is this so in view of appellant's denial of Syas' presence in his car, a fact which is a most integral part of the proof of the crimes.

3. The Actions of the Police Officers.

[5–7] Appellant contends that if he committed the crimes alleged, he was procured to do so by the state narcotic officer and Duarte; that, in effect, he was the victim of entrapment which he contends is against public policy. Here, however, there was no entrapment by either officer. Hometown, the informer, brought Syas to Duarte, who asked the latter if he could get him narcotics. There was no suggestion that Syas patronize appellant or any specified drug peddler. Nor was there any action of the officer that induced appellant to sell narcotics nor any evidence that it was the persuasion of the officer which caused him to do it. He at all times claimed he did not do so. Unfortunately, in narcotic cases, the most, if not the only, effective means of information concerning the procurement of drugs and the detection of peddlers and distributors is from known users, such as Hometown here. There was no entrapment here. Nor was Duarte what appellant calls an "agent provocateur." "Succinctly stated, the situation with which we are here confronted is that law enforcement officers were informed by Bonnie Whitcomb of her dealings with appellant. Upon receipt of this information the officers furnished appellant an opportunity to commit the offense charged. Does this constitute unlawful entrapment as that term is known to the law? We think not." People v. Schwartz, 109 Cal.App.2d 450, 454, 240 P.2d 1024, 1027. Moreover, no suggestion of this defense was made at the trial nor did the appellant ask that the jury be instructed upon the subject. It cannot be raised for the first time here. Furthermore, the defense of entrapment is not available to a defendant who denies he committed the act in question. People v. Johnson, 99 Cal.App.2d 559, 222 P.2d 58.

[8, 9] Again, great stress is laid by appellant upon the fact that Duarte permitted Syas and Hometown, as well as some women, to use the narcotics which he had purchased. As stated by Duarte, he was in a position where he either had to do so or he uncovered as a police officer. We can see nothing under the circumstances in the officer's actions which was against public policy. Moreover, assuming that the officer improperly permitted the use by others of those narcotics which appellant had transported and sold, we fail to understand how that fact could be a defense to appellant's earlier violation of the law.

4. Alleged Errors. (a) Admission of Evidence.

[10, 11] Appellant contends that the testimony of Noel as to statements made to him concerning appellant by Syas after the latter's arrest and without the presence of appellant, were admitted without limiting them to the case against Syas. However, an examination of the record discloses that the court did so limit them. Inspector Noel stated that he had had a conversation with Syas on the 9th of May outside the presence of appellant. The district attorney then asked the court to instruct the jury that this conversation be limited solely to the defendant Syas. The court so instructed the jury. Shortly thereafter Noel stated that he had another conversation with Syas. Appellant objected, and asked that any conversation had about appellant be stricken as immaterial. The court asked appellant's counsel whether he did not think that this conversation, if it established that Syas was dealing with another man, would be binding on Syas. Appellant's counsel said yes. The court then overruled the objection. The conversation was then testified to. After relating the conversation complained of, Noel then testified to the conversation with appellant, made outside Syas' presence. The district attorney asked for and the court so instructed the jury that this was just the reverse of the other proposition, referring to the previous instruction on Syas' first conversation. No other objection than that set forth above was made nor was any request made by appellant for further instructions. The same conversation was related a second time by a deputy district attorney *without objection,* at which time the prosecution declared that it would be binding only on Syas, and the court said, "Very well." Appellant's counsel said and did nothing. The testimony was admissible against Syas, although not against appellant. It was limited to the case against Syas. If it required further or more definite limitation than that given, it was incumbent upon appellant to say so. See People v. Agajanian, 97 Cal.App.2d 399, 405, 218 P.2d 114; People v. Beal, 108 Cal. App.2d 200, 206, 239 P.2d 84; People v. Matthew, 194 Cal. 273, 281, 228 P. 424. In its final instructions the court informed the jury that it was its duty to disregard completely as against one defendant evidence that was admitted only as to the other. Appellant's contention that Syas' statements were admitted as against both defendants is not supported by the record. If appellant felt that the judge's instructions to the jury limiting the testimony as against Syas were not sufficient, appellant both at the time of admission of the evidence and of final instruction, should have requested that the instructions be amplified. This appellant did not do. He cannot now complain. See People v. Matthew, supra, 194 Cal. 273, 281, 228 P. 424; People v. Beal, supra, 108 Cal. App.2d 200, 206, 239 P.2d 84.

4. Alleged errors (b) Rejection of Evidence.

[12] Appellant called a private investigator, Carter Shired. When he was asked if he had been employed to conduct an experiment for appellant, the prosecution asked for an offer of proof in chambers. There, appellant's counsel stated that he proposed to impeach the testimony of Duarte as to what he could see and the physical impossibility for him to do what he said he did, by the testimony of the witness concerning "an experiment that was conducted at 9:00 in the evening on the corners of Laguna and Ellis Streets with three automobiles involved, traveling at the speed of 20 miles an hour, persons in the cars, and the ability or the inability of a person to identify them, and at what distances they could identify them at." A discussion ensued, in which the prosecution objected that the experiment would have to be under the same conditions and pointed out that the time of Duarte's observation was in April under daylight saving time, while the experiment was made on or after October 8th, when there was no daylight saving. Appellant's counsel later stated: "I'm putting Mr. Shired on the stand to testify as to—my offer of proof is to testify that he conducted an experiment on the corner of Octavia and Ellis Streets with three automobiles involved going at approximately 20 miles an hour and parking them there, and he made an effort to distinguish and identify people in these automobiles, and that I believe his testimony would be this was impossible for him to do so." In replying to the prosecution's objections that there was nothing to indicate that the conditions were similar, appellant's counsel merely stated "that if we were allowed to put on the experiment *I think* we would simulate, *I think* we have simulated the same conditions. *I think* it's common knowledge that the street hasn't changed any, Octavia and Ellis Streets, the size of the street, the lights—they're the same as they were on the night in question—and *I think* we would produce in evidence the same kind of car, a 1940

Cadillac." (Appellant's car was a 1949 Cadillac.) Appellant's counsel then said, *"I think* we have been able to simulate the same conditions * * *." At no time did appellant positively state that the conditions of the experiment were substantially similar to those of April 3rd. The rule as to the reception of this type of evidence is set forth in People v. Parker, 4 Cal.App.2d 421, 424, 40 P.2d 836, 837: "To render evidence of experiments admissible there must be a possibility of reproducing substantially the same conditions which existed when the original occurrence took place. The reception or rejection of such evidence lies largely within the discretion of the trial court with the limitation thereon that it must be shown that substantially the same conditions existed; and further that the evidence shall be of such a character as to aid rather than to confuse the triers of fact with collateral matters."

[13] As pointed out in the cases cited by appellant, among others People v. Spencer, 58 Cal.App. 197, 208 P. 380; People v. Hadley, 175 Cal. 118, 165 P. 442; Ortega v. Pacific Greyhound Lines, Inc., 20 Cal.App.2d 596, 67 P.2d 702, the conditions of the experiment do not have to be identical with those existing at the time of the occurrence in question, but there does have to be a substantial similarity. See also People v. DeWitt, 98 Cal.App.2d 709, 220 P.2d 981. The cases cited by appellant, among others People v. Lamson, 1 Cal.2d 648, 36 P.2d 361; People v. Spencer, supra, 58 Cal.App. 197, 208 P. 380; People v. Hadley, supra, 175 Cal. 118, 165 P. 442, are distinguishable from the case at bar for the reason that in those cases the evidence indicated that the conditions of the experiment were substantially similar to those of the occurrence.

[14] In view of the fact that no positive offer to prove substantially similar conditions was made, except appellant's mere statement that he thought he could, we cannot say that the court abused its discretion in refusing evidence of the experiment. As said in the Parker case, "The impracticability of accomplishing this experiment with substantial conformity to the original episode would seem to require the trial court, in its exercise of discretion, to refuse admission of the evidence thereof." 4 Cal. App.2d at page 424, 40 P.2d at page 838.

5. Alleged Misconduct of District Attorney.

[15] In cross-examination of appellant as to his income, the district attorney asked, "You're commonly known in the Fillmore as a peddler of narcotics, are you not?" Appellant objected and the court promptly sustained the objection. Appellant did not assign this as misconduct nor request that the jury be instructed. He now claims that it was such misconduct that an instruction would not have cured it, that "you cannot unring a bell." We fail to see how the asking of this question constituted misconduct or how its effect could be as serious as contended by appellant. The district attorney at no time made any attempt to repeat it, nor refer to it in argument. Nothing indicates that the district attorney was acting in bad faith nor that it could have affected the verdict. Unquestionably, the district attorney, in attempting to find out from appellant the source of his income, properly could have asked appellant if he was a peddler of narcotics in the Fillmore district, so that asking him about his reputation in that respect to which the court promptly sustained an objection could not have been prejudicial. In the cases cited by appellant in which convictions were reversed for improper questions, there was either persistent questioning or else improper comment made to the jury. Thus, in People v. Valliere, 127 Cal. 65, 59 P. 295, while there was but one question asked and it was promptly rebuked by the court, the reversal was because the district attorney in argument referred to the objectionable matter "that I know of to my own knowledge." 127 Cal. at page 66, 59 P. at page 296.

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

113 Cal.App.2d 669

NAGLE v. CITY OF LONG BEACH.

Civ. 19074.

District Court of Appeal, Second District,
Division 2, California.
Oct. 16, 1952.

Action against city for injuries sustained by contractor's employee engaged in strengthening structure in municipal water tower, when ladder in reservoir gave way, causing employee to fall. The Superior Court, Los Angeles County, Fred Miller, J., entered judgment after granting motion for nonsuit in favor of city, and plaintiff appealed. The District Court of Appeal, Moore, J., held that contractor's employee accepted structure in condition in which he had found it, and city had right to assume that he would perceive that which would be obvious to him upon the ordinary use of his own senses.

Judgment affirmed.

1. Negligence ⚷66(2)

An invitee to an incompleted building in process of construction, or a building undergoing repairs, is invited to use such building in its condition then existing, and owner is entitled to assume that such invitee will perceive that which will be obvious to him upon the ordinary use of his own senses.

2. Municipal Corporations ⚷857

Where contractor's employee who suffered injuries in fall from ladder in municipal gas reservoir was skilled craftsman and a part of group retained to strengthen wooden structure within gas reservoir, and ladder, the rung of which broke and caused fall, had been under water for 25 years, and employee weighed over 200 pounds, employee accepted structure in its then existing condition, and city was entitled to assume that employee would use caution in climbing ladder and would perceive defects which would be obvious to him upon ordinary use of his own senses, and was not negligent in connection therewith.

3. Municipal Corporations ⚷857

Where contractor's employee was injured in fall from ladder in municipal gas reservoir, in absence of evidence showing that rung of ladder which gave way and caused fall had been result of some specific defective condition, no finding might be had that reasonable inspection by city would have disclosed alleged dangerous condition of ladder, and nonsuit was properly entered.

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Riedman & Silverberg, Fred M. Riedman, Long Beach, for appellant.

Gibson, Dunn & Crutcher, Sherman Welpton, Jr., Los Angeles, for respondents, William F. Spalding, C. Robert Simpson, Jr., Los Angeles, of counsel.

MOORE, Presiding Justice.

Appeal from a judgment entered after granting a motion for nonsuit in an action by an employee of the contractor for alleged negligence of the city in the maintenance of the facilities used for entering and leaving a gas holder. In ascending from the bottom of the tank's interior, a crossbar near the top of the ladder he was climbing gave way and he fell to the bottom, causing serious injuries.

Respondent contracted with a construction company to repair its gas holder, a reservoir for storing gas for domestic consumption. Appellant was an employee of the contractor engaged to make such repairs. The reservoir's lower portion is a large immobile stationary steel tank forty-five feet in height. Its upper portion contracts and expands after the fashion of a small telescope to accommodate its capacity to the amount and pressure of the gas stored. Within the lower part is a wooden structure made of uprights, extending vertically the entire forty-five feet with their necessary braces. Upon such wooden structure, the upper, expansive part of the tank rests when not lifted by the gas. The tank was built about 1927. Minor repairs were done in 1933 and in 1947. The construction company which employed appellant performed its contract in 1948. Throughout the years of its service the tank contained water thirty-five feet in depth which covered the wooden structure. When the construction company commenced its operations, it opened the top of the reservoir to permit entrance into and exit from the interior. This was accomplished by removing a steel plate at the top. Then a ladder four feet in width was constructed by the contractor inside the tank extending from the floor to the opening. It was made of wooden cross bars fastened to three vertical up-rights of 2 x 4 timbers set in a stationary position.

But there was another ladder already in the tank at the time of the commencement of repairs for the use of the workmen. It is referred to as a "chicken ladder." It consisted of cross bars 1″ x 4″ x 20″ nailed to a single timber. It extended directly to an aperture at the top. The cross bars had been nailed to the ascending timber at the time the tank was first constructed and through the years had remained there partially submerged in water. The chicken ladder was more than seventy-five feet from the four-foot ladder. Because the latter was covered with grease and muck from the boots of the men who climbed it, the chicken ladder was used by many of the men for ascending to the top of the reservoir.

When appellant entered the tank on August 3, 1948, he used the four-foot ladder, and again on leaving. He entered by the same on the following day but when appellant with his 210 pounds tried to make his exit he resorted to the chicken ladder. He faced the ascending timber as he progressed upwards and could see the union of the cross bars and the column all the way but found no defect. Also, three other craftsmen who had used that ladder observed no defect and they had seen other employees use it. Appellant chose to use it because (1) it was near the spot where he ended the day's work, (2) the grease on his employer's four-foot ladder was excessive, (3) a fellow-workman suggested their using the chicken ladder, and (4) no signs told him not to use it. His immediate duties in the tank were to assist in strengthening the interior wooden framework with new bracing and nailing.

In support of his demand for a reversal, appellant invokes the familiar rules applicable to the review by an appellate tribunal of judgment following a nonsuit as well as of the duty of an owner of property to exercise ordinary care to keep his premises reasonably safe and to warn an invitee of any hidden dangers or defective conditions thereon.

[1] His doctrines are sound but their application to the instant factual situation is not justified. He adopts the argument of the plaintiff in Ambrose v. Allen, 113 Cal.App. 107, 298 P. 169. Ambrose was a visitor to defendant's structure which was undergoing repairs. He stepped on a joist that gave way as a result of percolating water, dust and age. The court opined in 113 Cal.App. at page 113, 298 P. at page 171 that "Negligence is not absolute, but is a relative matter, depending upon time, place, persons, and circumstances. * * * The fact that the building and the stairway were evidently in process of construction charges those concerned in its construction with a very different degree of care from that which attaches to the owner of a completed building. * * *" The authorities cited in the opinion are pertinent and illuminating. It is an established rule that an invitee to an incompleted building in process of construction is invited to use such building in its condition then existing. Kolburn v. P. J. Walker, 38 Cal.App.2d 545, 549, 101 P.2d 747. The same rule should apply to a building undergoing repairs. In King v. Griffith Company, 65 Cal.App.2d 114, 116, 150 P.2d 8, 9, the plaintiff learned the same to his chagrin that if the dangerous condition of the premises is obvious, the "owner is 'entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses.'" See also Clyde v. Mitchell, 14 Cal.App.2d 365, 58 P.2d 205.

[2, 3] The doctrine announced in those decisions is especially applicable here. Appellant was upon respondent's property as part of a labor group specifically brought there for the purpose of strengthening and refurbishing a wooden structure within the gas reservoir. He was a skilled craftsman employed to assist in remedying the grossly defective conditions which contributed to his injuries. The very nature of his employment was itself warning of the dangers to be encountered. Moreover, his own

weight was a suggestion that he be cautious in climbing on any old structure especially one that had been under water for 25 years. The record contains no specific evidence as to the nature of the alleged defective condition of the ladder and why it gave way under appellant's weight. Although appellant testified that a rung gave way, it was not shown that this occurred because of rotting wood or rusted nails; nor does the proof show whether the rung broke or the nails pulled loose. In the absence of such evidence it might well have been that a thorough scrutiny by respondent would have failed to reveal any defective conditions. Where such proof is lacking, there can be no finding that a reasonable inspection by respondent would have discovered the alleged danger. It follows that the motion for nonsuit was properly granted. Trembley v. Capital Company, 89 Cal.App. 2d 606, 609, 201 P.2d 398.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

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113 Cal.App.2d 598

WEIGHTMAN v. HADLEY et al.

Civ. 18822.

District Court of Appeal, Second District, Division 3, California.

Oct. 8, 1952.

Hearing Denied Dec. 4, 1952.

Evelyn Weightman brought an action against George H. Hadley, Sr., and others for rescission of a sale to Hadley and for other relief. The Superior Court, Los Angeles County, William R. McKay, J., rendered a judgment adverse to Hadley, and he appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that the evidence would not support a finding of joint venture between plaintiff and Hadley entitling plaintiff to a one-third interest in leases and oil and gas interests acquired by Hadley.

Reversed.

1. Trusts 🔑110

Evidence would not sustain finding that defendant had acquired plaintiff's interest in lease by fraud.

2. Trusts 🔑262

Where owner of one-third interest in lease acquired another one-third interest in trust, and subsequently he sold a one-third interest in lease, it would be presumed that he had sold his own one-third interest rather than the interest held in trust.

3. Trusts 🔑196

Plaintiff who had sold her one-third interest in lease to holder of another one-third interest therein for purpose of having her interest resold and who received from her transferee the exact sum which he received upon resale of property was not entitled to any interest in sums received by her transferee as result of subsequent sublease of his own one-third interest. Civ. Code, §§ 2224, 2237.

4. Trusts 🔑372(3)

Neither findings nor evidence would support trial court's conclusion that defendant had held 6,000 shares of stock in trust for plaintiff, evidence showing to contrary that only 4,500 had been so held.

5. Trusts 🔑196

Beneficiary who had consented to sale of shares held in trust for an agreed price, which was full value of shares at time, would not be allowed to recover greater amount for which trustee subsequently sold shares of his own.

6. Trusts 🔑262

Evidence established that plaintiff had consented that defendant might sell, at agreed price, property held by defendant in trust for plaintiff.

7. Election of Remedies 🔑3(1)

Beneficiary suing trustee in equity for proceeds of sale elected her remedy and rules of damages for conversion were inapplicable.

8. Election of Remedies 🔑3(1)

Damages and restitution are alternative remedies and an election to pursue one is a bar to invoking the other.

9. Trusts ⚷91

It is to prevent unjust enrichment that constructive trusts are imposed as remedy.

10. Trusts ⚷196

Trustee of constructive trust who sells trust property with knowledge and consent of beneficiary, and for its full value, is accountable only for sum received, and consenting beneficiary can not hold trustee liable for any resulting loss.

11. Joint Adventures ⚷1.15

Evidence would not sustain finding that parties had entered into joint venture in which plaintiff was to have a one-third interest.

12. Mines and Minerals ⚷79(7)

Evidence established that assignment to plaintiff had only covered 7½ per cent interest in production resulting from development of leased oil land by specified party and that the specified developer had subsequently abandoned the project, and therefore it was error for trial court to award plaintiff 7½ per cent interest in lease.

◆

Walter M. Gleason, San Francisco, Prentiss Moore, Los Angeles, for appellant.

Dolley, Knight, Woods & Hightower, Eugene M. Elson, Los Angeles, for respondent.

SHINN, Presiding Justice.

This action was for rescission of a sale of an interest in an oil lease and corporate stock to George H. Hadley; for a money judgment against Hadley, and to establish interests in oil leases under an alleged joint venture.

The judgment from which defendant Hadley appeals awards plaintiff: (1) $4,995.92 as one-half of a bonus received by Hadley for an oil and gas sublease under the "Richardson" lease in which plaintiff had a one-half interest; Hadley does not question this award; (2) $58,106.41 as bonus, and royalties already received and those to be received by Hadley under a sublease to Richfield of a one-third interest in the "Stone" lease, which interest, it was claimed, was procured from plaintiff through Hadley's fraud, and subsequently sublet to Richfield; (3) $20,400 as the proceeds of a sale by Hadley of and a dividend on certain stock in Norris Oil Company which it was claimed was procured from plaintiff through fraud on the part of Hadley and held by him under a constructive trust; (4) a one-third interest in an oil and gas sublease from Norris Oil Company to Hadley of a 40 acre parcel, which interest it was claimed came to plaintiff as her share under an alleged joint venture agreement; and (5) a 7½ per cent interest in a nonexistent lease of 8,000 acres of the "Russell Ranch" in the Cuyama Valley.

Plaintiff alleged in her complaint that on or about the 22nd day of March, 1944, she entered into a joint venture with George H. Hadley for the acquisition of leases and other oil and gas interests in the Cuyama Valley, which is located in part in San Luis Obispo County, and in part in Santa Barbara County, and that subsequently it was orally agreed by said parties that plaintiff would have a one-third interest in said joint venture with the exception of certain leases thereafter mentioned in the complaint; plaintiff at that time gave Hadley $250; on April 17, 1944, Hadley acquired a one-half interest in an oil and gas lease known as the Richardson lease, and on that date assigned to plaintiff one-half of his one-half interest in said lease; on February 20, 1945, Hadley, having an agreement with one Stone and his wife for a lease, transferred to plaintiff a one-third interest therein for considerations theretofore received from plaintiff; the Stone lease called for by the agreement was executed to Hadley March 3, 1947; on November 15, 1945, plaintiff gave Hadley an additional $300; on or about October 20, 1945, pursuant to and in furtherance of said joint venture, Hadley secured an oil and gas lease on the Russell Ranch in the Cuyama Valley; on April 30, 1946, in consideration for moneys theretofore received, and her interest in the Russell lease, Hadley agreed to have issued to plaintiff 3,000 shares of stock in the Norris Oil Company, a corporation organized by Hadley and others October 30, 1944; on January 23, 1947, plaintiff gave Hadley an additional $300 and he agreed to give her an additional 1,500 shares of stock in Norris Oil Company; shortly thereafter he gave plaintiff a certificate for 4,500 shares of said stock as and *for her interest in the Russell lease.*

There were two other transactions which were not pleaded by plaintiff or defendant but on account of which the court found and decreed plaintiff was entitled to an interest in certain leases. The first of these was the basis of award number 5 above mentioned. It related to the Russell 8,000 acre lease. As previously stated, plaintiff had alleged that she was given 3,000 shares of stock in Norris Oil Company for her interest in this lease. During the trial she produced, under circumstances hereinafter related, a writing assigning to her a 7½ per cent interest out of Hadley's 37½ per cent of the proceeds and profits that might be derived by Hadley from a contract with one Frank for development of the Russell property. This writing was dated April 17, 1944.

An intelligible statement concerning this agreement necessitates some preliminary explanation: Sometime in 1940 Hadley obtained from one Russell, and in the name of Eugene H. Agee as lessee, a lease on the Cuyama Rancho of some 8,200 acres. This was superseded by another lease dated March 1, 1943, from Russell to Agee. On that day it was assigned to W. R. Ramsey and W. E. Ramsey. On June 28, 1943, W. R. Ramsey and wife, and W. E. Ramsey and wife, reassigned and quitclaimed the lease to Eugene H. Agee and Annie B. Agee. (W. E. Ramsey, now deceased, was the former husband of plaintiff.) On January 4, 1944, Agee assigned the lease to one P. H. Frank in consideration of Frank's agreement to drill a well upon terms and conditions under which Agee would receive shares of the production resulting from the development. On March 22, 1944, Agee assigned to Hadley a 37½ per cent interest in this contract. Hadley's assignment to plaintiff, after reciting the existence of the lease on approximately 8,000 acres, the assignment to Frank, and the contract with him, and specifying that Norris owned 25 per cent interest in the contract, Hadley 37½ per cent, and Agee 37½ per cent, provided as follows: "That G. H. Hadley for good and valuable consideration from Evelyn Ramsey and the late W. E. Ramsey I hereby this day assign seven and one-half per cent of my thirty seven and one-half per cent all the benefits derived therefrom to Evelyn Ramsey. (Signed G. H. Hadley.)" This lease was subsequently quitclaimed by Frank to Agee, was assigned to Norris Oil Company, was later surrendered by Norris and on October 20, 1945, Russell gave a lease to Norris Oil Company on a portion of the same property containing about 4,000 acres. It will thus be seen that the lease which plaintiff alleged Hadley procured from Russell October 20, 1945, was actually given to Norris Oil Company, and that at the time of the alleged joint venture agreement Hadley had an interest under the contract with Frank based upon the 1943 lease from Russell.

The second transaction was the basis of the number 4 award first mentioned. On or about April 10, 1948, Norris Oil Company executed to Hadley a sublease of 40 acres of the Russell Ranch, reserving a 14 per cent royalty to the sublessor. (Although this lease was not issued until that date, there was evidence that prior to December 16, 1947, Norris Oil Company had promised Hadley such a sublease.)

Thus, on December 16, 1947, plaintiff owned a one-quarter interest in the Richardson lease. She did not sell this interest. She owned a one-third interest in the Stone lease and 4,500 shares of Norris stock. Hadley at that time owned a one-quarter interest in the Richardson lease, a one-third interest in the Stone lease (having previously sold a one-third interest to one Lubkin), about 37,000 shares of stock in Norris Oil Company and had been promised by Norris a sublease on 40 acres by Norris Company.

On December 16, 1947, Hadley purchased from plaintiff her one-third interest in the Stone lease and her 4,500 shares of Norris stock for $3,000 of which $1,800 was the price of the stock at 40 cents per share, and plaintiff executed an instrument reading: "Dec. 16–47 For good and valuable consideration I hereby assign and transfer my forty five hundred shares of Norris Oil Co.

stock and all my right title and interest in and to the Stone property and any other interest that I may have in the Norris lease; to Mr. George H. Hadley. Accepted Evelyn Weightman. For the above agree to pay Mrs. Evelyn Weightman $3000. on demand. G. H. Hadley." Plaintiff delivered the 4,500 shares of stock to Hadley. Upon the following day Hadley mailed plaintiff a check for $2,700, retaining, with plaintiff's consent, $300 to be used in acquiring oil acreage near Santa Maria. Plaintiff alleged that this sale of her stock and other interests was induced by certain fraudulent representations of Hadley. She sought rescission of this transaction and other relief which will be considered in detail as we proceed.

Before we go further it is necessary to relate certain additional facts as to occurrences subsequent to Hadley's purchase of plaintiff's interests. On December 16, 1947, two men, Henderson and Carpenter, were and for some time had been purchasing stock in Norris Oil Company from various owners. Hadley was assisting them in making these purchases, and had told them of several people, including plaintiff, who owned stock. On November 8, 1947, he sold Henderson and Carpenter 15,000 shares of Norris stock for which he was paid at that time $3,750. On December 17, 1947, he sold them the additional 4,500 shares of stock which he had received from plaintiff and was paid on that date $5,250. In the same transaction he also sold and transferred to Henderson and Carpenter a one-third interest in the Stone lease. Of the purchase price $2,250 represented an additional amount paid for Hadley's 15,000 shares of stock at 40 cents a share, $3,750 of which had previously been paid, $1,800 was the purchase price of the 4,500 shares of stock Hadley had received from plaintiff and in the sale $1,200 of the $5,250 was allocated as consideration for the one-third interest in the Stone lease which was the price Hadley had paid plaintiff. The sale of this interest was evidenced by a written assignment thereof by Hadley to Carpenter and Henderson dated December 18, 1947, which specified that it was one-third of the whole from Hadley's undivided two-thirds interest in said lease. The assignment was recorded at the request of Carpenter December 22, 1947.

We can proceed more understandably by taking up separately the several provisions of the judgment, the findings upon which they rest and the evidence pertaining thereto. We shall take up later the questions of fraud, rescission and laches. We shall assume, merely for present purposes, that plaintiff established a case of fraud, that it was not necessary for her to rescind prior to filing the complaint (she gave no notice of rescission and made no offer to restore), and that she was not guilty of laches. It is also immaterial to the matters presently to be discussed whether the parties were in a joint venture. We shall consider first:

The Richardson Lease

Hadley sublet this property to Richfield for a net bonus of $9,991.84. It was not drilled on and there were no royalties. Plaintiff was awarded $4,995.92 as one-half of the bonus. Defendant does not question this provision of the judgment.

The Stone Lease

[1-3] On or about June 17, 1948, Hadley executed a sublease to Richfield of his one-third interest in the Stone lease, reserving a 1/48th royalty. He received $25,468.33 in bonuses for the sublease. To the time of trial royalties of $32,638.08 had been paid into court by Richfield. Plaintiff had judgment for these amounts and all further royalties to be paid by Richfield.

The theory of this award was that Hadley procured plaintiff's interest in the lease through fraud, that he held her interest as a constructive trustee and was accountable for everything he had received from it. This theory finds a basis in a finding the court made as follows: "* * * prior to December 16, 1947, said Hadley had actually sold a one-third interest in the Stone Lease to one Carpenter and one Henderson, and a one-third interest in the Stone Lease to one Lubking, et al; that on December 16, 1947, said Hadley had no further interest in the Stone lease left to sell." There was no evidence that Hadley had sold a one-third interest to Carpenter or Henderson before he acquired plaintiff's one-third interest. All the evidence was to the contrary. Although it was understood between Hadley and Carpenter and Henderson that the latter two were desirous of purchasing a one-third interest it was also understood that this would be the interest of plaintiff if it should be acquired by Hadley. There was no evidence whatever that Hadley intended or agreed to sell a one-third interest unless he acquired plaintiff's interest. There was no other agreement either written or oral nor was there any payment of money. Plaintiff's complaint and her testimony emphasized the fact that Hadley represented, and she understood, that he was purchasing her interests for resale to other parties who were ready to purchase the same. It was on December 17th, after Hadley acquired plaintiff's interest, that he negotiated a sale thereof to Carpenter and Henderson and agreed on a price, which was paid by them. The assignment of this interest which was executed two days after Hadley's purchase from plaintiff, after identifying the lease read, in part, as follows:

> "Whereas, the said lease and two-thirds of all rights thereunder or incident thereto are now held by G. H. Hadley of record.
>
> "Now Therefore, for and in consideration of Ten ($10.00) Dollars, and other good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned, present owner of the above mentioned interest does hereby bargain, sell, transfer, assign and convey to Scott Carpenter, and Maurice Henderson, One-Third (1/3) interest, of said G. H. Hadley, or 33 1/3 interest, of all of said 100 interest, of said G. H. Hadley, *undivided Two-Third interest* in the above mentioned lease." (Emphasis added.)

It is beyond question that Hadley leased his own one-third interest to Richfield and that plaintiff has no claim upon either the bonus or the royalties

Upon a rescission plaintiff would have been entitled to the return of the interest in the lease or what Hadley had received for it, if he had sold it. She received the exact amount for which it was sold. There was no evidence whatever that it was worth more. Plaintiff claimed Hadley had not sold it but the proof was to the contrary. Of course it was not claimed that he sold it at a profit or in bad faith. Neither was it claimed that he sold his one-third interest previously owned after he purchased plaintiff's interest.

If it be assumed that defendant acquired plaintiff's property by fraud and thus became an involuntary trustee with respect to it, Civ.Code, sec. 2224, section 2237 would apply. It reads: "A trustee who uses or disposes of the trust property, contrary to section two thousand two hundred and twenty-nine, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds with interest." Plaintiff did not allege that defendant had sold the interest in the Stone lease; she contended at all times and tried her case upon the theory that he did not sell it but that he made use of it. If she had succeeded in proving that he retained it as a constructive trustee, and profited by the sublease, she would have been entitled to have him account for the profits he had made. Such was the theory of the judgment but, as we have seen, the facts were to the contrary. Plaintiff has never contended that after Hadley acquired her interest in the lease he sold the interest he had previously owned, and even if she had attempted to change her theory she would have been unable to produce any evidence that Hadley sold his own third interest and retained hers. In addition to the positive evidence the presumption would be that he sold her interest and not his own. People v. California Safe Deposit etc. Co., 175 Cal. 756, 167 P. 388, L.R.A.1918A, 1151. However, her case must stand or fall as she made it. There was complete failure of proof of her claims to the bonus and royalties which came to Hadley through the sublease of his own interest in the lease. As we have previously stated, plaintiff sold her property for the express purpose of having it resold by Hadley and although she made a transfer of it she waited for her money until he had sold it. She received exactly what Hadley received for the property and if he incurred a liability to her through having sold the property it was fully satisfied. The award of the bonus and the royalties was in error.

Plaintiff's Stock In Norris Oil Co.

[4–10] Plaintiff was given judgment for $18,000, as the amount Hadley received for 6,000 shares of Norris stock July 9, 1948, when he sold 30,000 shares at $3.00 per share, and also judgment for $2,400, being the amount of a cash dividend on 6,000 shares declared after December 16, 1947. The findings contain the following: "Said Hadley holds as a constructive trustee * * * the sum of $18000.00 representing the proceeds from the sale of 6,000 shares of stock of Norris Oil Company, which the Court finds were sold by defendant Hadley on or about July 9, 1948." The finding that he sold stock at $3.00 per share is correct, but the shares he acquired from plaintiff were not included in that sale.

The conclusion that Hadley held 6,000 shares in trust for plaintiff is not based upon any finding. The court found that Hadley agreed to give plaintiff 3,000 shares; after that agreement was made and before the certificate for 4,500 shares of stock was delivered to her a stock dividend of 50 per cent was declared by Norris; thereafter, when plaintiff requested something to show for the promised stock Hadley said he would give her an additional 1,500 shares or a certificate for 4,500 shares instead of 3,000 shares, and a few days later delivered her such a certificate. The court did not find that Hadley ever agreed to give plaintiff more than 4,500 shares. Defendant claims that the additional 1,500 shares represented only the stock dividend on 3,000 shares and that there was no evidence and no finding that he promised to give plaintiff more than this. The point is well taken. Moreover, even if the court had found that plaintiff had been promised 6,000 shares there would have been no evidence to support the finding. When defendant delivered a certificate for 4,500 shares plaintiff accepted it without question. When she sold the shares it was by writing which read: "For good and valuable consideration I hereby assign and transfer my forty five hundred shares of Norris Oil Company stock" etc. In her original complaint and in her second amended complaint she alleged that defendant promised to give and did give her 4,500 shares of stock. She did not allege that he promised her 6,000 shares of stock, although in her second amended complaint she alleged that he holds as constructive trustee "such of the 6,000 shares of stock of Norris Oil Company as may now be registered in the name of said defendant Hadley, or any nominee or nominees for said defendant Hadley, or the highest market value thereof during the period between December 16, 1947 and the date of disposal by said defendant Hadley of his stock, on or about July 9, 1948, which is $3.00 per share, plus interest thereon at the rate of 6% per annum from the date of disposal thereof, together with any and all additional shares of stock so registered to which plaintiff may be entitled by reason of stock dividends or increased issuance of shares thereon, or the proceeds derived therefrom by sale thereof, or otherwise." But, most significant of all, is the fact that plaintiff did not testify that defendant ever promised her more than 4,500 shares, or that she ever asked for or expected more.

When Hadley sold the stock to Carpenter and Henderson he delivered them the identical certificate he had received from plaintiff. They paid him 40 cents per share and he paid plaintiff the same price. She waited for her money until Hadley had made the sale.

Plaintiff sued for the proceeds of the sale of the stock. She knew it had been sold December 17, 1947, but she also knew that it was sold for 40 cents per share and that Hadley had paid her the same price. In her complaint she ignored this sale for the obvious reason that Hadley had paid her the full proceeds, or all she could rightfully claim. Without any allegation as to whether Hadley had sold the stock, she alleged, as a mere conclusion, that he was a constructive trustee as to 6,000 shares, or the proceeds of a sale of some stock in July, 1948. Uncertain and incomplete as her complaint was, it was an election to seek the proceeds of a sale, even if she alleged a false date of the sale. Consistently with this election she proved Hadley had sold 6,000 shares for $3.00 per share. We do not see how plaintiff could, by evasion of the unquestioned facts, justly lay claim to more than she had already received. There was no fraud, mistake or deception in the sale to Carpenter and Henderson. Insofar as it bears upon the extent of Hadley's liability it was a separate transaction from plaintiff's sale to Hadley and constituted the consent of a beneficiary that her trustee might sell trust property at an agreed price. It was a top price for the stock at that time. We are aware of no principle of law or equity under which a beneficiary who has consented to a sale of trust property by one holding it as either a voluntary or involuntary trustee for an agreed price, and its full value at the time, would be allowed to recover a greater amount for which the trustee might sell like property of his own at a much later date. This was not an action at law for conversion of the stock. When plaintiff sued in equity for the proceeds of a sale of the property she elected her remedy. The rules of damages for conversion were inapplicable. Clapp v. Vatcher, 9 Cal.App. 462, 467, 99 P. 549.

Damages and restitution are alternative remedies and an election to pursue one is a bar to invoking the other Alder v. Drudis, 30 Cal.2d 372, 383, 182 P.2d 195.

Plaintiff demanded restitution and that is what the judgment purports to award her, but it rests upon a false foundation of fact. If it be assumed that defendant stood in a trustee relationship with reference to the stock the legal consequence would be that equity would not permit him to become unjustly enriched through the transaction with plaintiff. It is to prevent unjust enrichment that constructive trusts are imposed as a remedy. Rest., Restitution, § 160, p. 640; 54 Am.Jur., Trusts, § 219, p. 169. And when plaintiff resorted to equity she could demand only equitable relief, or such relief as would be appropriate under a rescission of her sale to defendant.

"Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result of the remedies given under the rules stated in the Restatement of this Subject is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered." Rest., Restitution, § 1, comment d. We think there could be no more appropriate case than the present one for holding that a trustee of a constructive trust who sells trust property with the knowledge and consent of the beneficiary, and for its full value, is accountable only for the sum received. It is axiomatic that a beneficiary who consents to an act or omission on the part of a trustee may not hold the trustee liable for any resulting loss. Rest., Trusts, § 216, p. 609. Where there is no deceit or misunderstanding with respect to the act or omission to which the beneficiary consents, the effect of the consent should be the same in the case of a constructive trust as in an express trust.

The trial court should have found that Hadley, if regarded as trustee of a constructive trust, was not accountable to plaintiff for more than he had received in the sale to Carpenter and Henderson. The award of $20,400, or any part of it, may not stand.

The 40 Acre Sublease From Norris

[11] It was decreed that plaintiff was the owner of a one-third interest in this sublease. She was awarded $1,666.60 as one-third of the bonus received by Hadley for a sublease to Richfield. The property was not drilled and there were no royalties. There was no evidence of any agreement that plaintiff should have any specific interest in this lease or that the lease was ever discussed by the parties. The interest was awarded plaintiff upon the basis of findings that when plaintiff advanced Hadley the first amount, $250, the parties, by oral agreement, entered into

a limited joint venture under which plaintiff would have an interest in oil and gas leases and interests to be acquired by Hadley in the Cuyama Valley, that they later agreed that she would have a one-third interest in such leases and interests, with the exception of certain leases, namely, the Richardson and Stone leases, and, inferentially, excepting the stock interests in Norris Oil Company which Hadley acquired from time to time. There remained only the 40 acre sublease and the 7½ per cent interest in the Russell lease. As already stated, plaintiff did not plead that Hadley had procured the 40 acre sublease or made a sublease to Richfield. However, the issues that were tried were broad enough to encompass her claim to an interest in the 40 acre lease.

We find no evidence in the record to support the finding that the parties entered into a joint venture in which plaintiff would have a one-third interest. Plaintiff's former husband, W. E. Ramsey, and W. R. Ramsey, had been interested in highly speculative oil ventures in the Cuyama Valley. This valley, which lies across mountainous territory west of the old fields of Maricopa and adjacent fields, had long been regarded by oil authorities as barren of oil and gas. A few wildcat operators, including Hadley and the Ramseys, had obtained leases and conducted small and ineffectual exploratory operations. Hadley and associates had drilled two wells to the Santa Margarita sand in which they found oil sand in combination with salt water. The wells were failures, as were other wells which both prior and subsequent to the Hadley wells were drilled to the Santa Margarita sand. Hadley spent about seven years in his efforts to get oil in the valley, promoting small amounts of capital for that purpose, expending all the money he could get his hands upon and devoting much labor to his various efforts. Plaintiff was familiar with these conditions but was willing to advance small sums of money to assist Hadley in his efforts. Although it was understood that she would have some interest in leases that Hadley might secure there was no agreement that she should have a one-third interest or any other definite interest in all the leases. In the light of the uncontradicted evidence their oral agreement can only be construed as one under which they would agree from time to time as to the leases in which plaintiff would have an interest and as to the extent of her several interests. Further than advancing Hadley sums aggregating $850 plaintiff had nothing to do with the efforts to obtain leases. There was no agreement as to the total amount she would advance. Hadley paid all of the costs, including substantial cash rentals which accrued from time to time. Plaintiff had no part therein. There was no understanding that she would assume, and she did not assume any rental or other obligations to the several lessors under any of the leases nor any share of the expenses or the debts which Hadley might and did incur. There was not the suggestion of an agreement that she would bear any share of the losses if losses were sustained. Her belated claim to a one-third interest in everything that was acquired is refuted by the several transactions which followed the initial arrangement under which she made advances. She was given a one-quarter interest in the Richardson lease, a one-third interest in the Stone lease and a 7½ per cent interest out of Hadley's 37½ per cent in the 8,000 acre Russell Ranch lease. Although this assignment came after the alleged joint venture agreement and plaintiff knew the extent of Hadley's interest she did not ask for one-third of it. At the time Hadley promised plaintiff 3,000 shares of Norris Company stock he was the owner of about 37,000 shares, 24,000 of which he had received as consideration for his interest in the Russell lease. Plaintiff was given 4,500 shares and did not ask for more. She has never claimed to be entitled to one-third of the stock Hadley received for his interest in the Russell lease. As previously stated, she alleged that the 3,000 shares were given her for her interest in that lease. She has never claimed that the stock which Hadley retained belonged to Hadley and herself as joint adventurers. At no time from the beginning to the end of these various transactions was it ever suggested by plaintiff or admitted by defendant that plaintiff's interest in the leases should be a one-third interest. Only in the case of the Stone lease was plaintiff given a one-third interest. *Plaintiff did not testify that Hadley ever promised her a one-third interest in leases or in other interests or rights he might acquire.*

It is immaterial what name is given the relationship between plaintiff and defendant. The question is what interest was plaintiff to have in leases and the proceeds of leases. There was no evidence of an agreement for a uniform interest in all leases. The interests were agreed upon in each separate transaction and in no two transactions were they in the same proportions. If it be granted that the original agreement contained the elements of a joint venture and that the parties might have acquired and retained leases which would have been the property of the joint venture, it is clear from the evidence that in each instance they segregated their interests in each property as it was acquired. As these interests were segregated plaintiff and defendant each held the interest set apart to him or her free from any claim of the other thereto. We have already shown this to be true of the Richardson and Stone leases and the stock in the Norris Company. We will now show it to be true with respect to the 40 acre sublease which Hadley received from Norris. The finding that plaintiff had a one-third interest in that lease under a joint venture agreement is not supported by the evidence. There was no evidence that plaintiff had any interest in the lease. It was established by uncontradicted evidence that it was given to Hadley by Norris Company in consideration for stock contributed by Hadley to a pool of stock which was sold and the proceeds given to Norris. Hadley's contribution brought Norris $3,333.00 in the summer of 1947. Plaintiff admits that the lease was acquired in this manner. She had or claimed no interest in the stock, held by Hadley, having already received her share. Whatever Hadley received in exchange for stock or as the proceeds of sales was his alone. Since there was no evidence that on December 16, 1947, plaintiff had any interest in the 40 acre lease, the award of a one-third interest in that lease and $1,666.66 as one-third of the bonus paid by Richfield was in error.

The 7½ Per Cent Interest in the Russell 8,000 Acre Lease

[12] We have heretofore set out the substance of the agreement relating to this interest. Actually Hadley had a 37½ per cent interest in an agreement with one Frank, to whom Agee had assigned the Russell lease in consideration for his agreement to drill a well. He did not drill the well and reassigned the lease to Agee, who in turn assigned it to Norris Oil Co.

Plaintiff did not plead this agreement nor allege that she had or ever had had an interest in the Russell lease by virtue of the agreement. She alleged that Hadley acquired a lease from Russell October 20, 1945, as a part of the joint venture. The lease of that date was from Russell to Norris Oil Company. The lease that was in existence at the time of the alleged joint venture agreement had been acquired June 28, 1943, and had been assigned to Frank, January 4, 1944. She also alleged that the 3,000 shares of Norris stock were issued to her for her interest in the Russell lease. According to her complaint she no longer had an interest in that lease. That was the state of the pleadings upon which the parties went to trial. Near the close of the trial the 7½ per cent agreement came to light under the following circumstances: Plaintiff had testified that certain writings identified by her were the only ones defendant had given to her. Thereafter the agreement in question was found among plaintiff's papers. Plaintiff was recalled to the stand and identified the writing. The purpose as stated by her counsel was to correct her testimony. Not only did plaintiff fail to plead that she had an interest in the lease but she pleaded that she had none; yet the court awarded her a 7½ per cent interest in the original 8,000 acre lease. Had she pleaded this agreement instead of alleging she no longer had any interest in the lease many defenses might have been urged. Her assignment related specifically to an interest in the avails of the Frank contract; the 8,000 acre lease had been assigned to Norris Oil Company and had been cancelled; it was no longer in existence; Norris Oil Company had sold stock upon the strength of its ownership of the lease; plaintiff, so far as shown, had never recorded her agreement or notified anyone she held it; the maps in evidence show that Richfield has developed an extensive oil field upon land embraced within the original 8,000 acre lease and the 4,000 acre lease from Russell to Norris Company dated October 20, 1945. No issue was raised or tried as to any claims plaintiff may have against Hadley, or Norris or others, arising out of the numerous transactions subsequent to April 17, 1944, the date of plaintiff's assignment.

It was error to decree that plaintiff has an interest in the original 8,000 acre lease by virtue of the April 17, 1944 assignment.

The Issues of Fraud, Rescission and Laches

Defendant vigorously challenges the finding that he was guilty of misrepresentation; he says the essence of the alleged misrepresentation was that a well about to be brought in by Norris Oil Company on the Russell property was "wet" and that the cores showed salt water which had ruined two wells previously drilled on the same structure, and he insists that his representation was true—that the well came in 20 per cent salt water, soon went to 80 per cent water, and was a failure. It is true that the well was a failure in the Santa Margarita sand, the only one that was then known to exist. He urges as further defenses that plaintiff did not give notice of rescission and that although she knew January 1, 1948, that the well had been brought in and believed Hadley had misrepresented the facts to her, she slept upon her rights until the following November, when she instituted this action.

The briefs discuss these questions at length. It would greatly enlarge this opinion and serve no purpose to decide them.

If fraud were established plaintiff would be entitled to no more than she had already received. She had been paid all that Hadley received for the 4,500 shares of stock and the third interest in the Stone lease. There was no evidence that she had any interest in the Norris lease. Whatever conclusions we might reach upon the issues of fraud, rescission and laches would not add to or detract from the results of our decision.

It is unnecessary to discuss other defenses urged by the defendant.

The judgment is reversed.

PARKER WOOD and VALLÈE, JJ. concur.

Hearing denied; CARTER, J., dissenting.

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113 Cal.App.2d 712

ROBERTS v. LEBRAIN.

Civ. 19115.

District Court of Appeal, Second District,
Division 2, California.
Oct. 17, 1952.

Quiet title action wherein defendant sought specific performance of alleged oral contract to convey the real property in question. The Superior Court, Los Angeles County, A. A. Scott, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Fox, J., held, inter alia, that there was an insufficient memorandum of the alleged contract to satisfy the statute of frauds, and that the contract could not be taken outside the operation of such statute by partial performance because the contract was indefinite in a number of its material terms.

Affirmed.

1. Quieting Title 🔑44(1)

Vendor and Purchaser 🔑189

Purchaser seeking specific performance of alleged contract to sell real estate could not dispute title of vendor, and therefore vendor seeking quiet title judgment in same proceeding was not required to prove her title.

2. Quieting Title 🔑44(4)

Evidence in quiet title actions supported finding that survivor of joint tenants was the owner of the property in question.

3. Frauds, Statute of 🔑110(3)

Receipt describing real estate involved as one small house on a certain street in Los Angeles, California, was insufficient to satisfy statute of frauds because it did not contain any description by which the property could be located.

4. Vendor and Purchaser 🔑22

One of the most essential parts of an agreement for the sale of real estate is a description by which the property can be located, and such description must be such, either in terms or by reference, that the property can be identified without resort to parol evidence.

5. Frauds, Statute of 🔑158(3)

Parol evidence cannot be used to furnish a description of property involved in contract to convey real estate.

6. Frauds, Statute of 🔑158(3)

The only purpose for which parol evidence can be admitted in case involving contract for sale of real estate is to apply the description given to the subject matter and thus identify the property.

7. Frauds, Statute of 🔑113(3)

Receipt stating name of payer and amount of down payment and balance was insufficient to satisfy statute of frauds relating to sale of real estate in that it failed to state the time, the terms, or the manner of payment of the purchase price.

8. Specific Performance 🔑28(2)

A contract for the sale of real property will not be specifically enforced unless it not only contains all the material terms but also expresses each in a reasonably definite manner.

9. Specific Performance 🔑121(9)

Person seeking specific performance of alleged contract to sell real estate had burden of proving the existence of a contract which stated all material terms in a reasonably definite manner.

10. Appeal and Error 🔑1012(1)

In quiet title action wherein defendant cross-complained for specific performance of alleged contract to sell the land in question, the weight and value of the testimony was for the trial court.

11. Specific Performance 🔑121(6, 9)

Where joint tenant who allegedly had contracted to sell real estate had died, the evidence by which the terms of the contract were attempted to be proved would be strictly construed, closely scrutinized, and weighed with a careful balance and would be required to be clear as to existence of the contract.

12. Appeal and Error 🔑931(1)

An appellate court must view the evidence most favorable to the successful party in the trial court.

13. Vendor and Purchaser 🔑19

Alleged oral contract between purchaser and vendor for sale of real estate was deficient and uncertain in that it failed to state the time and manner of payments, whether interest on the balance was to be paid, and if so at what rate, the character of the interest to be conveyed, and what, if any, arrangement was made for payment of taxes or reimbursement for such payments.

14. Specific Performance 🔑121(9)

In action wherein specific performance was sought of alleged oral contract to sell real estate on grounds that partial performance took case outside statute of frauds, evidence justified trial court in denying specific performance because of indefiniteness of material terms of the contract. Civ.Code, § 3390, subd. 6.

15. Specific Performance 🔑130

Where tenant had been paying $20 rental per month prior to entering into alleged oral contract for purchase of such property, upon denial of specific performance of such contract, it was not error to fail to require the return of $865 paid under the contract over a period of 63 months, because such amount was a reasonable sum for the use and occupancy of the premises for such period, since such amount averaged only about $14 per month.

Kelsey Petterson, Bellflower, for appellant.

Morris T. Johnson, Los Angeles, for respondent.

FOX, Justice.

In 1945 respondent and her husband, Allen L. Roberts, owned as joint tenants the real property here in controversy. It is located on 115th Street in the city of Los Angeles. They owned other property on that street, in which they lived. In August of that year respondent and her husband rented the subject property to appellant on a month-to-month basis at a rental of $20 per month.

As a result of negotiations between Mr. Roberts and appellant in August, 1946, he gave appellant the following memorandum:

"8, 16, 1946

"Received of Mrs. Maria Clark as Down Payment 400^{00} Bal. 800^{00} 1 Small House and Lot on 115 st. Los Angeles Calif

"Allen and Ella Roberts"

Respondent did not take part in this transaction, did not sign the above memorandum, and did not give her husband any authority to sign her name thereto. Appellant made payments to Mr. Roberts from time to time and received receipts from him indicating that the payments were to apply on the purchase price of real property. In June, 1950, Mr. Roberts passed away. Shortly thereafter respondent contacted appellant suggesting that they arrange to have the papers fixed up regarding the property and "everything straightened out." This suggestion was unavailing. In July respondent went to an attorney who wrote appellant making a demand upon her to the same general effect. There was no response. No payments were made to respondent after the passing of Mr. Roberts, and no demand was made upon her by appellant until March 1, 1951, when counsel for appellant wrote respondent demanding that she deposit in escrow a deed and policy of title insurance, and stating that appellant desired to pay the balance due on the contract.

Respondent thereupon brought this action to quiet her title to the property. Appellant, by cross-complaint, sought a decree of specific performance. From a judgment in favor of respondent, appellant appeals.

Appellant challenges the sufficiency of the evidence to support the findings; contends she has a specifically enforceable contract; and that it is inequitable to quiet title in respondent.

[1, 2] The court first finds that respondent is the owner of the property in dispute. Appellant is in no position to question this finding because in her cross-complaint she states respondent and her husband were the owners as joint tenants of the property; that Mr. Roberts had died; and that the record ownership of the property, by operation of the joint tenancy provisions by which it was held, reverted to respondent "who became the sole record, legal owner of said property." Respondent testified that she and her husband owned the property at the time the alleged contract was made and that she and her husband paid the taxes on the property throughout the entire period, and exercised other acts of ownership over it. They rented it to appellant approximately a year prior to the date of the quoted memorandum. Since appellant got possession through respondent and her husband and claims title through respondent it was not necessary for respondent to prove her title because appellant cannot dispute the title of the person through whom she claims. Tannahill v. Greening, 85 Cal.App. 714, 717, 259 P. 1017; Strange v. Strange, 23 Cal.App. 281, 284, 137 P. 1104. The record abundantly supports the finding that respondent is the owner of the property.

The correctness of the finding that appellant had no right, title or interest in the disputed property depends on whether appellant had a valid and specifically enforceable contract for the purchase thereof. The initial deal (whatever it was) between Mr. Roberts and appellant was admittedly oral and respondent not only denied the alleged contract but affirmatively plead the statute of frauds. Appellant, however, contends the transaction is taken out of the statute of frauds by (1) the quoted receipt, and (2) part performance.

[3–7] The receipt is insufficient to satisfy the statute of frauds because it does not contain any description by which the property can be located. Allen v. Stellar, 106 Cal.App. 67, 70, 288 P. 855. This is one of the most essential parts of such an agreement. Craig v. Zelian, 137 Cal. 105, 106, 69 P. 853. The description must be such, either in terms or by reference, that the property can be identified without resort to parol evidence. Craig v. Zelian, supra; Simpson v. Schurra, 91 Cal.App. 640, 648, 267 P. 384; Gordon v. Perkins, 108 Cal.App. 336, 340, 291 P. 644. Parol evidence cannot be used to furnish a description. The only purpose for which such evidence can be admitted is to apply the description given to the subject matter and thus identify the property. Marriner v. Dennison, 78 Cal. 202, 208, 20 P. 386; Simpson v. Schurra, supra, 91 Cal.App. 648, 267 P. 384. Here the receipt contains no street address or other information by which the particular house and lot on 115th Street in Los Angeles can be identified. The problem is further complicated by the fact that Mr. and Mrs. Roberts owned two residential properties on that street. The memorandum is further deficient in that it states "neither the time, the terms, nor the manner of payment" of the purchase price. Fritz v. Mills, 170 Cal. 449, 458, 150 P. 375, 378.

Appellant argues that her possession, which began as a tenant prior to the alleged agreement, and the fact that she thereafter made certain payments to Mr. Roberts which appear to be referable to her transaction with him, constitute sufficient part performance to take the contract out of the statute of frauds and permit the introduction of parol testimony of its terms. We may assume, but without so deciding, that this is true, yet appellant is not entitled to a decree of specific performance.

[8] A contract for the sale of real property will not be specifically enforced unless it not only contains all the material terms, but also expresses each in a reasonably definite manner. Buckmaster v. Bertram, 186 Cal. 673, 676, 200 P. 610; Wood v. Anderson, 199 Cal. 440, 444, 249 P. 862; Dickey v. Pattison, 92 Cal.App.2d 659, 662, 207 P.2d 1081.

[9–12] The burden was upon the appellant as the cross-complainant to prove such a contract. It was, of course, for the trial court to weigh and evaluate the testimony and since the voice of the opposite contracting party may not be heard in opposition, the evidence by which the terms of the contract are proved "will be strictly construed, closely scrutinized, and weighed with a careful balance". Kurtz v. De Johnson, 42 Cal.App. 221, 227, 183 P. 588. "The proofs of the contract should be clear" under such circumstances. Owens v. McNally, 113 Cal. 444, 451, 45 P. 710, 712, 33 L.R.A. 369. Furthermore, an appellate court must view the evidence most favorable to the successful party in the trial court.

[13, 14] With these principles in mind it must be said that the oral contract between appellant and Mr. Roberts was deficient and uncertain in a number of its material terms. It failed to state the time and manner of payments, Mills v. Skaggs, 64 Cal.App.2d 656, 658–659, 149 P.2d 204; Fritz v. Mills, supra, 170 Cal. 449, 150 P. 375; Wood v. Anderson, supra, 199 Cal. 444, 249 P. 862; Buckmaster v. Bertram, supra, 186 Cal. 676, 200 P. 610; whether interest on the balance was to be paid, and if so at what rate, Burnett v. Kullak, 76 Cal. 535, 18 P. 401; the character of interest to be conveyed, i. e., whether a grant in fee free and clear of encumbrances or a mere quitclaim; and what, if any, arrangement was made for payment of taxes or reimbursement for such payments. While appellant testified as to time, manner and amount of and interest on the installment payments to be made, it is apparent that the court was not satisfied with her version of the transaction. The indefiniteness and uncertainty of these material and substantial terms of the alleged agreement, when considered together, justified the trial court in denying specific performance. Civ.Code, sec. 3390, subd. 6; Klein v. Markarian, 175 Cal. 37, 40, 165 P. 3; Chandler v. Hollingsworth, 96 Cal.App. 472, 475–476, 274 P. 581; Dickey v. Pattison, supra, 92 Cal.App.2d 662, 207 P.2d 1081.

[15] Appellant argues that respondent should have been required to return the $865 paid to Mr. Roberts. To have required this would have resulted in giving appellant the free use of the property since August, 1946. The court found the total payments made by appellant "from August 15, 1946, to the time of trial, November 23, 1951, is a reasonable sum for the use and occupancy of said premises for that period." The sum of $865, covering 63 months, averages about $14 per month. Appellant had been paying $20 per month rental for the premises. These facts amply support the foregoing findings.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

113 Cal.App.2d 639

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. HARRAH.

Civ. 18988.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1952.

Hearing Denied Dec. 11, 1952.

Action based on two judgments. The Superior Court of Los Angeles County, Julius V. Patrosso, J., rendered a judgment for plaintiff and defendant appealed. The District Court of Appeal, Fox, J., held that appearance made by defendant was a general appearance rather than a special appearance and that default was properly entered against defendant where defendant had not filed timely answer after making such appearance.

Judgment affirmed.

1. Appearance 🔑9(2)

If a defendant by his appearance insists only upon objection that he is not in court for want of jurisdiction over his person and confines his appearance for that purpose only, he has made a "special appearance", but if he raises any other question, or asks any relief which can only be granted upon hypothesis that court had jurisdiction of his person, he has made a "general appearance".

See publication, Words and Phrases, for other judicial constructions and definitions of "General Appearance" and "Special Appearance".

2. Appearance 🔑9(3)

Defendant's motion to dismiss action on ground of laches in failing to have summons and complaint served within reasonable time, and that summons had not been served although issued three years previously, which motion was supported by affidavit stating that defendant had lived in state after filing of action for approximately 4½ months before moving outside of state, and that failure of plaintiff to then serve such papers constituted laches, constituted a general appearance rather than special appearance. Code Civ.Proc. § 581a.

3. Appearance 🔑9(1)

Whether an appearance by defendant was general or special would be determined by character of relief sought and not by defendant's designation.

Hiram E. Casey, Guy Richards Crump, Los Angeles, for appellant.

Samuel B. Stewart, Jr., San Francisco, Hugo A. Steinmeyer, John E. Walter, Los Angeles, for respondent.

FOX, Justice.

On January 28, 1946, plaintiff filed this action based on two judgments. On June 27, 1950, the defendant, "appearing specially for the purpose of making this motion," filed his notice of motion to dismiss on the grounds of laches in failing to have summons and complaint served within a reasonable time after the filing of the action and issuance of summons; and upon the further ground that the action had been pending more than three years, that it had been more than three years since the summons had been issued, and that it had not been served upon the defendant. The motion was supported by two affidavits of defendant. In one of his affidavits defendant states he lived in Los Angeles County from January

28, 1946, to June 10, 1946, at which time he moved to Nevada; that during this period plaintiff could have served him with summons and complaint; and that the failure of plaintiff to serve such papers upon him "constitutes laches upon the part of said plaintiff and has resulted in great and serious detriment to your said defendant, inasmuch as it has prevented your said defendant, among other things, from regularly conducting his affairs and attending to his practice of law as a profession, in the State of California and otherwise." Plaintiff filed counter-affidavits which set forth the efforts made to locate and serve defendant.

The motion to dismiss was denied, the minute order reciting the defendant was appearing specially for that motion only. Thereafter plaintiff filed its notice of motion to enter the default of defendant upon the ground defendant had by his motion to dismiss made a general appearance and since making such appearance had not answered in the time allowed by law. The court held defendant had made a general appearance and since he had not answered in the required time his default was ordered entered and judgment for plaintiff followed.

The only question on this appeal is whether defendant's notice of motion to dismiss and motion based thereon constituted a general or a special appearance.

From defendant's notice of motion it is apparent his motion to dismiss was based on section 581a, Code of Civil Procedure. This section in brief provides for mandatory dismissal of an action if the summons is not served and returned within three years after the filing of the action, except no dismissal shall be had under this section as to any defendant because of the failure to serve summons on him during his absence from the state or while he has secreted himself within the state to prevent service of the summons.

It is clear from the grounds of defendant's motion and his supporting affidavits that he was not objecting solely to the jurisdiction of the court, but that he was appealing to the equity and discretion of the court. He was asking for affirmative action to terminate the litigation which could only be given to a party on the basis that the court had jurisdiction of his person. Lacey v. Bertone, 33 Cal.2d 649, 652, 203 P.2d 755; Milstein v. Ogden, 84 Cal.App.2d 229, 232, 190 P.2d 312; 3 Am.Jur. 793, par. 19. He was seeking relief outside of the mandatory provisions of section 581a, Code of Civil Procedure.

[1, 2] In such circumstances the rule is that "if a defendant by his appearance insists only upon the objection that he is not in court for want of jurisdiction over his person and confines his appearance for that purpose only, then he has made a special appearance, but if he raises any other question, or asks any relief which can only be granted upon the hypothesis that the court had jurisdiction of his person, then he had made a general appearance." Judson v. Superior Court of Los Angeles County, 21 Cal.2d 11, 13, 129 P.2d 361, 362. Applying this rule to the situation here presented it is obvious the defendant's motion to dismiss constituted a general appearance. Judson v. Superior Court of Los Angeles County, supra; In re Clarke, 125 Cal. 388, 392, 58 P. 22; Olcese v. Justice's Court, 156 Cal. 82, 87, 103 P. 317; Lacey v. Bertone, supra, 33 Cal.2d 652, 203 P.2d 755; Milstein v. Ogden, supra, 84 Cal.App.2d 233, 190 P.2d 312.

[3] It should be noted that defendant's designation of his notice of motion as a special appearance is not controlling. Whether an appearance is general or special is determined by the character of the relief sought. Judson v. Superior Court of Los Angeles County, supra; In re Clarke, supra.

Defendant argues that in denying his motion to dismiss the court held he appeared specially for the motion only. In support of this argument he points to the recital in the minute order. The language of the minute order clearly indicates it was intended only as a description of the motion then before the court. Furthermore, there was no question before the court at that time as to whether defendant's motion to dismiss constituted a general or special appearance. Consequently the recital in the minutes was not an adjudication of the character of his motion.

Defendant relies upon Brock v. Fouchy, 76 Cal.App.2d 363, 172 P.2d 945; Frohman v. Bonelli, 91 Cal.App.2d 285, 204 P.2d 890; and Pease v. City of San Diego, 93 Cal.App.2d 706, 209 P.2d 843. These cases, however, are not here applicable since they do not involve the exceptions contained in section 581a, Code of Civil Procedure, viz., absence from the state or the defendant's secreting himself within the state to prevent service of summons. In those cases no relief which might involve the court's discretionary action was sought by the motions. In each of them dismissal was mandatory. Furthermore, the motions of the respective defendants were truly special appearances since their office was expressly declared to be to effect a dismissal solely by virtue of the mandatory provisions of section 581a, Code of Civil Procedure.

The judgment is affirmed.

MOORE, P. J., concurs.

McCOMB, J., deeming himself disqualified, does not participate herein.

Hearing denied; SCHAUER, J., dissenting.

39 Cal.2d 654

LAWRENCE BARKER, Inc. v.
BRIGGS et al.
L. A. 21947.

Supreme Court of California, in Bank.
Oct. 10, 1952.
Rehearing Denied Nov. 3, 1952.

Action for possession of realty. Defendant counterclaimed for breach of covenant in lease, and filed cross-complaint asking for declaratory judgment. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment for plaintiff, entered judgment against defendant on his counterclaim, and denied declaratory judgment, and defendant appealed. The Supreme Court, Carter, J., held, inter alia, that action for damages for breach of covenant in lease relating to party wall was an action "founded on an instrument in writing" within statute limiting commencement of such actions to four years.

Reversed.

Traynor, J., dissented in part.

Edmonds, J., dissented.

Prior opinion, 236 P.2d 600.

1. Limitation of Actions 🔑24(1)

Under statute limiting commencement of action founded on an instrument in writing to four years, all obligations and promises which the words of the writing necessarily import must be regarded as included in the terms of the writing. Code Civ.Proc. §§ 337, 339, subd. 1.

2. Limitation of Actions 🔑41

Where lease contained covenant that lessor would maintain party wall and city condemned lessee's use of the property as parking lot because of dangerous condition of the premises resulting from lessor's failure to maintain wall, counterclaim for damages for breach of covenant was "founded on an instrument in writing" within four year statute of limitations. Code Civ.Proc. §§ 337, 339, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Founded On An Instrument In Writing".

3. Landlord and Tenant 🔑280

Where lease provided that lessor could re-enter and repossess premises for default in payment of rent without written notice to lessee, and action for possession was commenced by lessor without having served statutory notice to quit, action was one in ejectment and not one for unlawful detainer. Civ.Code, § 793; Code Civ.Proc. §§ 337, 1159 et seq.

4. Ejectment 🔑28

Where plaintiff in ejectment action sought no money damages other than attorney fees, such attorney fees constituted sufficient prayer for damages to entitle defendant to counterclaim for damages for breach of covenant in lease under statute allowing counterclaim when it tends to diminish or defeat plaintiff's recovery. Code Civ.Proc. § 438.

5. Declaratory Judgment 🔑186

Where lease based portion of parking lot rent on percentage of gross income derived in any manner, directly or indirectly, from the use or occupancy of the lot, and lessee used adjoining lot as overflow for leased lot and drove automobiles to adjoining lot over leased premises, lessee was entitled to declaratory judgment to construe applicability of rental provision to fees charged for parking on adjoining lot.

6. Landlord and Tenant 🔑108(1), 282

Lease provision that lessor could reenter and repossess premises for lessee's failure to pay rent without terminating lease was valid, and lessor could maintain ejectment action without terminating lease.

7. Landlord and Tenant 🔑108(1)

Where lease provided for re-entry and repossession by lessor for lessee's failure to pay rent without terminating lease, reentry and repossession by lessor did not constitute a forfeiture.

8. Landlord and Tenant 🔑108(1)

Where lease provided that lessor could hold or sell securities deposited by lessee as security for performance of lease upon lessee's default, retention of deposit by lessor on lessee's default did not constitute a forfeiture.

9. Landlord and Tenant 285(6)

In ejectment action based on lessee's alleged failure to pay rent in which insufficient findings were made as to lessee's default and interpretation of lease provision relating to payment of rent, judgment for lessor could not be sustained.

Benjamin J. Goodman and Krystal & Paradise, Los Angeles, for appellant.

Kenyon F. Lee, Los Angeles, Thomas D. Mercola, Beverly Hills, Gibson, Dunn & Crutcher and Sherman Welpton, Jr., Los Angeles, for respondent.

CARTER, Justice.

Plaintiff, Lawrence Barker, Inc., recovered judgment entitling it to immediate possession of certain real property leased by it to defendant, Walter M. Briggs. The judgment provided that defendant was not entitled to take anything by reason of his counterclaim and that he was not entitled to a declaratory judgment by reason of his cross-complaint. Plaintiff recovered costs and attorney's fees.

The lease involved in the controversy was entered into on January 1, 1945, for a ten year term by Lawrence Barker, Inc., as lessor, and Walter M. Briggs, as lessee. The lease covered premises consisting of one lot located on Spring Street in the City of Los Angeles, which was to be used by the lessee as a parking lot. Pursuant to the lease, Briggs entered into possession and operated thereon an automobile parking lot or station. Subsequent to the execution of this lease, defendant Briggs, who operated approximately 70 other such lots in the vicinity of Los Angeles, entered into another parking lot lease with another lessor. This subsequent lease covered premises located on Main Street adjacent to the premises in question but separated by a 20 foot public alley. The premises in question will hereinafter be referred to as the Spring Street lot and the Main Street lot. The provisions of the lease involved here are as follows:

> "*Second:* The Lessee covenants and agrees to pay to the Lessor as a monthly rental for the demised premises the sum of One Thousand Two Hundred and Fifty ($1,250.00) Dollars per month, payable in advance upon the 1st day of each month of said term. In addition to the monthly rental payments, Lessee covenants and agrees annually to pay to the Lessor the amount, if any, by which sixty (60%) per cent of the gross income or receipts of the Lessee, *derived in any manner, directly or indirectly, from or by the use or occupancy of said demised premises* in any one calendar year, exceeds the sum of Fifteen Thousand ($15,000.00) Dollars. Lessee agrees annually to furnish to Lessor a report or statement, *prepared and certified by a reputable Certified Public Accountant*, showing said gross income or receipts of Lessee from said demised premises, as aforesaid, during the preceding calendar year, paying at the same time any such additional rent shown by said report or statement to be due the Lessor from the Lessee. Said report or statement shall be furnished, and said payment of additional rent, if any be due, shall be made, within a reasonable time after the close of each calendar year of the term of this lease, and in no event later than sixty (60) days after said close of said calendar year. The expense of said report or statement shall be borne by the Lessee.
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> "*Third:* The Lessee has deposited with Lessor concurrently with the execution of this Lease certain stocks and securities * * *. Said stocks and securities * * * are deposited for the purpose of, and shall be held as, security to the Lessor for the performance by the Lessee of all the terms, agreements, covenants and conditions of this lease. * * * Title to said stocks and securities, originally constituting said 'deposit', has been transferred or shall be transferred to the name of Lessor, and Lessor may continue to hold said 'deposit' in its own name. * * * In the event that Lessee, shall be in default under any of the terms, agreements, covenants, or conditions of this lease, other than the covenants for the payment of rent, and said default shall continue for the period of thirty (30) days, after notice by Lessor to Lessee, or if default be made in the payment of rent, when the same is due and payable, and said default in the payment of rent shall continue for a period of thirty (30) days, no notice of default in the

payment of rent being necessary, Lessor may sell, at public or private sale, with or without notice, any or all of the stock or securities. * * * Upon the expiration of * * * this lease, provided Lessee be not in default at said time, or upon its earlier termination by the mutual consent of Lessor and Lessee, the 'deposit' shall be delivered by Lessor to Lessee and all rights of Lessor in and to said deposit shall thereupon cease and terminate. However, should Lessee, at said expiration of said stated term, the lease having not been terminated earlier by mutual consent, be in default under any of the terms, agreements, covenants and conditions of this lease, said 'deposit' shall continue to be held by Lessor until all such defaults of Lessee are cured, Lessor having during said period of default all of its original rights therein, as if the term of this lease had not expired * * *.

"*Ninth:* It is expressly covenanted and agreed by and between the parties hereto that in case at any time default shall be made by the Lessee in the payment of *any rent* herein provided for upon the day when the same shall become due or payable, and such default shall continue for ten (10) days, or in case default shall be made by the Lessee in the performance *of any of the other terms, conditions or covenants of said lease* by said Lessee to be performed, other than the covenant for the payment of rent, and said default shall continue for a period of thirty (30) days after the service of written notice of such default by the Lessor on the Lessee (no notice of default in the payment of rent being necessary), * * * then and in any of such cases, the Lessor may enter into and upon the demised premises or any part thereof and *repossess the same, with or without terminating this lease, and without prejudice to any of its remedies for rent or breach of covenant, and in any such event may, at its option, terminate said lease by giving written notice of its election so to do, or may, at its option, let the premises or any part thereof as the agent of the Lessee, or otherwise* * * *. The foregoing rights and remedies hereinabove given to the Lessor are, and shall be deemed to be, cumulative, and the exercise of one shall not be deemed to be an election, excluding the exercise by the Lessor at any other or different time of a different or inconsistent remedy, and shall be deemed to be given to said Lessor in addition to any other and further rights given or granted to said Lessor by the terms of paragraph 'Third' herein, or by law, and the failure upon the part of the Lessor at any time to exercise any right or remedy hereby given to it shall *not be deemed to operate as a waiver by it of its right to exercise such right or remedy at any other or future time.*"

Beginning in 1948, and after defendant had entered into the second lease covering the Main Street lot, when the Spring Street lot was filled with cars, defendant would move the "overflow" cars from Spring Street across the alley to the Main Street lot. He kept records of the number of cars so moved, but kept no records as to how much rental he received per car. For example, he could not tell whether he had received 25 cents, 50 cents or $1.00 or more for each of the cars moved. In accounting to the plaintiff-lessor, he allowed 25% of the gross receipts on overflow cars parked on the Main Street lot. At about this time, he operated both lots at night with an attendant stationed on the Main Street lot. This attendant serviced cars entering on the Spring Street lot but issued Main Street parking tickets to them. During 1948, and until July, 1949, no records were kept of gross receipts for night parking on the Spring Street lot, although defendant allocated a portion of the Main Street night gross receipts to the Spring Street lot. Defendant continued to use the Spring Street lot as a feeder and driveway for the Main Street lot up until the time plaintiff discovered that method of operation and told him to desist. On July 27th, subsequent to notice given by plaintiff, defendant started to keep a record of night receipts derived from cars entering and parked on the Spring Street lot.

Prior to the commencement of this action, defendant submitted annual reports or statements as required by the lease, although they were not certified, and the reports he did furnish were, with one exception, not furnished within the sixty day period from the close of the calendar year as required by the lease. Plaintiff, prior to 1949, made no objection to the belated and inadequate reports. The 1949 report was submitted within the time provided for in the lease agreement.

Plaintiff, on July 22, 1949, served on defendant written notice of default in which it claimed the right to repossess the premises without terminating the lease and without prejudice to any other rights provided for in the lease. Defendant claimed that he was not in default under the terms of the lease and refused to surrender possession. Plaintiff then brought this action for recovery of possession of the premises, defendant counterclaimed for damages for breach, by the plaintiff, of a covenant in the lease pertaining to a party wall. Defendant also filed a cross-complaint seeking declaratory relief, alleging that the terms and provisions of the lease were uncertain and ambiguous, and seeking an adjudication of the respective parties' rights thereunder.

In the cross complaint it was alleged that defendant had paid the minimum rent up until, and including, June 1, 1949; that commencing July 1, 1949, he has tendered to plaintiff the minimum rent per month plus the sum of $3,707.50 which represented additional rent for the calendar year of 1949 "in accordance with paragraph Second of said lease" but that plaintiff has refused to accept such tender; that the money is now on deposit in a special bank account. It is also alleged that an actual controversy exists between the parties as to the interpretation of the lease in that defendant claims that he is entitled to allocate gross income or receipts to the parking lot actually used to park the particular car, whereas plaintiff claims that, under the lease, if the cars enter the Spring Street lot but are parked in the Main Street lot, the receipt for those cars should be credited to the Spring Street lot. Defendant further alleges that his "method of allocating gross income or receipts as between the demised premises and other parking lots operated as a unit with the demised premises constitutes a fair and reasonable method of allocation and that cross defendant received its just, fair and proportional share of the gross income or receipts attributable to the use or occupancy of the demised premises." Defendant alleges that plaintiff had waived strict compliance with the terms of the lease pertaining to statements or reports. The trial court was requested, if any money was found due and owing to plaintiff, to give defendant a reasonable opportunity to pay the same, to relieve him from default and from any cancellation or the forfeiture of any of his rights.

The minimum rental of $1,250 per month was the only rent paid by defendant and is not an issue in this case. Percentage rental for the calendar years 1945, 1946 and 1947 is not in issue. The dispute centers around the percentage rental for the calendar years 1948 and 1949.

Defendant's Counterclaim.

[1, 2] Defendant's counterclaim was based on paragraph Twelfth of the lease which reads as follows: "The demised premises as accepted by Lessee are subject to a party wall agreement with respect to the southern wall of the building adjoining the demised premises on the north. Pursuant to the terms of said agreement, Lessor has certain maintenance obligations with respect to said party wall. Lessor shall not be relieved of its said maintenance obligations with respect to said party wall and said obligations are not assumed by Lessee, except that should Lessee in some manner avail himself of the rights of Lessor in and to said party wall, and use said party wall in connection with said Lessee's use and occupation of the demised premises, then and in such event, Lessee shall be deemed to have assumed and thereafter shall perform all obligations of Lessor with respect to the maintenance of said party wall."

Defendant alleged that during the period from approximately August 15, 1946, until

October 15, 1946, through the negligence and carelessness of the plaintiff he was deprived of the use of the premises by reason of the party wall becoming a hazard to anyone using the premises, as a result of which the wall was condemned by the Building and Safety Department of the City of Los Angeles. It was alleged that he had not availed himself of the rights of the lessor in and to the party wall and that he had not used it in connection with the use of the premises. He prayed for damages in the sum of $3,731.20. Plaintiff objected to the introduction of evidence under the counterclaim on the ground that it was barred by section 339, subdivision 1 of the Code of Civil Procedure (liability not founded upon a writing) and that the counterclaim did not tend to diminish or defeat plaintiff's recovery. Defendant thereupon made an offer of proof to show that the City of Los Angeles had, on or about August 25, 1946, served defendant with a written notice which required him to immediately vacate and give up the use and occupancy of the auto parking lot because of the dangerous condition of the premises and that as a result of this notice he was compelled to shut down the parking lot to his damage in the sum of $3,731.20. It is defendant's contention that the applicable statute of limitation is found in section 337 of the Code of Civil Procedure (action founded upon a written instrument) and that the counterclaim was filed on October 3, 1949, less than four years from the date of the alleged breach by plaintiff of the provision contained in the lease. This would appear to be the correct statute of limitation. In Tagus Ranch Co. v. Hughes, 64 Cal.App.2d 128, 148 P.2d 79, the court held that all obligations and promises which the words of the writing necessarily import must be regarded as included in the terms of the writing, under section 337, Code of Civil Procedure. The cause of action here for damages did not arise until plaintiff breached the terms and provisions of the contract.

[3, 4] Aside from the merits of the counterclaim, whether or not defendant may counterclaim depends on the type of plaintiff's action, and whether or not it will "tend to diminish or defeat the plaintiff's recovery" § 438, Code Civ.Proc. Plaintiff maintains that its action is not one of ejectment, but that it was brought under section 793 of the Civil Code which reads as follows: "An action for the possession of real property leased or granted, with a right of re-entry, may be maintained at any time, after the right to re-enter has accrued, without the notice prescribed in section seven hundred and ninety-one." See § 1159 et seq., Code Civ.Proc. Inasmuch as plaintiff did not comply with the statutory notice requirements for unlawful detainer, it would appear that this is not such an action.

If the action is one in ejectment as it appears to be and which is proper in such a situation, Roffinella v. Roffinella, 191 Cal. 753, 218 P. 397; B. & B. Sulphur Co. v. Kelley, 61 Cal.App.2d 3, 141 P.2d 908, then the question arises whether the defendant's claim will tend to diminish or defeat plaintiff's recovery. Plaintiff seeks no money damages other than attorney's fees, as provided for in the lease, but such fees would seem to be a sufficient prayer for damages to entitle defendant to counterclaim for damages suffered by him because of plaintiff's alleged breach of the Twelfth paragraph of the lease which pertains to maintenance of the party wall.

Defendant's cross-complaint for declaratory relief:

[5] The defendant contends that the trial court abused its discretion in denying declaratory relief under the cross-complaint. The trial court found that in view of the findings made, there was no occasion to enter any declaratory judgment; that plaintiff was entitled to be placed in immediate possession of the leased premises but made no finding as to whether or not plaintiff was entitled to repossession of the premises without terminating the lease. More specifically the trial court found that the reports furnished to plaintiff, with one exception, although prepared and signed by a member of a firm of certified public accountants, were not certified and were not furnished within the sixty day period and that they did not correctly reflect the gross income attributable to the use and occupation of the leased premises. It was also found that the gross revenue attributable to the leased premises for the year 1949 should have been $35,485.60 instead of $31,179.17, as reported by defendant; that the sum of $3,707.50 tendered by defendant to, and refused by, plaintiff, should have been the sum of $6,291.36. It was further found that plaintiff had not waived "these defaults" and had not led the defendant to believe that strict compliance with the terms of the lease would be waived in the future.

Other than the specific references made, and the use of the words "these defaults", the trial court made no attempt to construe the lease. No finding was made as to whether plaintiff's interpretation of the terms of the lease is the correct one, and although it may be inferred that defendant was in default because of his interpretation of the lease, no finding is made thereon. The findings as to the incorrect gross receipts report could, moreover, refer either to the overflow and night parking receipts or to the gross receipts on cars actually parked on the Spring Street lot.

The percentage rental plaintiff was to receive over and above the minimum monthly rental was to be the amount by which 60% of the gross receipts exceeded the sum of $15,000, and was to be based on gross income *"derived in any manner, directly or indirectly, from or by the use or occupancy* of said demised premises." No finding other than by implication from the judgment was made as to whether this provision of the lease applied to the manner in which defendant operated the two lots (parking cars entering Spring Street in the Main Street lot) so as to entitle plaintiff to the revenue received and thus place defendant in default for failing to account therefor other than on a percentage basis.

In Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576, 582, 118 A.L.R. 789, the court said: "The two words (directly or indirectly) must have been used with some definite intent and purpose; otherwise why were they used at all? Aid furnished 'directly' would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished 'indirectly' clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes. How could the people have expressed their purpose in the fundamental law in more apt, simple and all-embracing language?" See also, Nelson v. Johnson, 38 Minn. 255, 36 N.W. 868; Kirkpatrick v. State, 177 Ark. 1124, 9 S.W.2d 574. In Goodman v. Global Industries, 80 Cal.App.2d 583, 587, 182 P.2d 300, 303, the court, in construing section 342 of the Civil Code had this to say concerning the legislative use of the words "directly or indirectly": "The words 'directly or indirectly' indicate the intention to comprehend and include all types of repurchases however devised, and when the section is read in its entirety it is clear * * * that it was designed to prohibit *any* purchase by a corporation of its own shares *except under conditions prescribed within the section's own four corners.*"

The words "directly or indirectly" and "from or by the use or occupancy" of the premises could be construed in accordance with plaintiff's theory or, as defendant contends that they should be construed, namely, that he, defendant, was to account to plaintiff for only a percentage of the revenue received for cars entering the Spring Street lot but actually parked on the Main Street lot and for cars entering the Main Street lot at night and thereafter parked on the Spring Street lot. If, as defendant contends, plaintiff is entitled only to a percentage of the revenue, rather than the entire revenue, from cars so parked, then the determination of the amount of that percentage is a question for the trial court. It is clear, therefore, that defendant stated a cause of action for declaratory relief and that the trial court erred in finding that "there is no occasion to enter any declaratory judgment."

Termination of the Lease:

[6, 7] Defendant contends that plaintiff cannot maintain an action in ejectment without terminating the lease, and that he is entitled to relief from forfeiture.

In Yates v. Reid, 36 Cal.2d 383, 224 P.2d 8, 9, although the facts differ from the case under consideration, the lease contained a provision that in the event of abandonment or vacation of the premises by the tenant, the lessor could re-enter and take possession and might "at his option, either terminate this lease and recover from the Lessee all damages caused by the breach hereof of the Lessee * * *. No re-entry of said property by the Lessor, as herein provided, shall be construed as an election on his part to terminate this lease, unless written notice to that effect is delivered to the Lessee * * *." This court held that the retaking of possession by the plaintiff as landlord and his reletting of the premises were entirely consistent with the rights of the tenants under the lease; that the plaintiff did no more than exercise the rights accorded to him; that the provision in the lease was valid and controlling, Burke v. Norton, 42 Cal.App. 705, 184 P. 45; Brown v. Lane, 102 Cal.App. 350, 283 P. 78; Security Realty Co. v. Kost, 96 Cal.App. 626, 274 P. 608.

In Burke v. Norton, supra, 42 Cal.App. 705, 184 P. 45, 47, again the same provision was involved and plaintiff-lessor brought an action to recover rent, attorney's fees, damages and restoration of the premises. There, the court, quoting from Grommes v. St. Paul Trust Co., 147 Ill. 634, 35 N.E. 820, said: "'There is nothing illegal or improper in an agreement that the obligation of the tenant to pay all the rent to the end of the term shall remain, notwithstanding there has been a re-entry for default; and, if the parties choose to make such an agreement, we see no reason why it should not be held valid as against both the tenant and his sureties.' We think this language is applicable to the case at bar. To hold otherwise, it seems to us, would be to place a lessee in a position to retain the premises without the payment of rent, and to compel the lessor to rely wholly upon the financial responsibility of the lessee and seek his rent from month to month by action, or to wholly terminate the lease, either of which would be less advantageous to the landlord than the right to re-enter and, if necessary, to relet the premises, looking to the lessee for only that portion of the rental reserved which represents the difference between what the landlord could obtain from any person upon such reletting and the total monthly rental. We do not hesitate to say that a construction which would thus permit a lessee to determine his own liability is, as we understand them, repugnant to the decisions of this state [citing many cases]. From what we have said, it follows that the court erred in declaring a forfeiture of the lease." It would follow from the above quoted decision that so far as the re-entry and repossession of the premises by plaintiff was concerned, defendant suffered no forfeiture.

[8] Paragraph Third of the lease heretofore quoted contains provisions relating to the deposit which was intended by the parties as security for the faithful performance of the terms, conditions and covenants of the lease. It was specifically provided that plaintiff could hold or sell the securities so deposited, upon defendant's default, either during, or at the end of, the term of the lease. It would appear that the retention of this sum by plaintiff does not constitute a forfeiture. Moreover, defendant does not request that it be returned to him. It is difficult to see where there is any forfeiture involved here.

[9] Defendant does pray that if the court finds that any sum is owed by him to plaintiff that he be given a reasonable time within which to pay it. Plaintiff does not request any damages, nor any money whatever except for attorney's fees and costs. The trial court did find, as heretofore set forth, that defendant had not tendered the correct amount to plaintiff as percentage rental for the calendar year 1949. It would appear that *any* finding as to the amount of percentage rental owing by defendant (under plaintiff's construction of the lease) would be pure speculation in the absence of any records as to the revenue collected in the daytime for cars entering the Spring Street lot but parked in the Main Street lot, and the number of cars either parked in, or which entered, the Spring Street lot during the nighttime parking hours.

In the absence of any findings on material issues presented (wherein lay defendant's default, other than the belated and uncertified annual reports; whether or not the Second paragraph of the lease is to be interpreted according to the theory advanced by plaintiff or defendant; whether plaintiff has the right to possession without terminating the lease; whether plaintiff has the right to retain the security deposit) the case must be reversed. As this court said in Dabney v. Philleo, 38 Cal.2d 60, 70, 237 P.2d 648, 654, "It is apparent that there was a justiciable controversy between plaintiffs and Clifford's assignees. The trial court should have expressly declared their rights. (Essick v. City of Los Angeles, 34 Cal.2d 614, 624, 213 P.2d 492.)"

Another error warranting reversal is found in the trial court's refusal to allow the introduction of evidence on defendant's counterclaim inasmuch as the action was not barred by the applicable statute of limitations, Code Civ.Proc., § 337, appears to be one of ejectment, and the claim would tend to diminish or defeat plaintiff's recovery.

Judgment reversed.

GIBSON, C. J., and SHENK, SCHAUER and SPENCE, JJ., concur.

TRAYNOR, Justice (concurring and dissenting).

I agree that the trial court erred in refusing to admit any evidence relating to the party wall and that the cause should therefore be remanded for a new trial on the issues raised by the counterclaim. On the basis of the provision in the lease that "Lessor shall not be relieved of its said maintenance obligations with respect to said party wall," defendant offered to prove that "the lessor plaintiff both expressly and impliedly agreed to maintain and keep in repair this party wall as far as the lessee is concerned, in conjunction with its contractual liability with the contiguous owner under a party wall agreement." The counterclaim quotes the paragraph of the lease stating the parties' obligations with respect to the party wall, and alleges that the "plaintiff herein negligently and carelessly failed to maintain said party wall in a safe condition." The words "negligently and carelessly" do not prevent defendant from proving a cause of action in contract see L. B. Laboratories, Inc., v. Mitchell, 39 Cal.2d 56, 59, 60, 244 P.2d 385; George v. Bekins Van & Storage Co., 33 Cal.2d 834, 841, 205 P.2d 1037, and since the alleged obligation was based on the written lease, section 337(1) appears to be the applicable statute of limitation. Accordingly, the trial court erred in rejecting the offer of proof.

On the other issues, I concur in the dissenting opinion of EDMONDS, J.

EDMONDS, Justice (dissenting).

The counterclaim of Briggs does not charge Barker with any breach of contract to maintain a party wall. At most, the pleading states a cause of action in tort which would lie against either owner of the wall for permitting it to become a private nuisance. For that reason, section 337(1) of the Code of Civil Procedure relating to "[a]n action upon any contract, obligation or liability founded upon an instrument in writing" is not the applicable statute of limitations.

The lease does not contain any obligation or promise, express or implied, whereby Barker promises Briggs that the wall will be kept in repair. It states that the demised premises are subject to a party wall agreement whereby Barker has certain maintenance obligations. What these obligations are, or with whom, is not specified. Presumably they are owed to the other owner of the party wall. The lease further provides that Briggs is not to be liable for these obligations except under certain circumstances which are alleged not to have occurred. Barker is to remain obligated under the party wall agreement. The most which can be construed from this provision is that Briggs, as lessee, is to be protected against an assumption of a covenant with some third party. The only promise is that Briggs will not be held liable for any obligations under this separate agreement.

The facts alleged in the counterclaim do not support a charge that Barker breached its obligation to Briggs to protect him from liability for the party wall agreement. There is no claim that the cause of action is based upon the party wall agreement, not is it alleged that the agreement is in writing and that Briggs is a third-party beneficiary of it. Cf. Division of Labor Law Enforcement v. Dennis, 81 Cal.App.2d 306, 183 P.2d 932.

Tagus Ranch Co. v. Hughes, 64 Cal.App. 2d 128, 148 P.2d 79, is cited for the proposition "that all obligations and promises which the words of writing necessarily import must be regarded as included in the terms of the writing, under section 337, Code of Civil Procedure." Although the statement of the rule of that case is correct, it is not here applicable. In the Tagus Ranch case, the instrument read: "I * * hereby confess and acknowledge that I have stolen and embezzled from you" a certain sum of money. The court, quite properly, construed this to imply as a matter of law a promise to repay the sum embezzled. According to the court, "The obligation to repay could be established by the use of these writings and there would be no need for evidence of facts and occurrences outside of those appearing on the face of the instruments. Under these circumstances we think the writings in question are sufficient to bring the action within the provisions of the four-year statute above mentioned." 64 Cal.App.2d at page 131, 148 P.2d at page 80.

In support of this conclusion, the court relied upon O'Brien v. King, 174 Cal. 769, 164 P. 631, which stated the rule as follows: "A cause of action is 'founded upon an instrument of writing' when the contract, obligation, or liability grows 'out of written instruments not remotely or ultimately, but immediately.'" 174 Cal. at page 772, 164 P. at page 632. The O'Brien case concerned an instrument reading: "Received from Miss Hannah O'Brien, * * * $450 * * * at 5 per cent interest." The court said: "The reasonable—indeed, the only reasonable—meaning of these words is that the money was received as a loan at the specified interest rate. A loan being established by the writing, a promise to repay is implied by necessary inference of law and fact. Such promise is embodied in the language of the writing, although not expressed in the words 'I promise to pay.'" 174 Cal. at page 773, 164 P. at page 632. According to the court, "promises 'merely implied by law' from a situation evidenced by a writing—i. e., *quasi* contracts—are not within the statutory provision under discussion. The promise must be one arising directly from the writing itself, and included in its terms. But in determining whether the obligation is 'supported by an express promise or stipulation in the written instrument,' we must regard, as included in the terms of the writing, all obligations and promises which its words necessarily import." 174 Cal. at page 774, 164 P. at page 633.

In McCarthy v. Mt. Tecarte Land & Water Co., 111 Cal. 328, 43 P. 956, the plaintiff, director of the corporation, attempted to rely upon a resolution of the board of directors appointing him superintendent of the company. The resolution did not fix any compensation for the position, and plaintiff was entitled to none unless the circumstances raised an implied assumpsit. The court said: "But a cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the nonperformance of which the action is brought." 111 Cal. at page 340, 43 P. at page 959. Therefore, the court concluded, the plaintiff's cause of action was not upon a written instrument and was barred by section 339 (1). It summarized the situation as follows: "Appellant could not have been precluded from showing affirmatively that no compensation was intended or expected, upon the ground that it would have been an attempt to contradict a written instrument. If respondent have any cause of action, it is upon an understanding of appellant and the expectation of respondent that he would be compensated, which may be implied, if the evidence be sufficient, from all of the circumstances of the case, and not upon any written instrument." 111 Cal. at page 342, 43 P. at page 959.

In the present case, the lease provision that Barker will remain obligated upon the separate party wall agreement may be some evidence of its liability in tort for failure to maintain the wall. But it would not be precluded by the rule of integration from proving that it is not subject to such liability. From all that appears, its obligations under the agreement may have been no more than to paint or light the wall. The lease contains no promise that Barker will repair the wall, or so maintain it that it will not become a nuisance. If this is Barker's obligation, it can be proved only by evidence of the agreement or other evidence outside the lease. The counterclaim is based upon Barker's negligence and carelessness in maintaining the wall, as a result of which it became a hazard. Barker's liability, if any, for this condition does not arise "immediately" out of a written instrument. The lease does not contain a contract to keep the wall in repair, for nonperformance of which the action is brought. Therefore, the action is barred by section 339(1) of the Code of Civil Procedure which requires that an action "upon a contract, obligation or liability not founded upon an instrument of writing" must be commenced within two years.

As another ground for reversal of the judgment, it is held that Briggs stated a cause of action for declaratory relief and the trial court erred in deciding that he was not entitled to such a judgment. Dabney v. Philleo, 38 Cal.2d 60, 70, 237 P.2d 648; Essick v. City of Los Angeles, 34 Cal.2d 614, 624, 213 P.2d 492. However, whether a declaration of the rights of the parties is necessary or proper at the time under all the circumstances is a matter within the discretion of the trial court, and in the absence of a clear showing of abuse of that discretion, which does not appear here, its decision will not be disturbed upon appeal. Code Civ.Proc. § 1061; Hannula v. Hacienda Homes, Inc., 34 Cal.2d 442, 448, 211 P.2d 302, 19 A.L.R.2d 1268; California Physicians' Service v. Garrison, 28 Cal.2d 790, 801, 172 P.2d 4, 167 A.L.R. 306; Moss v. Moss, 20 Cal.2d 640, 643–644, 128 P.2d 526, 141 A.L.R. 1422; Cutting v. Bryan, 206 Cal. 254, 257, 274 P. 326.

Barker's complaint and supplemental complaint alleged that Briggs was in default under the second paragraph of the lease by failure to furnish certified statements and pay the additional rental of 60% of the gross income or receipts in excess of $25,000 derived in any manner, directly or indirectly, from the use or occupancy of the premises. The pleader claimed the right, by reason of these defaults, to reenter and repossess the premises without terminating the lease. According to the supplemental complaint, the lease does not authorize any allocation or proration of receipts between the demised premises and the other parking lots not belonging to Barker.

By amended answer to the complaint and answer to the supplemental complaint, Briggs admitted his failure to file a certified statement within the proper time in 1948, but claimed that Barker had waived the provisions of the lease in this respect by accepting, in prior years, unverified statements later than the time specified. He denied that the 1949 statement did not comply with the lease. Briggs also denied that he had failed to pay the additional rental provided in the lease and was in default. Therefore, he said, Barker is not entitled to re-enter and repossess the premises without terminating the lease. According to Briggs, "The dispute, if any, over the amount of rent owed * * * arises from the manner in which defendant has apportioned gross receipts from the operation of all defendant's parking lots to the use or occupancy of the demised premises * * *. Plaintiff is not entitled to receipts from the parking of cars on the adjoining lots not owned by plaintiff."

As stated by Briggs in his cross-complaint, it was his custom to operate the demised premises and two other lots as a single unit from time to time and he alleged that he maintained records to show "the gross profits fairly attributable to the use and occupancy of the demised premises". He claimed the right under the lease "to allocate gross income or receipts to the parking lot on which a particular automobile is parked when overflow cars enter the demised premises but are parked on adjoining lots". He also pleaded that "his method of allocating gross income or receipts as between the demised premises and other parking lots operated as a unit with the demised premises constitutes a fair and reasonable method of allocation and that cross defendant received its just, fair and proportional share of the gross income or receipts attributable to the use or occupancy of the demised premises". According to Briggs, unless he secures a declaration of his rights Barker "will endeavor to terminate and cancel the rights of cross complainant in and to the lease * * * and will forfeit and use the deposit of the cross complainant put up on said lease".

The basic issues joined by the pleadings were simply whether Briggs was in default under the terms of the lease and, if so, whether Barker was entitled to repossession without terminating the lease. Insofar as the alleged default in payment of additional rentals was concerned, Briggs' defense was that he was entitled to allocate receipts between the several lots. No new issue was raised by the cross-complaint for declaratory relief.

"The purpose of section 1060 et seq., Code of Civil Procedure, providing for actions for declaratory relief, is to provide a ready and speedy remedy in cases of actual controversy relating to the legal rights and duties of the respective parties. By section 1061, the court is permitted to refuse to exercise the power in any case where its declaration or determination is not necessary under the circumstances. This is such a case. All the issues raised in the cross-complaint can be readily determined in the trial of the special defenses raised in the answer and, because this affirmatively appears upon the face of the pleading, the trial court properly refused to exercise the power granted by these sections of the code." Welfare Investment Co. v. Stowell, 132 Cal.App. 275, 278, 22 P.2d 529, 530; Sunset Scavenger Corp. v. Oddou, 11 Cal.App.2d 92, 96, 53 P.2d 188.

The trial court found that Briggs did not furnish a report prepared and certified as required by the lease in 1946 and that the reports which he supplied in 1947, and 1948 and 1949 were not certified and were not presented within the time provided by the lease. With regard to these reports, it said that, "It is not true that these reports correctly reflected the gross income attributable to the use and occupation by the defendant of the leased premises." As a portion of this finding concerning reports, the court declared: "It is not true that the plaintiff, * * * waived these defaults, or led the defendant to believe that strict compliance in the future with the terms of the Lease would not be required."

The court then found that a certified report was furnished within the proper time for the year 1949, but that it showed a gross revenue attributable to the leased premises of $35,485.60, rather than the sum of $31,179.17 which Briggs reported to Barker. This report, the court said, did not correctly reflect the gross income attributable to the use of the premises. The court also found that the payment of $3,707.50 which Briggs tendered after commencement of the action, should have been in the amount of $6,291.36. From these findings, the court concluded that Barker was entitled to a judgment for immediate possession of the property and that Briggs was not entitled to a declaratory judgment.

Because of asserted deficiencies in the findings, it is now held that the judgment must be reversed. However, even if we assume that the findings are insufficient, this court "may make findings of fact contrary to, or in addition to, those made by the trial court." Code Civ.Proc. § 956a. In Tupman v. Haberkern, 208 Cal. 256, 266, 280 P. 970, 974, the court explained the purpose of section 956a to be that, "whenever possible, and the interests of justice would seem to require, the reviewing court should have the power to make new findings contrary to or in addition to those made by the trial court, either on the record presented or on new evidence to be taken under the direction of the court, all with reference to material issues framed by the pleadings, to the end that the judgment or order appealed from may be affirmed and further litigation terminated". The constitutional and statutory provisions which empower this court to affirm, modify or direct the entry of a final judgment are to be liberally construed toward the end that a cause may be disposed of on a single appeal. Cal.Const. Art. VI, § 4¾; Code Civ.Proc. §§ 53, 956a; American Enterprise, Inc. v. Van Winkle, 39 Cal.2d 210, 219, 246 P.2d 935; Tupman v. Haberkern, supra; Gudger v. Manton, 21 Cal.2d 537, 547, 134 P.2d 217; Culjak v. Better Built Homes, 58 Cal.App.2d 720, 725, 137 P.2d 492.

Where the error in an action for declaratory relief consists of entering a judgment of dismissal rather than decreeing expressly that the complainant is not entitled to declarations in his favor (as is implied by the judgment of dismissal), the court may modify the judgment by inserting an express declaration of the rights of the parties. Essick v. City of Los Angeles, 34 Cal.2d 614, 624–625, 213 P.2d 492. In the Essick case the judgment was affirmed, as modified, although the trial court erroneously failed to declare the rights of the parties. Because the evidence contained in the record was sufficient to empower the court to modify the judgment, the error in entering a judgment of dismissal was not prejudicial. Under the circumstances, no reversal was required.

The present decision implicitly approves the trial court's findings, as far as they go, with the exception of the specification of the amount of additional rental which Briggs should have paid, a determination which is unnecessary to the judgment. These findings are sufficient to sustain the judgment restoring Barker to possession and allowing attorney's fees and costs. Even if additional findings were necessary, the record would enable this court to supply them and modify the judgment. No extrinsic evidence has been offered to aid in the interpretation of the terms of the lease, nor is it contended that any such evidence is required. The document is in evidence and may as readily be interpreted from its face by this court as by the trial court.

The majority have gone half way in supplying the findings which they say are missing by determining that, if Briggs has breached the terms of the lease, Barker is entitled to possession without terminating the lease and may retain the security deposit in accordance with its terms. With this conclusion, I am in complete accord. No other interpretation of the lease provisions in this regard is possible. However, no issue was raised by the cross-complaint concerning either of these points and there was no necessity to grant declaratory relief for the sole purpose of deciding them.

"As to the principals governing appellate courts in considering the adequacy of findings to dispose of issues and support a judgment it is a general rule that 'Even though a finding might have been more clearly phrased, it is sufficient if its language is clear enough to indicate what the court intended; and if there are findings sufficient to support the judgment, they are not vitiated by the unintelligibility of others. Any uncertainty in the findings will be construed so as to support the judgment rather than to defeat it.' * * * It is also to be noted that while full findings are required upon all material issues a judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made." Richter v. Walker, 36 Cal.2d 634, 639–640, 226 P.2d 593, 596.

Also, "[i]t is well settled, in spite of the fact that section 633 of the Code of Civil Procedure provides that facts and conclusions must be separately stated, that a finding may be regarded as one of fact, although mistakenly placed among the conclusions of law." Linberg v. Stanto, 211 Cal. 771, 776, 297 P. 911, 75 A.L.R. 555. "It is also the rule that findings are sufficient if they can be made certain by reference to the record". Ethel D. Co. v. Industrial Accident Comm., 219 Cal. 699, 708, 28 P.2d 919, 923, or the pleadings. Kennedy, etc., Co. v. S. S. Const. Co., 123 Cal. 584, 585–586, 56 P. 457. Although the findings in this case are far from ideal, and should have been drawn with more certainty, the weakness in them is not fatally defective. Richter v. Walker, supra. Upon the ultimate fact of whether Briggs was in default under the provisions of the lease, the court found that he did not report the proper gross receipts attributable to the use and occupation of the leased premises. From a review of the record, it is obvious that the finding also was intended to encompass a failure to pay the correct amount of additional rental.

The majority object to the findings of an incorrect report of gross receipts upon the ground that they could "refer either to the overflow and night parking receipts or to the gross receipts on cars actually parked on the Spring Street lot". However, "[t]he court's finding was upon the ultimate fact in issue and was therefore sufficient". In re Estate of Janes, 18 Cal.2d 512, 514, 116 P.2d 438, 440. It was not necessary for the court also to find upon the probative facts from which it deduced the ultimate fact of failure to comply with the provisions of the lease. Klein v. Milne, 198 Cal. 71, 75, 243 P. 420.

Ample support for the finding that Briggs failed properly to account for gross receipts is provided by the undisputed evidence that, for more than a year, no records were kept of gross receipts for night parking. This breach of the lease is sufficient of itself to give Barker the right to possession. In addition, there is some indication in the record that the trial court intended to construe the lease contrary to Briggs' claim of a right to allocate receipts to various lots. However, the finding being supported by other sufficient evidence, it is unnecessary for this court to consider that question of interpretation. "It is, of course, immaterial that the theory upon which the judgment may be affirmed is not identical with that relied upon by plaintiffs or by the trial court, since plaintiffs are required only to plead and prove facts sufficient to justify relief, and the trial court's judgment must be affirmed if the findings, supported by the evidence, are sufficient to warrant the relief granted on any legal theory." Sears v. Rule, 27 Cal.2d 131, 140–141, 163 P.2d 443, 448.

Among the findings of fact there is none directed specifically to the question of whether Barker has the right to possession without terminating the lease. However, there is a so-called conclusion of law providing: "That plaintiff is entitled * * * to be placed in the immediate possession of said real property." This, is, in effect, a finding upon an ultimate fact in issue, and may be treated as such. Linberg v. Stanto, supra. Even if it were not to be considered as a finding of fact, a determination that Barker is entitled to immediate possession of the property results by necessary implication from the express finding that Briggs is in default under the lease. It is obvious from the lease, as construed by the majority, that, if Briggs is in default, Barker is entitled to possession without terminating the lease. The finding must be interpreted to include the right to continue the obligations of the lease. The only issue raised by the pleadings was whether the lease had been breached so that Barker had the right to possession without terminating it. There was no issue as to whether he had the right to possession, but not the right to continue the lease in effect.

Construing the findings so as to support the judgment rather than defeat it, Richter v. Walker, supra, I conclude that they are sufficient to determine the cause without the necessity of making additional findings. Those which were made, supported by sufficient evidence, eliminated any necessity for determining whether Briggs' interpretation of the lease in regard to allocation of rentals was correct. The court having found that Briggs was no longer entitled to possession of the property, his interpretation of the additional rental provision became an immaterial issue and the failure to find thereon does not constitute prejudicial error. Merrill v. Gordon & Harrison, 208 Cal. 1, 6, 279 P. 996; Woodhead v. Wilkinson, 181 Cal. 599, 602, 185 P. 851, 10 A.L.R. 291.

For these reasons, I would affirm the judgment.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

39 Cal.2d 602

TOSHIO HAMASAKI et al. v. FLOTHO et al.

L. A. 22006.

Supreme Court of California, in Bank.

Oct. 9, 1952.

A minor, by his guardian ad litem, and minor's father brought action against driver of automobile and others to recover for injuries sustained by minor when struck by automobile and for medical expenses. The Superior Court of Los Angeles County, Harold B. Jeffery, J., entered order granting motion of plaintiffs for new trial on issue of damages only, and defendants appealed. The Supreme Court, Traynor, J., held that Superior Court erred in granting new trial on issue of damages only.

Order reversed and cause remanded with directions to vacate judgment and order new trial on all issues.

Carter, J., dissented.

Prior opinion, 240 P.2d 298.

1. New Trial 🔑9

Though granting of a new trial limited to issue of damages rests primarily in discretion of trial court, it is abuse of discretion to grant such new trial if question of liability is close, if damages awarded are grossly inadequate, and if there are other circumstances that indicate that verdict was result of prejudice or improper compromise.

2. Automobiles 🔑245(8)

In action for injuries sustained by minor when struck by automobile while minor was crossing street in middle of block, and for medical expenses, whether driver of automobile was negligent was for jury.

3. New Trial 🔑9

A new trial limited to damages issue may be ordered by trial court where it can reasonably be said that the liability issue had been determined by jury.

4. New Trial 🔑9

Generally, only when verdict allows a substantial, even though inadequate amount for general damages, can it reasonably be concluded that jury's error related solely to damages issue, so as to justify new trial on damages issue only.

5. New Trial 🔑9

Where questions of negligence and contributory negligence in personal injury action were close, and jury allowed only $182.90 for injuries consisting of brain concussion, several skull fractures, fracture of collar bone, puncture wounds in forehead, and bilateral ankle clonus, inadequacy of damages was so great as to indicate that there had been a compromise by jury, and therefore it was error to grant a new trial on damages issue only.

6. Appeal and Error 🔑110, 870(6)

No appeal lay from denial by trial court of motion for new trial, and denial could be reviewed only through an appeal from the judgment.

7. Appeal and Error 🔑874(5)

Where defendants did not appeal from judgment for plaintiffs but only from order granting motion of plaintiffs for new trial on issue of damages only, Supreme Court was without jurisdiction to review the judgment or denial of defendants' motion for new trial.

8. Appeal and Error 🔑1178(4)

In disposing of appeal from order granting motion of plaintiffs for new trial on damages issue only, Supreme Court could direct complete new trial. Code Civ.Proc. §§ 657, 662.

9. Appeal and Error 🔑874(5)

In case of partial appeals, such as appeal from order granting a limited new trial, Supreme Court may review as much of the judgment as is necessary to give appellant relief he seeks, even though it is necessary to reverse parts of the judgment with which appellant has no quarrel, and from which neither party has appealed.

10. New Trial 🔑9

On motion for limited new trial on question of inadequacy of damages, trial court can order complete new trial.

11. Appeal and Error 🔑1004(1)

The power of an appellate court to reverse a judgment because of inadequacy of damages is much more limited than power of trial court to grant new trial for inadequacy of damages. Code Civ.Proc. §§ 657, 662.

12. New Trial ⚿109

Though application of an aggrieved party is a jurisdictional requirement for new trial proceedings, trial court, in correcting error complained of in motion for new trial, is not limited to method specified in the motion. Code Civ.Proc. §§ 657, 662.

13. New Trial ⚿113

The 1929 amendment of new trial statute providing that verdict may be vacated and decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on application of party aggrieved, for enumerated causes, materially affecting substantial rights of parties, was intended to relate solely to a subject matter of statute dealing with powers of court in ruling on motion for new trial, and was not designed to alter jurisdictional effect of a motion for new trial. Code Civ.Proc. §§ 657, 662.

◆

Parker, Stanbury & Reese and Raymond G. Stanbury, Los Angeles, for appellants.

Culbert L. Olson, John H. Carter and Richard C. Olson, Los Angeles, for respondents.

TRAYNOR, Justice.

Plaintiff Toshio Hamasaki was struck by an automobile driven by defendant Fred Flotho, Jr. The latter was acting in the course of his employment by defendant Leland and was using the car with the consent of its owner, defendant Fred Flotho, Sr. Toshio and his father brought this action to recover for injuries and medical expenses.

The accident occurred in a residential neighborhood while Toshio, who was then not quite six years of age, was crossing the street in the middle of the block. At the trial plaintiffs contended that the defendant driver was traveling at an excessive rate of speed and was not maintaining a reasonable lookout for pedestrians. Defendants contended that the driver was not speeding and that plaintiff suddenly darted from behind a parked truck into the path of the automobile. Although it was conceded that Toshio was severely injured, the extent of his injuries was contested.

The jury returned a verdict in favor of plaintiffs for $1,000. Defendants' motion for a new trial was denied. Plaintiffs' motion for a new trial on the issue of damages only was granted after defendants refused to consent to a judgment of $7,500. Defendants have appealed from the order granting plaintiffs' motion. There is no appeal from the judgment.

Defendants do not claim that the damages awarded by the jury are adequate. It is their position that the jury compromised the liability issue and that liability was therefore never determined. They suggest even that the verdict is "less than a compromise," that is, that the jury concluded defendants were not liable but nevertheless, out of sympathy, allowed plaintiffs approximately the amount of the special damages.

[1] Although the granting of a new trial limited to the issue of damages rests primarily in the discretion of the trial court, it is an abuse of discretion to grant such a new trial if the question of liability is close, if the damages awarded are grossly inadequate, and if there are other circumstances that indicate that the verdict was the result of prejudice or an improper compromise. Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324.

(1) Evidence of liability. The accident took place on Carmelita Street in Los Angeles. The pavement is 30 feet wide and has no center line. There are houses on most of the adjoining lots, but no sidewalks. Between the pavement and the houses on each side of the street there is a dirt shoulder. Immediately before the accident Toshio was walking south on the east shoulder. A truck was parked on the shoulder in the middle of the block, approximately 195 feet south of the nearest intersection. A witness saw Toshio pass the truck on the side away from the pavement and then turn around it into the street. At that moment this witness looked away and did not see the accident. The defendant driver was also proceeding south on

Carmelita. He testified that he was driving at 20 to 25 miles per hour. Other witnesses variously estimated his speed at from 35 to 60 miles per hour, but they all testified that he stopped within 50 feet beyond the point of impact. Just before the accident he had moved into the east half of the street to pass around another truck parked partially off the pavement on the west side. Photographs of his skid marks indicate that at the point of impact he had returned to the west side; his left skid mark passed over a manhole cover in the center of the street. He testified that Toshio suddenly ran into his path from behind the truck when only 15 feet in front of the moving car and that it was then impossible to avoid the accident. Toshio did not testify.

[2] In view of the residential character of the neighborhood, the testimony that the driver was traveling 60 miles per hour would fully justify the conclusion that he was negligent, but the opposing evidence was also ample to uphold a contrary finding. It is apparent that the jury faced a difficult task in resolving this question.

(2) Inadequacy of damages. Plaintiffs' special damages were stipulated to be $817.10. Thus the award of $1,000 allowed only $182.90 for general damages.

When taken to General Hospital immediately following the accident, Toshio was not expected to live. He was unconscious for several days. His injuries included brain concussion, a complete fracture of the collar bone, and several fractures of the skull. Three of the skull fractures were extensive; one of them resulted in a separation of almost half an inch and a depression of almost one-quarter of an inch. There were two puncture wounds in the forehead, the coverings of the left eyeball were swollen, and the pupils were unequal. There was also a bilateral ankle clonus. This much was not contested. In addition there was medical testimony that as a result of the accident Toshio was suffering from permanent psycho-motor epilepsy and that he would require continuous medical care throughout the remainder of his life. This latter evidence, however, was disputed by defendants' medical experts. Toshio's teachers were in disagreement as to whether or not he had made a substantial recovery insofar as his school activities were concerned.

Even if the jurors rejected the evidence of permanent injury, it is inconceivable that they regarded $182.90 as adequate compensation for the brain concussion, the broken clavicle, the various skull fractures, and the other injuries admittedly sustained. The conclusion is inescapable that the verdict was not the result of an effort to assess the pecuniary value of Toshio's suffering. Had the jury truly believed that defendants were liable, the verdict would have been for many times this amount.

[3, 4] Plaintiffs contend, however, that whenever the jury allows full compensation for special damages and any amount, no matter how small, for general damages, the trial court's decision to allow a limited new trial will not be reversed on appeal. Such a view offers the convenience of a mechanical formula, but it ignores the principles that govern the granting of partial new trials. A new trial limited to the damages issue may be ordered by the trial court when it can reasonably be said that the liability issue has been determined by the jury. A refusal to allow for undisputed special damages is usually convincing evidence that the jury failed to make a decision of the liability issue, and that circumstance has therefore been stressed in a number of appellate opinions. See Wallace v. Miller, 26 Cal.App.2d 55, 56, 78 P.2d 745; Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 11, 175 P. 26, 177 P. 845. In a particular case, however, gross inadequacy of unliquidated general damages may be just as convincing. Thus, in Simmons v. Fish, 210 Mass. 563, 571, 97 N.E. 102, it was held that a verdict of $200 for the loss of an eye was a conclusive indication that the jury had compromised the issues of liability and damages. See, also, Schuerholz v. Roach, 4 Cir., 58 F.2d 32, 34 [$625 for loss of eye]; Keogh v. Maulding, 52 Cal.App.2d 17, 21, 125 P.2d 858 [verdict for $291.23 more than undisputed damages]. As a general rule, it is only when the ver-

dict allows a substantial, even though inadequate, amount for general damages that it can reasonably be concluded that the jury's error related solely to the damages issue. Hughes v. Schwartz, 51 Cal.App.2d 362, 368, 124 P.2d 886; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 16, 146 P.2d 34. In view of Toshio's serious injuries, $182.90 cannot be regarded as substantial.

Taylor v. Pole, 16 Cal.2d 668, 675, 107 P.2d 614, does not conflict with the foregoing authorities. In that case the error necessitating a new trial directly involved the trial court's instructions regarding damages. Moreover, the evidence of defendant's liability was "overwhelming." The new trial was therefore limited to the damages issue even though, as to one of the plaintiffs, the jury had awarded less than the undisputed special damages. See, also, Crandall v. McGrath, 51 Cal.App.2d 438, 440–442, 124 P.2d 858; Loughran v. McKenna, 60 R.I. 453, 457, 199 A. 302; cf. Keogh v. Maulding, 52 Cal.App.2d 17, 21–22, 125 P.2d 858. In the present case the jury was properly instructed concerning damages and the issue of liability was close, so that the grossly inadequate award cannot reasonably be explained as a mere error of the jury in the assessment of damages.

(3) Other circumstances indicating compromise. The order granting plaintiffs' motion for a limited new trial provided that if defendants would consent to a judgment of $7,500, the motion would be deemed denied. This proposal of the trial judge thus allowed $6,682.90 for general damages—more than 36 times the $182.90 allowed in the verdict. The great disparity between the jury's determination and that of the judge provides an additional and striking indication that the jurors could not agree on the liability issue and that those who believed defendants were liable consented to inadequate damages in return for the votes of those who had decided that defendants should pay nothing.

[5] Our conclusion that the verdict was the result of an improper compromise necessitates a reversal of the order granting a limited new trial.

Plaintiffs contend that in the event a limited new trial is denied them they should be given a new trial on all issues. Unquestionably plaintiffs have been prejudiced by the jury's inadequate award, and they would ordinarily be entitled to a reversal of the judgment on that ground. Defendants urge, however, that under the special circumstances of this appeal we have no jurisdiction to do more than affirm or reverse the trial court's order and that we cannot direct a complete new trial.

[6, 7] No appeal lies from the trial court's denial of defendants' motion for new trial; that ruling may be reviewed only through an appeal from the judgment. City of Los Angeles v. Glassell, 203 Cal. 44, 46, 262 P. 1084; Litvinuk v. Litvinuk, 27 Cal.2d 38, 42, 162 P.2d 8; Caldwell v. Caldwell, 80 Cal.App.2d 378, 384, 182 P.2d 258. Defendants have not appealed from the judgment, and, since timely notice of appeal is a jurisdictional requirement, Estate of Hanley, 23 Cal.2d 120, 122, 142 P.2d 423, 149 A.L.R. 1250, we are without jurisdiction to review the judgment or the denial of defendants' motion.

[8] The only appeal before us is that from the order granting plaintiffs' motion for a limited new trial. In disposing of this appeal we have jurisdiction to do no more than the trial court itself could have done. See Tomales Bay Oyster Corp. v. Superior Court, 35 Cal.2d 389, 392, 217 P.2d 968; Crescent Feather Co. v. United Upholsterers' Union, 153 Cal. 433, 434, 95 P. 871; Byxbee v. Dewey, 128 Cal. 322, 326, 60 P. 847; Wheeler v. Bolton, 92 Cal. 159, 167, 28 P. 558; Bloxham v. Tehama County Tel. Co., 29 Cal.App. 326, 340, 155 P. 654. The controlling question, therefore, is whether or not the trial court, on plaintiffs' motion for a new trial on the issue of damages only, had power to grant a new trial on all issues.

[9, 10] This question is analogous to that presented when an appeal is taken from only a part of a judgment. To simplify litigation a party who is aggrieved by a judgment is ordinarily entitled to limit his appeal to the parts thereof with which he is dissatisfied. Similarly, when he is seeking relief in the trial court by way of a new trial, he ordinarily may seek a retrial only of the issues on which the decision has been adverse to him. In either case, however, situations may arise where the issues are so interwoven that a partial retrial would be unfair to the other party. When, as in the present case, for instance, the jury has, by compromising the issues of liability and damages, inextricably interwoven those issues, a retrial of the damages issue alone based on the erroneous assumption that defendants' liability has been determined would be extremely unjust to him. A situation is thus presented where the plaintiff has been aggrieved, but the specific relief he seeks may not be granted without doing an injustice to the defendant. Since the relief requested may not be granted, the trial court, if the issue is presented by motion for a limited new trial, or the appellate court, if the issue is presented by a partial appeal, must do one of two things. It must either deny all relief, or order a new trial on both issues. In the case of partial appeals it is settled that the court may review as much of the judgment as is necessary to give the appellant the relief he seeks even though it is necessary to reverse parts of the judgment with which he has no quarrel and from which neither party has appealed. Milo v. Prior, 210 Cal. 569, 571, 292 P. 647; Blache v. Blache, 37 Cal.2d 531, 538, 233 P.2d 547; American Enterprise v. Van Winkle, Cal. Sup., 246 P.2d 935; Bailey v. Bailey, 60 Cal.App.2d 291, 293, 140 P.2d 693. Logically the same rule should govern the trial court when passing on a motion for a limited new trial.

It is suggested that in a particular case both parties may prefer the judgment as originally entered to the expense and uncertainty of a new trial on all issues, and that therefore the trial court should not have jurisdiction to grant a complete new trial in the absence of a motion therefor. There is no reason why, if a limited new trial cannot be granted, the parties should not be allowed to adopt the jury's compromise as their own. In such a case, however, the trial court would undoubtedly respect their preference in this respect and deny any new trial at all. Cf. Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324. Accordingly, it is not necessary to limit the jurisdiction of the trial court in passing upon a motion for a partial new trial to prevent a complete new trial that neither party wants. If the defendant does not wish a new trial he need not move for one, and if the plaintiff does not wish a complete new trial, if he cannot have a partial new trial, he need simply say so.

[11] On its face, however, a motion for a limited new trial gives no inkling that the plaintiff would prefer no new trial to a complete new trial. Before such a preference could be inferred it would be necessary to assume his knowledge of a rule that the trial court could only grant or deny the motion as made. To adopt such a rule would thus create a procedural trap for those unwary of the niceties of practice, who, following the natural instinct to ask only for what they wished would discover they could receive nothing because they asked for too much. It is no answer to say that the plaintiff could extricate himself from this trap by appealing from the judgment after his motion for a limited new trial was denied. The power of the appellate court to reverse a judgment because of the inadequacy of the damages is much more limited than that of the trial court to grant a new trial for the same reason, and thus in most cases the plaintiff must secure relief from the trial court if he is to secure it at all.

Defendants contend, however, that by amending section 657 of the Code of Civil Procedure in 1929, the Legislature adopted the rule that a trial court may not order a new trial on all issues when the motion is limited to the issue of damages alone. Although this contention is supported by Quevedo v. Superior Court, 131 Cal.App. 698, 21 P.2d 998, the court in that case did not consider the analogous rule applicable to partial appeals, and we have concluded that its interpretation of the amendment to the statute was erroneous.

Before 1929, section 657 read: "The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: * * *." After the amendment of that year the section read: "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: * * *."

The principal changes effected by the amendment were the addition of the words "modified," "in whole or in part," and "on all or part of the issues". Since it had earlier been held that a new trial could be limited by the trial court to particular issues, it was said in the Quevedo case that the purpose of the amendment could not have been merely to authorize such limited new trials and therefore must have been to restrict the trial court's jurisdiction to the exact terms of the motion.

[12] The statutory language itself does not expressly refer to jurisdiction and by no means compels the conclusion that the Legislature meant to affect jurisdiction. Although the application of an aggrieved party is a jurisdictional requirement for new trial proceedings in California, Tabor v. Superior Court, 28 Cal.2d 505, 507, 170 P.2d 667; Prothero v. Superior Court, 196 Cal. 439, 444, 238 P. 357; Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 398, 205 P. 446; Title Ins. & Trust Co. v. California Dev. Co., 171 Cal. 173, 194, 152 P. 542; Kohlstedt v. Hauseur, 24 Cal.App.2d 60, 64, 74 P.2d 314, there is no direct suggestion in the statute that the trial court, in correcting the error complained of, is limited to the method specified in the application. If the limited new trial sought would be prejudicial to the opposing party, the granting of a complete new trial is the most reasonable response to the motion. Moreover, if the language of section 657 is interpreted to restrict the trial court's power to either granting or denying a request for a limited new trial, then logic dictates that the statute should also be interpreted to restrict the trial court's power to either granting or denying a request for a complete new trial. The power of the trial court, however, to limit a new trial to particular issues, even when the motion was for a complete new trial, has not been questioned and was expressly recognized in the Quevedo case itself.

An examination of the legislative history of section 657 shows that the purpose of the amendment of 1929 was unrelated to the jurisdictional question here presented. The changes in section 657 were effected by section 2 of chapter 479 of the Statutes of 1929. Section 7 of chapter 479, enacted on the same day, added the following new section to the Code of Civil Procedure: "§ 662. In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered. Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code."

[13] Section 657 of the Code of Civil Procedure is a general section giving the trial court authority to review its own judgments and setting forth the grounds on which review is to be made. Before 1929, such authority was limited to granting new trials, but in that year the Legislature gave the trial court, in nonjury cases, the alternative power of modifying its judgments. To this end, section 662 was added to the Code, setting forth in detail the procedure for nonjury cases. An important purpose of the new section was the granting of authority to make partial changes in findings and judgments, and the words "modify," "in whole or in part," and "on all or part of the issues" were used to describe that authority. Since section 662 is concerned with a special application of the general power of review conferred by section 657, rewording of section 657 was also necessary to make it conform to

the new procedure for nonjury cases. Thus it was provided that decisions other than verdicts could be "modified" "in whole or in part" and new trials granted "on all or part of the issues". This phraseology is identical with that used in the newly added section 662. It is clear that the changes in section 657 were intended to relate solely to the subject matter of section 662 and were not designed to alter the jurisdictional effect of a motion for new trial. To the extent that the Quevedo case holds to the contrary it is disapproved.

The order granting a new trial on the issue of damages only is reversed, and the cause is remanded to the trial court with directions to vacate the judgment and order a new trial on all issues.

GIBSON, C. J., and SHENK, and SPENCE, JJ., concur.

EDMONDS, Justice.

I concur in the judgment. As I understand the rule now stated and applied, a plaintiff under the circumstances here shown may not, by limiting the scope of his motion for a new trial, restrict the action of the court in ruling upon it.

However, the language of the opinion is inconsistent with the decision. It is said: "[I]f the plaintiff does not wish a complete new trial, if he cannot have a partial new trial, he need simply say so." Where is he to "say so"? Is he to state in his notice of motion that he is moving for a new trial on the issue of damages only? Or is he to "say so" in the presentation of the motion?

In either event, what is the purpose of stating to the court, either in writing or orally, that the plaintiff does not wish a complete new trial if that statement is of no legal effect? By the present decision, the rule is laid down that, in the situation shown by the present record, a plaintiff may not limit the action of the trial judge in ruling upon his motion. To suggest that, in some manner not specified, a plaintiff may make his wishes known to the court which is under no duty to consider them, is to add confusion to procedure and uncertainty in regard to the respective rights of the parties.

Also, the court points out that, by compromise, the parties may wish to stand on the judgment. In that event, why should there be any motion for a new trial? The obvious rule that parties to litigation may stipulate to the amount of a judgment needs no judicial recognition or approval.

CARTER, Justice.

I dissent.

The order granting plaintiff a new trial on the issue of damages should be affirmed. The trial court has exercised its discretion and determined that the evidence on liability was clearly sufficient (it denied defendants' motion for a new trial) and also that a limited new trial (damages only) was proper and not unjust to defendants—that there was no indication of a compromise verdict by the jury. I have discussed that phase of this case in my dissent in Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324, and here adopt the views expressed there.

There is an additional factor here presented. The sole appeal was from the order granting plaintiffs a limited new trial; no appeal was taken from the judgment. The majority opinion nevertheless reverses the entire judgment on the ground that the issue of liability and damages are inseparable. With that I disagree. Indeed, this court held in Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752, that it was error to admit evidence of liability where defendant admitted he was liable for the injuries suffered by plaintiff but denied the amount of damages claimed. Hence, the holding in the Fuentes case was not only that liability is severable from damages but it is error for the court to fail to treat it so. We have a similar question here, because by not appealing from the judgment, defendant is now in the position of admitting liability. The similarity between the rule in the Fuentes case and granting a new trial on the issue of damages alone was pointed out in Tumelty v. Peerless Stages, 96 Cal.App. 530, 535, 274 P. 430, 432, where the court was discussing the latter question: "It is not at all rare or unusual for defendants in negligence cases to concede liability at the outset of a trial and to put before the jury the single question of the extent of plaintiff's damage. *On principle there would seem to be no difference between the elimination of the issue of negligence by voluntary act of the defendant, and its elimination by the trial judge after the defendant has had his day in court on such issue,* and the trial judge, who has heard all the evidence, has become convinced that nothing could be gained by relitigating that issue, and no prejudice suffered by not relitigating it." (Emphasis added.)

It has been held repeatedly that in personal injury and wrongful death actions the issue of liability is severable from the issue of damages, and a new trial on the latter issue alone is proper. Tumelty v. Peerless Stages, supra, 96 Cal.App. 530, 274 P. 430; Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 121 P.2d 829; Bauman v. San Francisco, 42 Cal.App.2d 144, 108 P.2d 989; Amore v. Di Resta, 125 Cal.App. 410, 13 P.2d 986; Brush v. Kurstin, 11 Cal.App.2d 258, 53 P.2d 777; Bellman v. San Francisco H. S. Dist., 11 Cal.2d 576, 81 P.2d 894; Hoffart v. Southern Pac. Co., 33 Cal.App.2d 591, 92 P.2d 436; Crandall v. McGrath, 51 Cal.App.2d 438, 124 P.2d 858; Adams v. Hildebrand, 51 Cal.App.2d 117, 124 P.2d 80; Rigall v. Lewis, 1 Cal.App.2d 737, 37 P.2d 97; Henslee v. Fox, 25 Cal.App.2d 286, 77 P.2d 307. As said in Bauman v. San Francisco, supra, 42 Cal.App.2d 144, 160, 108 P.2d 989, 998: "In its brief it is argued that the question of damages is 'so interwoven with the question of liability that the issues should not be segregated'. The issue of liability is clearly severable from the *issue as to the amount of damage. The two issues are in no way connected.* Since 1929, section 657 of the Code of Civil Procedure has expressly authorized the trial court in a proper case to grant a new trial on the issue of damages alone." (Emphasis added.) And the same is true where there is a reversal on appeal where the basis therefor goes to the damage question only. Southern Pacific Milling Co. v. Billiwhack, etc. Farm, 50 Cal.App.2d 79, 122 P.2d 650; Moeller v. Market St. Ry. Co., 27 Cal.App.2d 562, 81 P.2d 475; Bellman v. San Francisco H. S. Dist., 11 Cal.2d 576, 81 P.2d 894; Pretzer v. California Transit Co., 211 Cal. 202, 294 P. 382; Paul v. Williams, 64 Cal.App.2d 696, 149 P.2d 284; Brewer v. Second Baptist Church, 32 Cal.2d 791, 197 P.2d 713; Bishop v. Kelley, 100 Cal.App.2d 775, 224 P.2d 814; Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 131, 17 P.2d 712; 5 C.J.S., Appeal & Error, § 1935.

In an endeavor to escape the effect of the holding in these cases the majority opinion attempts to side-step them by saying the jury has "inextricably interwoven those issues"—liability and damages. Although the jury instructions do not appear in the record they undoubtedly included the standard instructions that the jury was to give no consideration to the question of damages until it had found liability. See Calif. Jury Instructions, B.A.J.I., Instructions Nos. 112, 113, 114. And that damages could not be allowed unless there was liability. It is presumed that the jury followed those instructions. 2 Cal.Jur., 871; 24 Cal.Jur., 795–6. A jury may be said to have disregarded the instructions only in the event that the evidence does not support the verdict. Commonwealth Bonding etc. Co. v. Pacific Electric Railway Co., 42 Cal.App. 573, 184 P. 29; Fidelity & Casualty Co. v. Llewellyn Iron Works, 42 Cal.App. 766, 184 P. 402; 24 Cal.Jur. 796. Hence, there is no basis for the conclusion that the verdict was a compromise, and, as pointed out in my dissent in Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324, that issue was resolved in accordance with the presumption by the trial court.

While the majority accuse the jury of compromising the issue of liability in this case, in my opinion the majority of this court is guilty of rendering a decision based upon a compromise in the decision it has rendered today in this case. It will be remembered that in a former decision in this case the majority of this court held that since there was no appeal from the judgment this court was without jurisdiction to review the judgment and was limited to a consideration of defendant's appeal from the order of the trial court granting plaintiff's motion for a new trial on the issue of damages only. It thereupon reversed this order which meant that the judgment of

$1,000 was reinstated and plaintiff had no further opportunity to obtain redress for the injuries suffered by him as the result of the negligence of the defendant. See 240 P.2d 298.

In my dissent to the former decision of this court in this case I stated: "In view of the foregoing, for this court to find the trial court guilty of an abuse of discretion in granting a new trial on the issue of damages only, and reverse the order, thus entitling the defendant to recover his costs on appeal, with no opportunity for the plaintiff to ever retry the case or obtain further redress, is, to my mind, not only unsound from the standpoint of legal reasoning, but is so cruel and inhuman as to shock the sense of justice of all who may read the majority opinion." 240 P.2d 298, 303.

A petition for rehearing was filed by plaintiff and a rehearing was granted by vote of the following members of this court: Chief Justice Gibson, Justice Shenk and myself. Justice Edmonds being absent from the state, Justice Dooling of the First Appellate District was assigned to sit in his place, and Justice Dooling also voted for a rehearing. Justices Traynor, Schauer and Spence all voted against the granting of a rehearing. Anticipating that plaintiff's petition for a rehearing would be denied, I prepared a dissenting opinion which I intended to file upon the entry of the order of denial which was as follows:

> "I dissent from the order denying a rehearing in this case and feel constrained to write an opinion expressing my views because of certain points raised in Respondent's Petition for Rehearing which were not discussed in either the majority or dissenting opinions now on file.
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> "Respondent's Petition for Rehearing calls attention to the fact that the judgment, entered in the trial court conclusively established the liability of the defendant, and is now final since no appeal was taken therefrom and is res adjudicata on the issue of defendant's negligence and the absence of contributory negligence on the part of the plaintiff. In other words, there is a *final judgment* which establishes defendant's liability for the injuries suffered by plaintiff and the majority opinion holds that there is ample evidence to support this judgment. The only appeal in this case is from the order granting plaintiff's and respondent's motion for a new trial on the issue of damages only. This presents a question as to the scope of review of this court on the appeal from such order. It appears to be the settled rule that in reviewing an order of this character the only issue involved is one of damages; that is, the amount to which plaintiff is entitled in view of the nature and extent of the injuries suffered by him, the extent of the disability, if any, which will result from such injuries and the amount necessarily expended and which he will be required to expend in the future because of such injuries as disclosed by the evidence. Upon a consideration of this evidence this court must determine whether or not the trial court abused its discretion in granting plaintiff's motion for a new trial on the issue of damages only. Since the judgment established the liability of the defendant for plaintiff's injuries and no appeal has been taken from the judgment, this court has no power to review the issue of liability as that issue is not before this court on this appeal. The defendant, by not appealing from the judgment, is conclusively presumed to be satisfied with it and his only concern is the retrial of the issue of damages.
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> "This proposition is clearly stated in 2 Cal.Jur., page 828. 'Upon an appeal from an order upon a motion for a new trial, when allowed, the appellate court is limited in its review of the action of the trial court to the grounds upon which such a motion was based, and upon which the new trial was asked in the particular case. The sole object of an appeal from an order granting a new trial is to determine whether the court erred in granting the motion on the record made up by the moving party, in respect to any one or all the

grounds stated in the specifications presented by the moving party. And nothing can be considered on the appeal that does not go to show that a re-examination of fact is necessary for the protection of the rights of the appealing party. This precludes a review of errors apparent upon the face of the judgment-roll, such as, for example, the insufficiency of the complaint or findings to support the judgment.' This proposition is not discussed in the majority opinion and it is evident that those who concurred therein did not give consideration to respondent's contention that the issue of liability was settled by the final judgment, and therefore, the scope of the review on the appeal from the order granting the motion for a new trial on the issue of damages only is limited to matters relating to that issue.

"Obviously, the plaintiff would not appeal from the judgment as it was in his favor on the only issues which were determined by it after the entry of the order granting plaintiff's motion for a new trial on the issue of damages only. The defendant was the only party aggrieved by the judgment as it determined that defendant was guilty of negligence which was the proximate cause of the injuries suffered by the plaintiff and established defendant's liability for such injuries.

"The theory of the majority opinion is that the order granting plaintiff's motion for a new trial on the issue of damages only must be reversed because the jury failed to determine the issue of liability. The logical result of this reasoning is that the judgment is void because the issue of liability was not determined, and therefore, no valid award of damages could be made. However, the settled rule is that the issue of liability can only be reviewed upon an appeal from the judgment, and if no appeal is taken, and the judgment becomes final, it is res adjudicata and cannot be collaterally attacked. The majority holding in this case amounts to a collateral attack upon the judgment. To be logical, the majority should order the judgment set aside and vacated as no amount of damages can be awarded unless the liability of the defendant is first established.

"The foregoing is the only reasonable and logical deduction which can be made from the reasoning of the majority in this case although the majority opinion does not consider the case from this point of view.

"The patent error on the face of the majority opinion is that it treats defendant's appeal from the order granting plaintiff's motion for a new trial on the issue of damages only the same as if defendant had appealed from the judgment. An appeal from the judgment would confer upon this court jurisdiction to review the issue of liability also. This was the situation in the cases where the appellate court reviewed both issues and gave consideration to the question as to whether the inadequacy of the award of damages was the result of a compromise of the issue of liability. Here the issue of liability was determined by the verdict and is now set in concrete by the finality of the judgment. This issue cannot now be reviewed and the judgment is not subject to collateral attack under any rule of law that can be found in the books. The majority squarely holds that the order of the trial court denying defendant's motion for a new trial can be reviewed only on an appeal from the judgment, and since no appeal was taken from the judgment, this court is without jurisdiction to review the judgment or the denial of defendant's motion. Yet the majority proceed and review the only issue determined by the judgment—the issue of liability—and holds that such issue was not determined properly because it was the result of a compromise. In other words, the majority does that which it says this court has no jurisdiction to do. What more could the majority have done on an appeal from the judgment? It has reviewed the evidence of negligence and contributory negligence and holds that these issues were properly submitted to the jury and that the evidence was sufficient to justify the verdict in favor of plaintiff. For all that appears there were no other issues of fact or law except the issue of damages. It would seem that the majority has resorted to double talk in a vain attempt to sustain its unsound position.

"The majority opinion contains the following statement: 240 P.2d 298, 302. 'If the plaintiff prefers a new trial on all issues to none at all, he can move for a complete new trial and in his argument on the motion urge the trial court to limit the new trial to the question of damages; or he can make an alternative motion, asking for a limited new trial and if that cannot be granted for a complete trial.' The reasoning of the majority in the foregoing statement is somewhat obscure, as the majority does not attempt to point out how the plaintiff could be benefited by making a motion for a new trial on all issues if the court should grant the motion on the issue of damages only and the defendant should appeal from the order granting such limited new trial. Certainly, the scope of review would not be enlarged because the plaintiff made his motion for a new trial on all issues. It is the scope of the order of the trial court granting the motion for a new trial which determines the scope of review on appeal. The quoted statement from the majority opinion can afford little solace to a plaintiff who has been awarded a new trial on the issue of damages only and this court sees fit to reverse such order as it did in this case.

"It seems both unfortunate and unwise to me to permit the ill-considered, illogical, unsound and unjust majority opinion to stand as a precedent to confuse, mislead and befuddle trial judges, lawyers and litigants, so long as the majority of this court blindly persist in perpetuating such an erroneous pronouncement."

Of course, the foregoing dissent was not filed because a rehearing was granted.

It now appears to me that in order for the majority to avoid the shocking injustice which would result from its former decision, it has rewritten its decision on a theory entirely out of harmony with every other decision on the subject, and by implication, at least, has overruled numerous cases without even citing them. At this point I cannot refrain from remarking that this practice is entirely out of harmony with my idea of how to run a court and develop a system of jurisprudence.

It seems to me that if the majority decision is to stand, a trial judge, in considering a motion for a new trial on the ground that the damages awarded are either inadequate or excessive, must weigh the evidence on liability and base his conclusion as to the adequacy of the damages awarded on the strength or weakness of the evidence of liability. In other words he should be clairvoyant to the extent of ascertaining how much the verdict was increased or decreased by the evidence on the issue of liability. Every lawyer or judge who has tried a damage suit knows this cannot be done. But the majority of this court can look at a cold record and say just what took place in the jury room. At least, that is what the majority has done in these four cases.[1] The position of the majority would amuse those who have had experience in the trial of jury cases if it were not fraught with such dire consequences in the administration of justice. We are supposed to have a judicial system which reposes broad discretion in our trial judges. It has been said that they are something more than referees or umpires. The decided cases generally hold that in the conduct of a trial the opinion of a trial judge as to the affect on the jury of instructions of the court and remarks of counsel are controlling on an appellate court. In fact, in the very field here involved, the discretion of the trial judge has been upheld in all but four cases with the exception of these four cases. And, as pointed out in my dissent in Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324 the rule here announced is based upon statements contained in decisions which did not purport to review the exercise of the discretion of a trial judge in *granting* a new trial on the issue of damages only, but where a new trial had been *denied* and the appellate court was asked to reverse with directions to retry the issue of damages only. The majority seize upon these statements and ignore all that is said in the decisions upholding the discretion of the trial judge in granting such limited new trial of which there are 27 according to my research, see 39 Cal.2d 462, 247 P.2d 324.

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[1] Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324; Cary v. Wentzel, 39 Cal.2d 491, 247 P.2d 341; Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335.

While the theory upon which the majority decision is based does not require it, the majority has seen fit to change the settled rule that a trial court may not grant a complete new trial when a limited new trial only is demanded, see Quevedo v. Superior Court, 131 Cal.App. 698, 21 P.2d 998. It will be remembered that both the appellant and respondent took the position at the oral argument of this case that the Quevedo case is sound law, and I am unable to follow the reasoning of the majority in holding that a new trial may be granted on grounds other than those upon which the motion is made. Aside from the basic unsoundness of this holding, the mischief which may flow therefrom staggers the imagination. While conceding, as it must, that a notice of intention to move for a new trial is necessary to confer jurisdiction upon the trial court to grant a motion for a new trial, the majority, by a peculiar process of reasoning seem to hold that because a trial court could grant a limited new trial in a case where a complete new trial is demanded, it should have power to grant a complete new trial where a limited new trial is demanded. This is the equivalent of saying that although a notice of intention to move for a new trial specifies only one ground for the motion, the court may grant it on all the statutory grounds. This is contrary to every decision on the subject of new trials. See Sitkei v. Frimel, 85 Cal. App.2d 335, 192 P.2d 820; Jeffords v. Young, 197 Cal. 224, 228, 239 P. 1054; Smith v. Ibos, 22 Cal.App.2d 551, 71 P.2d 847; Polk v. Boggs, 122 Cal. 114, 54 P. 536; Laver v. Hotaling, 115 Cal. 613, 47 P. 593; Estudillo v. Security Loan etc. Co., 158 Cal. 66, 109 P. 884; Strange v. Strange, 23 Cal. App. 281, 137 P. 1104; Johnston v. Blanchard, 16 Cal.App. 321, 116 P. 973; Cooper v. Superior Court, 12 Cal.App.2d 336, 55 P. 2d 299; 20 Cal.Jur. 162–3. In Watkins v. Nutting, 17 Cal.2d 490, 499, 110 P.2d 384, 389, this court said: "A notice of intention to move for a new trial upon one or more of the grounds specified in the Code of Civil Procedure is essential to the court's jurisdiction. Smith v. Ibos, 22 Cal.App.2d 551, 71 P.2d 847; Peters v. Anderson, 113 Cal. App. 158, 298 P. 76."

Obviously a motion for a new trial on the issue of damages only would have to be made upon the ground that the evidence was insufficient to support the award of damages. See Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324. The defendant comes into court to oppose this motion and learns for the first time that the court intends to hear argument in support of a motion for a complete new trial on all statutory grounds or on some other ground than that specified in the notice. He would justly have cause for complaint, and he would be supported by all of the decided cases. But if the majority opinion here is permitted to stand, neither the plaintiff nor the defendant will have any idea as to what might happen when a notice of intention to move for a new trial on a limited issue is filed. This is not and should not be the law.

I have hereinbefore stated that the majority are guilty of rendering a compromise decision, and I think I have demonstrated the truth of that statement. The majority opinion holds, contrary to all the decided cases, that evidence of liability may be considered in determining the adequacy of the award of damages; that a complete new trial on all issues may be granted when a new trial is demanded on a limited issue only (likewise contrary to all decided cases); that although no appeal is taken from a judgment which establishes liability and it has become final, the judgment may nevertheless be reviewed and reversed on an appeal from an order granting a new trial on the issue of damages only. It is obvious that the foregoing unsound pronouncements are made in order to enable the majority to sustain its unsound position that the trial judge committed a gross, manifest and unmistakable abuse of discretion in granting plaintiff's motion for a new trial on the issue of damages only, and at the same time to give plaintiff an opportunity to seek redress for his patently serious injuries. In other words, the majority is compromising on the law in order to give plaintiff an opportunity to retry his case and probably obtain a fair award of damages. While I commend the majority for this display of human kindness, I cannot yield to a compromise which will necessarily throw the law into a state of confusion, especially when full justice may be accomplished by following settled rules of law.

I would affirm the order.

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39 Cal.2d 622

FLORES et al. v. BROWN et al.

ZAVALA et al. v. BROWN et al.

S. F. 18460.

Supreme Court of California, in Bank.

Oct. 9, 1952.

Rehearing Denied Nov. 3, 1952.

Five actions were brought for injuries and death resulting from collision of automobile and truck. The Superior Court of Santa Clara County, Leonard R. Avilla, J., entered certain judgments and orders, and various appeals were taken. The Supreme Court, Traynor, J., held that Superior Court properly granted new trials on all issues against owner of truck, rather than new trial on issue of damages alone.

Judgment in accordance with opinion.

Carter, J., dissented.

Prior opinion 233 P.2d 168.

1. Appeal and Error 🔑790(3)

Where no appeal was taken from order granting new trial, and such order became final, and judgment was finally vacated, appeal from the judgment was required to be dismissed.

2. Negligence 🔑90

Where owner of tractor at time of accident was towing trailer of another for benefit of owner of trailer, alleged negligence of driver of tractor could be imputed to owner of trailer only if owner of tractor was acting as agent or employee of owner of trailer, and if owner of tractor was hauling trailer merely as a favor to owner of trailer or as an independent contractor, negligence could not be imputed to owner of trailer.

3. Negligence 🔑90

Primary test for determining whether one performing gratuitous services for another does so as the other's agent, so that his negligence may be imputed to the other, is the same as the test applied to determine whether one performing services for compensation does so as an employee or as an independent contractor, and in both situations determinative issue is whether alleged principal controlled or had legal right to control activities of alleged agent.

4. Negligence 🔑90

Where two truckers were independent truckers, and first trucker had not in the past been in second trucker's employ, and first trucker arranged with second trucker to assist him in hauling pears, and first trucker used second trucker's driver and equipment on job on trip basis, and when job ended one of second trucker's trailers was left with first trucker, and when business required first trucker to go to certain city, he towed second trucker's trailer without compensation for purpose of returning it, first trucker was not an agent or employee of second trucker in towing trailer, and therefore alleged negligence of first trucker in towing trailer could not be imputed to second trucker.

5. Husband and Wife 🔑249, 260

A cause of action for injuries to either husband or wife, arising during marriage and while they are living together, is community property, in absence of agreement to the contrary and the same rule is applicable to a cause of action for wrongful death of a minor child or for damages suffered by husband and wife because of injury to such child.

6. Death ⚷95(1)
Negligence ⚷89(1)

Damages for wrongful death are the sum of those suffered by each heir or parent, and when heirs are not husband and wife, negligence of one is not imputed to the others because recovery may be limited to nonnegligent heirs.

7. Negligence ⚷93(2)

Where father and son were killed in automobile accident while father was driving automobile, and mother brought action against owner and driver of truck, which collided with automobile, to recover damages for death of son, alleged negligence of father could not be imputed to mother, and she was entitled to recover damages suffered by her.

8. New Trial ⚷9

When issues of liability and damages are so interwoven that new trial limited to damages alone will be unfair to defendant, trial court may order complete new trial though only motion is by plaintiff for limited new trial on issue of damages.

9. New Trial ⚷9

Where verdicts in five actions for injuries and deaths occurring in same accident, were not unanimous, and verdict in one of the actions was inconsistent under instructions given, with verdict in another of the actions, trial court did not err in granting new trial on all issues in the actions, though plaintiffs moved for new trial on issue of damages alone in all of the actions.

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James F. Boccardo, David S. Lull, San Jose, and Edward J. Niland, Santa Clara, for plaintiffs and appellants.

Dana, Bledsoe & Smith and Morton B. Jackson, San Francisco, for defendants and appellants.

TRAYNOR, Justice.

On Sunday night, September 7, 1947, on Highway 101 near Madrone, an automobile driven by Herman Flores was struck by a tractor-trailer driven by defendant Brown. Brown owned the tractor, but the trailer was owned by defendant Murray. With Mr. Flores in the front seat of the automobile was his wife, who was holding a baby; in the back, which had been converted into a small truck bed, were their son Felipe (19 years of age), their daughter Anita (14 years of age), and a friend, Nellie Zavala (17 years of age). Mr. Flores, Felipe, and Nellie Zavala were killed; Mrs. Flores and Anita were injured.

As a result of the accident, five actions were filed against Brown and Murray: the first by Mrs. Flores and her surviving children for the death of Mr. Flores; the second by Mrs. Flores for her personal injuries; the third by Anita, through Mrs. Flores as guardian ad litem, for Anita's personal injuries; the fourth by Mrs. Flores for the death of Felipe; the fifth by Maria Zavala, mother of Nellie Zavala, for the death of Nellie Zavala.

In each of the actions it was alleged that Brown was negligent and that, in hauling the trailer, he was acting as Murray's agent.

Defendants denied negligence and pleaded contributory negligence. Murray's motions for nonsuits and directed verdicts were denied. The trial court instructed the jury that the contributory negligence of Mr. Flores would bar recovery for his death and would also be imputed to Mrs. Flores to bar recovery for her personal injuries. With respect to the other three actions, the jury was instructed that the defense of contributory negligence of Mr. Flores was not applicable. The jury returned the following verdicts:

1. In the Mr. Flores action, for defendants.

2. In the Mrs. Flores action, for plaintiff in the amount of $5,000 against both defendants.

3. In the Anita action, for plaintiff in the amount of $15,000, against both defendants.

4. In the Felipe action, for plaintiff in the amount of $5,000, against both defendants.

5. In the Zavala action, for plaintiff in the amount of $5,000, against both defendants.

The motions of both defendants for judgments notwithstanding the verdicts were denied.

Plaintiffs moved for a complete new trial in the Mr. Flores action and for a limited new trial on the issue of damages only in each of the other actions. Murray moved for a complete new trial in each of the actions except the Mr. Flores action. Brown moved for a complete new trial in the Mrs. Flores action and in the Felipe action.

The trial court granted a complete new trial as to all actions, all parties, and all issues. In doing so he stated that separate consideration of each motion might lead to a new trial only of certain issues in certain actions, with the result that the case would be even more complicated than at the first trial. He also observed that the various verdicts were not unanimous and were in part inconsistent and that they were probably compromise verdicts. He concluded that "substantial justice" required that the entire case be retried.

There is no appeal from the order granting a complete new trial in the Mr. Flores action, and that order is now final.

[1] There is no appeal from the order granting a complete new trial in the Mrs. Flores action, but Murray has appealed from the judgment. Since the new trial order is now final, that judgment has been finally vacated and the appeal therefrom must be dismissed.

In the remaining three actions, plaintiffs have appealed from the order granting complete new trials. Under the provisions of Rule 3a of the Rules on Appeal, Murray has appealed from the judgment in each of these actions, and Brown has appealed from the judgment in the Felipe action.

Since no question is raised as to the sufficiency of the evidence to support a finding of Brown's negligence or of Mr. Flores's contributory negligence, it is unnecessary to review the evidence relating to the happening of the accident.

Murray contends that there was no evidence that Brown was his employee or agent, and that therefore the trial court erred in denying his motions for judgments notwithstanding the verdicts. The only evidence introduced on this issue was the testimony of Brown and a deposition of Murray. It may be summarized as follows: Both Brown and Murray were in the trucking business and had known each other for many years. Each owned a tractor and two trailers. A few weeks before the accident, Brown had secured a contract to haul pears from Lakeport to Yuba City during the canning season. Since he did not have enough equipment to handle all of the hauling himself, he arranged with Murray to assist him. Murray sent his equipment and a driver from Los Angeles to Lakeport. Brown used Murray's equipment on a trip to trip basis and paid Murray for the amounts so hauled. The job ended about two weeks before the accident, and Murray's driver returned to Los Angeles with Murray's tractor and one trailer, leaving the other trailer in Lakeport. Brown felt obligated to assist Murray in returning this second trailer to Los Angeles, and in a conversation it was agreed that when Brown was next in Lakeport with a tractor he would take the trailer as far as King City, unless Murray had picked it up sooner. Pursuant to this understanding, Brown picked up the trailer at Lakeport, and while he was hauling it to King City, the accident occurred. Brown had business of his own to attend to in Lakeport on the day he picked up the trailer, but he would have made the trip in his automobile rather than in his tractor, had he not planned to take Murray's trailer to King City. No compensation was contemplated or given for this service.

[2] Although it is clear from the foregoing evidence that at the time of the accident, Brown was towing Murray's trailer for the latter's benefit, Brown's negligence may be imputed to Murray only if Brown was acting as his agent or employee. If Brown was hauling the trailer as a mere favor to Murray, or as an independent contractor, negligence may not be imputed. Edwards v. Freeman, 34 Cal.2d 589, 592, 212 P.2d 883; Malloy v. Fong, 37 Cal.2d 356, 370, 232 P.2d 241.

[3] The primary test for determining whether a person performing gratuitous services for another does so as the latter's agent is the same as that applied to determine whether one performing services for compensation does so as an employee or as an independent contractor, and in both situations the determinative issue is whether or not the alleged principal controlled or had the legal right to control the activities of the alleged agent. Edwards v. Freeman, supra, and cases cited; Malloy v. Fong, supra, and cases cited. Accordingly, it is unnecessary to decide whether the jury could reasonably infer that Brown was not acting gratuitously. It need only be determined whether there is any evidence from which the jury could infer that Murray had the right to control the manner in which the job was done.

There is nothing in the evidence of the business relations between Brown and Murray from which that right could be inferred. Both men were independent truckers, and Brown had not in the past been Murray's employee. In fact the evidence indicates that either Brown had employed Murray or engaged him as an independent contractor to haul such loads as Brown wished.

[4] Plaintiffs contend, however, that the jury could infer the right to control from the fact that Brown was towing Murray's trailer with permission for Murray's benefit. It has frequently been held that when one person is driving another's automobile for the latter's benefit an inference of agency may be drawn. Souza v. Corti, 22 Cal.2d 454, 461, 139 P.2d 645, 147 A.L.R. 861; Perry v. McLaughlin, 212 Cal. 1, 14, 297 P. 554; Graf v. Harvey, 79 Cal.App.2d 64, 69, 179 P.2d 348; Cope v. Goble, 39 Cal.App.2d 448, 456, 103 P.2d 598; DuBois v. Owen, 16 Cal.App.2d 552, 556, 60 P.2d 1019. In such cases the right to control may be inferred from the owner's power over the way his automobile should be operated, particularly when he is present on the trip. On the other hand, it is settled that if one person is riding in another's automobile, the right to control may not be inferred merely because the trip is undertaken for the passenger's benefit and the destination is selected by him. Edwards v. Freeman, supra, 34 Cal.2d 589, 592, 593, 212 P.2d 883; Pope v. Halpern, 193 Cal. 168, 174–176, 223 P.2d 470; Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 742, 164 P. 385; Lowe v. Lee, 95 Cal.App.2d 685, 689, 213 P.2d 767; Cox v. Kaufman, 77 Cal.App.2d 449, 452, 175 P.2d 260; see also, Stoddard v. Fiske, 35 Cal.App. 607, 609–610, 170 P. 663. Similarly, the right to control may not be inferred merely from the fact that one person with his own equipment is transporting another's goods. Clarke v. Hernandez, 79 Cal.App.2d 414, 424, 179 P.2d 834; Preo v. Roed, 99 Cal.App. 372, 380, 278 P. 928; see also, Gaskill v. Calaveras Cement Co., 102 Cal.App.2d 120, 124, 226 P.2d 633; Walton v. Donohue, 70 Cal.App. 309, 314, 233 P. 76. In both of these latter situations in which an owner is driving his own vehicle, the right to control its operations will ordinarily rest with him, and accordingly, in the absence of other evidence, it cannot be inferred that he has surrendered that right by agreeing to carry the person or property of another. The facts of the present case bring it within the foregoing rule. Brown was towing Murray's trailer with his own equipment in carrying out an apparently isolated transaction between the parties, and the fact that he was towing Murray's property instead of carrying his person or his goods is immaterial. Walton v. Donohue, supra; Gaskill v. Calaveras Cement Co., supra. Accordingly, Murray's motions for judgments notwithstanding the verdicts should have been granted.

Plaintiffs contend that the trial court erred in granting complete new trials against Brown in the last three causes of action instead of new trials limited to the issue of damages. Brown justifies the complete new trial order in the action for the wrongful death of Felipe on the ground that the trial court erred in instructing the jury that contributory negligence on the part of Mr. Flores would not bar Mrs. Flores recovery for the death of Felipe. He relies upon Keena v. United Railroads of San Francisco, 57 Cal.App. 124 207 P. 35; Cossi v. Southern Pacific Co., 110 Cal.App. 110, 293 P. 663; Dull v. Atchison, T. & S. F. Ry. Co., 27 Cal.App.2d 473, 81 P.2d 158; and Kataoka v. May Dept. Stores Co., 60 Cal.App.2d 177, 140 P.2d 467, for the proposition that the negligence of one parent that contributes to the death of a minor child must be imputed to the other in any action for wrongful death against a third party. All of these cases dealt with negligence on the part of the mother, and in each it was said that such negligence would be imputed to the father, either because the mother was acting as agent for the community in caring for the child, or because the recovery would be community property in which she would have an interest.

Since the mother and father are equally entitled to the custody of a minor child, Civil Code, § 197, if negligence is to be imputed from one to the other on an agency theory it must be because their relationship in caring for their child is in the nature of a joint enterprise, each being the agent of the other. In view of their equal rights in this respect it cannot be said that the mother is necessarily the agent and the husband the principal. Since the decision in the Keena case, however, where the agency doctrine was enunciated, it has been settled that the family relationship standing alone is not sufficient to convert family activities into joint enterprises for purposes of imputing negligence. Campagna v. Market St. Ry. Co., 24 Cal.2d 304, 309, 149 P.2d 281; Cox v. Kaufman, 77 Cal.App.2d 449, 452, 175 P.2d 260; see also, Spence v. Fisher, 184 Cal. 209, 214, 193 P. 255, 14 A.L.R. 1083; Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 742, 164 P. 385; Sanfilippo v. Lesser, 59 Cal.App. 86, 88, 210 P. 44; Hill v. Jacquemart, 55 Cal.App. 498, 501–502, 203 P. 1021. Since there is no evidence in addition to the family relationship of a joint enterprise between Mr. and Mrs. Flores, Mr. Flores's negligence may be imputed to his wife if at all, only because the cause of action for the wrongful death of Felipe was community property.

[5] In the absence of an agreement to the contrary, it is settled that a cause of action for injuries to either the husband or the wife arising during the marriage and while they are living together is community property, Zaragosa v. Craven, 33 Cal.2d 315, 318–321, 202 P.2d 73, 6 A.L.R.2d 461, and cases cited, and the same rule is applicable to a cause of action for the wrongful death of a minor child, or for damages suffered by the parents because of injury to such a child. Fuentes v. Tucker, 31 Cal.2d 1, 10, 187 P.2d 752; Crane v. Smith, 23 Cal.2d 288, 301, 144 P.2d 356; Sandberg v. McGilvray-Raymond etc. Co., 66 Cal.App. 261, 272, 226 P. 28. Accordingly, in all of these situations it is ordinarily necessary to impute the negligence of one spouse to the other to prevent the negligent spouse from profiting by his own wrong. Moody v. Southern Pacific Co., 167 Cal. 786, 790, 141 P. 388; Basler v. Sacramento Gas & Elec. Co., 158 Cal. 514, 518, 111 P. 530; see also, Rosenbloom v. Southern Pac. Co., 59 Cal. App. 102, 107, 210 P. 53. When the marriage is dissolved, however, the interests in any of these causes of action become separate property, and it becomes possible to segregate the elements of damages that would, except for the community property system, be considered personal to each spouse. Under these circumstances the objective of preventing unjust enrichment may be accomplished by barring only the interest of the negligent spouse or his estate.

[6, 7] Mr. Flores died in the same accident in which his wife was injured. To allow her to recover for her personal injuries will in no way enrich Mr. Flores

or those who might take through him. Similarly, there will be no unjust enrichment if Mrs. Flores is allowed to recover for the wrongful death of her son. Damages for wrongful death are the sum of those suffered by each heir or parent, Fuentes v. Tucker, 31 Cal.2d 1, 10, 187 P. 2d 752; Estate of Riccomi, 185 Cal. 458, 462, 197 P. 97, 14 A.L.R. 509, and accordingly, when the heirs are not husband and wife, the negligence of one is not imputed to the others because the recovery may be limited to the nonnegligent heirs. Bowler v. Roos, 213 Cal. 484, 485–486, 2 P.2d 817; Bowen v. Kizirian, 105 Cal.App. 286, 290, 287 P. 570. Similarly, in this case the damages will be limited to those suffered by Mrs. Flores and the recovery will be hers alone.

It is contended, however, that the rights of the parties arising out of an accident must be determined as of the time that the causes of action arise, and that the right to recover for personal injuries or the wrongful death of a minor child should not turn upon the chance of whether or not the plaintiff's spouse survives until after the statute of limitations has run or judgment has been rendered. It is not unusual, however, for the chance chronology of death to determine whether recovery may be had. It does so in all tort actions that abate on the death of one or the other of the parties. It would govern here, even if we were to hold that the determinative issue was whether Felipe died before or after his father. If he died after his father, his mother's action for his wrongful death could in no event be considered community property. Although there is evidence from which the jury could have found that Mr. Flores survived his son, we think this issue was properly not presented to them. Uudoubtedly, convenience and certainty in litigation would be served if facts occurring after the accrual of a cause of action could be ignored, but benefits so achieved would be far outweighed by the hardship and injustice of applying a rule designed to prevent unjust enrichment after the reason for it has ceased to exist. See, Civil Code, § 3510. When the husband is dead, not only is the reason for the rule imputing his negligence to his wife gone, but to apply it defeats its own purpose. It is but a windfall to a defendant who negligently injures a wife or causes the death of a minor child that recovery may be barred because the wife's husband was also negligent. Although allowing the negligent defendant to escape liability has been considered a lesser evil than allowing the negligent spouse to profit from his own wrong, surely the former evil may not be balanced by the latter when the latter is no longer present. Accordingly, the order granting a complete new trial cannot be sustained on the ground that the trial court erred in instructing the jury that negligence of Mr. Flores, if any, would not be a defense to Mrs. Flores action for the wrongful death of Felipe. To the extent that Solko v. Jones, 117 Cal.App 372, 3 P.2d 1028; Cossi v. Southern Pacific Co., 110 Cal. App. 110, 293 P. 663; and Dull v. Atchison, T. & S. F. Ry. Co., 27 Cal.App.2d 473, 81 P.2d 158, are inconsistent with the foregoing they are disapproved.

Brown did not move for a new trial in the actions for Anita Flores's personal injuries and for Maria Zavala's wrongful death, and as indicated above, his motion for a new trial in the action for the wrongful death of Felipe cannot be supported on the ground that the jury was erroneously instructed with respect to imputed negligence. Plaintiffs, however, moved for a new trial on the issue of damages alone in all of these actions. The question is presented, therefore, whether in view of plaintiffs' motions, the court erred in granting a new trial on all issues against Brown in these actions.

[8] It has recently been settled that when the issues of liability and damages are so interwoven that a new trial limited to damages alone would be unfair to the defendant, the trial court may order a complete new trial although the only motion is by the plaintiff for a limited new trial. Toshio Hamasaki v. Flotho, Cal.Sup., 248 P.2d 910.

[9] In the present case the verdicts were not unanimous, and the verdict in the action for the wrongful death of Mr. Flores was inconsistent, under the instructions given, with the verdict in the action for the personal injuries of Mrs. Flores. Under these circumstances we cannot say that the trial court erred in concluding that the verdicts were probably the result of compromise and that substantial justice required a complete new trial.

The appeals from the judgments are dismissed. The order denying Murray's motion for judgments notwithstanding the verdicts as to the last three causes of action is reversed and the trial court is directed to grant his motion as to those actions. Code Civ.Proc. § 629. The order granting a new trial is reversed to the extent that it orders a new trial against Murray in those actions, and affirmed to the extent it orders a new trial against Brown. Murray shall recover his costs on appeal. The other parties shall bear their own costs.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

On the question of limited new trials, I adhere to the views expressed by me in Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324, and Toshio Hamasaki v. Flotho, Cal. Sup., 248 P.2d 910. In addition, however, I believe that it was proper to deny defendant Murray's motion for judgment notwithstanding the verdict against him, because it is quite clear that the evidence was sufficient to show that defendant Brown was acting as Murray's agent at the time of the accident and the latter was therefore liable on the basis of respondeat superior.

From the record it appears that while the contract was being performed Brown and Murray were engaged in either a joint trucking enterprise or Murray was the agent of Brown as the latter had the contract and was using Murray's trailer in the performance of the trucking operation. Although the trucking work had been finished, Murray's trailer was still at the place of operation, many miles from Murray's home and place of business in Los Angeles and from whence it came when the trucking job was commenced. Hence the association between Brown and Murray was still in existence. As the concluding step in the association, Brown felt obligated to Murray to aid in returning the latter's trailer to Los Angeles and hence agreed that he would pick up the trailer and return it to Los Angeles. That he did, and the accident occurred while he was on that trip. There is a clear inference from these facts that Brown was acting as Murray's agent on that trip. It is conceded by the majority that where a person drives another's automobile for the latter's benefit (precisely the instant case) an inference or presumption arises that the driver is acting as the owner's agent. That such is the law has been held in many cases. It is said in Souza v. Corti, 22 Cal. 2d 454, 461, 139 P.2d 645, 648, 147 A.L.R. 861: "As to the liability of the defendant Arthur Gigli, the record shows that defendant Corti took possession of the Dodge car for the use, benefit and accommodation and under the direction of Arthur and for the purpose of taking it to Rocca's for Arthur. Under these circumstances Arthur was the principal and Corti was his agent. The negligence of the latter was therefore imputable to Arthur."

The same rule has been stated repeatedly Maberto v. Wolfe, 106 Cal.App. 202, 289 P. 218; McWhirter v. Fuller, 35 Cal.App. 288, 170 P. 417; Randolph v. Hunt, 41 Cal.App. 739, 183 P. 358; Dierks v. Newsom, 49 Cal.App. 789, 194 P. 518; Navarro v. Somerfeld, 35 Cal.App.2d 35, 94 P.2d 623; Gates v. Pendleton, 184 Cal. 797, 195 P. 664; Jacobus v. Brero, 190 Cal. 374, 212 P. 617; Grover v. Sharp and Fellows etc. Co., 66 Cal.App.2d 736, 153 P.2d 83; Graf v. Harvey, 79 Cal.App.2d 64, 179 P.2d 348.

Hence in the instant case an inference arises that Brown was Murray's agent which is sufficient to justify the verdicts against Murray.

The majority endeavors to evade that rule by stating that the case is more like one where a trip is taken in the owner's car for a passenger's benefit, in which it is said that the cases hold there is no inference that the owner is the passenger's agent, or where one is transporting another's goods in the former's car, in which the cases are said to hold that there is no inference of agency. That answer is not satisfactory for several reasons. There is no sound reason why the rule should be any different merely because Brown was towing Murray's trailer with his own truck. The fact remains that he was operating Murray's trailer and his own truck on the highway for Murray's benefit. The case is not like those relied upon by the majority such as Edwards v. Freeman, 34 Cal.2d 589, 212 P.2d 883, where the owner of the car did nothing more than give a ride to his mother to town where she had her eyes tested. She was merely being given a ride in the owner's car. It was not a case of a person (Brown) operating another's (Murray's) trailer on the highways for the benefit of the latter. Here there was a clear business relationship between Brown and Murray that was still continuing when the accident happened. To take from the jury this issue of fact is just another instance in which the majority has deprived a litigant of his right to a jury trial in violation of the constitutional mandate.

In view of the fact that a motion for a complete new trial was made in each of the actions the court had the power to grant the same. This is true even though the motion in Mr. Flores' action was made by plaintiff and a similar motion was made by defendant Murray in each of the other actions and by defendant Brown in the Mrs. Flores and Felipe actions. Therefore, we are not faced with the problem presented in the Hamasaki case, supra, where the only motion granted by the trial court was plaintiff's motion for a new trial on the issue of damages only.

I would, therefore, affirm both the order denying the motion for judgment notwithstanding the verdicts and the order granting a complete new trial on all issues.

Rehearing denied; CARTER, J., dissenting.

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113 Cal.App.2d 657

THOMAS et al. v. LAGUNA et al.

Civ. 18798, 18799, and 18800.

District Court of Appeal, Second District,
Division 2, California.

Oct. 16, 1952.

Action for damages from collision between defendants' truck which was traveling in middle or passing lane of highway and was overtaking other vehicles, and plaintiffs' oncoming automobile which swung from its driving lane into the passing lane twenty-five feet in front of truck. The Superior Court of Los Angeles County, Ellsworth Meyer, J., entered judgment on verdict for defendants, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that evidence sustained verdict.

Judgment affirmed.

1. Automobiles 🔑244(10)

Evidence sustained finding that defendants were not guilty of negligence with regard to collision which occurred as their truck was traveling about 40 miles per hour in middle or passing lane of highway and was struck head-on by plaintiffs' oncoming automobile which swung out of its driving lane and into the passing lane twenty-five feet in front of truck.

2. Appeal and Error 🔑999(1)

Evidence which is believed by the jury is binding upon the appellate court.

3. Appeal and Error 🔑930(1)

The appellate court is bound to resolve all conflicts in evidence in favor of the respondents and to draw all inferences from the evidence which will support the verdict of the jury.

4. Automobiles 🔑244(10)

In action for damages from collision between truck, which was being driven in middle or passing lane of highway, and oncoming automobile, which swung from its driving lane into the passing lane, evidence established that truck was being driven in middle lane for purposes of passing other automobiles as permitted by Vehicle Code. Vehicle Code, § 526(b).

5. Witnesses ⚷236(1)

In action for damages from collision between defendants' truck which was in middle or passing lane when struck by plaintiffs' oncoming automobile objection to question concerning how close right side of truck was to adjoining lane, which had been previously asked and answered both on cross-examination and re-direct examination, was properly sustained on ground that question was argumentative.

6. Appeal and Error ⚷699(2), 703

The giving or refusing of an instruction will not be reviewed by an appellate court unless the record sets forth the questioned instruction.

7. Appeal and Error ⚷928(2, 4)

In action for damages from collision between truck and oncoming automobile where record on appeal failed to contain any of the instructions requested or given, it would be presumed that jury was fully and fairly instructed by trial court and that there was no error in the giving or refusal to give instructions.

◆

Melvin Simon and Samuel Schekman, Los Angeles, for appellants.

Hunter & Liljestrom, by Wendell Mackay, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before a jury in an action to recover damages for injuries resulting from an automobile collision, plaintiffs appeal.

On January 15, 1950, plaintiffs were returning to Los Angeles from Perris, California on Firestone Boulevard in an automobile being driven by plaintiff Thomas. At the place where the accident occurred Firestone Boulevard consisted of three traffic lanes which, for the purposes of this opinion, will be designated at follows: the east bound lane, #1; the center passing lane, #2; and the west bound land, #3. The permissive speed limit was 55 miles per hour.

At about the same time defendant Louis Quesada Laguna was driving a truck belonging to his father, the co-defendant, in an easterly direction on Firestone Boulevard at a speed of about 40 miles per hour in lane #1. He gradually overtook several automobiles traveling in the same direction and in order to pass them he blinked his lights as a signal to pass and turned into lane #2. He continued in lane #2 and was even with the second car traveling in the same direction which was in lane #1. As he approached the car driven by plaintiff Thomas, which at the time was in lane #3 and about 25 feet from the truck, plaintiffs' car turned into lane #2 and collided with defendants' truck. The entire left front of plaintiffs' car was demolished but there was no damage to the left front fender or bumper of defendants' truck.

As a result of the accident plaintiffs were seriously injured.

Questions: First: *Was there substantial evidence to sustain the verdict of the jury?*

[1–3] *Yes.* Defendant Louis Quesada Laguna gave direct testimony relative to each of the facts set forth above. This evidence having been believed by the jury is binding upon an appellate court, and clearly shows that defendants were free from negligence. We, of course, are bound to resolve all conflicts in the evidence in favor of defendants (respondents) and to draw all inferences from the evidence which will support the verdict of the jury. In re Estate of Bristol, 23 Cal.2d 221, 223[2], 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 527[3], 154 P.2d 384.

Second: *Were defendants guilty of contributory negligence in traveling in the center lane in violation of section 526(b) of the Vehicle Code?*

No. Section 526(b) of the Vehicle Code reads: "(Driving in center lane.) Upon a roadway which is divided into three lanes a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle where the roadway ahead is clearly visible and such center lane is clear of traffic within a safe distance, or in preparation for a left turn or where such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding and is signposted to give notice of such allocation."

[4] It is to be noted that the quoted section prohibits the driving in the center lane of a three lane highway "except when overtaking and passing another vehicle". In the instant case the evidence disclosed that defendants in using the center lane of the highway were using it within the permissive provision of section 526(b), Vehicle Code.

[5] Third: *Did the court commit prejudicial error in its rulings upon the admission of evidence?*

No. (a) During the course of the trial the following occurred:

> "Q. Louis, after you got into lane 2, the middle lane, after you turned out into that lane to pass these cars, did one car going the opposite direction pass by you before the accident happened? A. Yes.
>
> "Q. What lane was it in, the one that passed you? A. That was in lane 3.
>
> "Q. Louis, from the time you first turned out into the center lane to pass these two cars that were ahead of you, was your truck at any time out of that center lane before the accident?
>
> "Mr. Schekman: Just a moment. That is objected to as calling for a conclusion on the part of this witness.
>
> "The Court: Overruled."

There was no error in the court's ruling. The question did not call for a conclusion of the witness but for a fact. Therefore the evidence was properly received.

(b) On redirect examination plaintiffs asked the witness:

> "Q. Now, when you were passing this first car, about how close was the right side of your truck to the dividing line between lanes 1 and 2? A. About three feet.
>
> "Q. Three feet? A. Two and a half to three feet.
>
> "Q. And then the accident happened; is that correct? A. Yes."

Counsel for plaintiffs then interrogated the witness at great length about his operation of the car and his observation of the road and the speedometer of the car. He then asked the following question:

> "Q. You recall that yesterday, when I asked you, 'Now, when you were passing this first car, about how close was the right side of your truck to the dividing line between lanes 1 and 2' you answered, 'About 3 feet.'
>
> "Mr. Liljestrom: To which we object upon the ground it is argumentative; and, furthermore, it is a different question.
>
> "The Court: Sustained as argumentative."

The foregoing ruling was correct for the reason that the question had been asked and answered both on cross-examination and redirect examination. (See Converse v. Ferguson, 166 Cal. 1, 6, 134 P. 977.)

Fourth: *Did the trial court err in giving or refusing to give instructions?*

This question must be answered in the negative and is governed by these rules:

[6] (1) The giving of an instruction will not be reviewed by an appellate court unless the record sets forth the questioned instruction. (Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 27[20], 276 P. 1017.)

(2) The refusing of an instruction will not be reviewed by an appellate court unless the record sets forth the requested instruction. (Alexander v. McDonald, 86 Cal.App.2d 670, 671[2], 195 P.2d 24.)

[7] In the present case the record fails to contain any of the instructions requested by either party or those given by the court. Therefore the above rules are applicable and it will be presumed that the jury was fully and fairly instructed by the trial court and that there was no error in the giving or refusal to give instructions. (See Alexander v. McDonald, supra, 86 Cal.App.2d 671[5], 195 P.2d 24; Foster v. Young, 172 Cal. 317, 321, 156 P. 476. See also 3 Cal. Jur.2d(1952), Appeal and Error, section 275, p. 819.)

Affirmed.

MOORE, P J., and FOX, J., concur.

113 Cal.App.2d 642

BREITMAN v. BRODY et al.

Civ. 19167.

District Court of Appeal, Second District, Division 2, California.

Oct. 15, 1952.

Rehearing Denied Nov. 6, 1952.

Hearing Denied Dec. 11, 1952.

Action by employee, who was member of labor union, against employer to recover wages alleged to be due for overtime. The Superior Court of Los Angeles County, Clarence L. Kincaid, J., entered judgment adverse to employee, and he appealed. The District Court of Appeal, McComb, J., held that clause of collective bargaining agreement that any and all claims for adjustment of salaries and hours shall be made on or before thirty days from the time of which such adjustment was claimed was not in violation of public policy.

Affirmed.

1. Labor Relations ⚿263

Under provisions of labor code making it unlawful in case of any wage agreement arrived at through collective bargaining, to withhold from employee any part of wage agreed upon, and providing that where any statute or contract requires employer to maintain designated wage scale, it is unlawful to secretly pay lower wage while purporting to pay wage designated by statute or contract, and that article cannot be set aside by private agreement, where a wage scale has been reached through a collective bargaining agreement, a private agreement to the contrary cannot set aside the wage scale. Labor Code, §§ 219, 222, 223.

2. Labor Relations ⚿249

Clause in collective bargaining agreement requiring all claims for adjustment of salaries to be made within thirty days from time when such adjustment was claimed, was not in violation of provisions of labor code making withholding from employee of any part of wage agreed upon by statute of contract unlawful. Labor Code, §§ 219, 222, 223.

3. Labor Relations ⚿249

Clause in collective bargaining agreement requiring all claims for adjustment of salaries and hours to be made on or before 30 days from the time when such adjustment was claimed, was not against public policy, but operated for the benefit of both employer and employee in that it insured prompt settlement of controversies and prevented a long and secret accumulation of claims without same being promptly brought to the attention of the other party.

4. Labor Relations ⚿257

Where clause of collective bargaining contract required all claims for adjustment of salaries and hours to be made on or before 30 days from time when such adjustment was claimed, failure of employee to present claim within time specified was waiver of any rights in connection therewith.

5. Evidence ⚿450(6)
Labor Relations ⚿257

Clause of collective bargaining contract that any and all claims for adjustment of salaries and hours should be made on or before thirty days from the time when such adjustment was claimed, was clear and unambiguous that if either the employer or employee had any claim as to either salary or hours he should be compelled to make it before lapse of 30 days from time for which adjustment was claimed, and parol evidence could not be received in controversies thereunder.

◆

David Sokol, Los Angeles, for appellant.

Max Albeck, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to recover certain wages alleged to be due for overtime, plaintiff appeals.

Facts: The Meat Cutters Local 421, an unincorporated labor organization of which plaintiff was a member, entered into a collective bargaining agreement with defendants which contained, among others, this clause: "Any and all claims for adjustment of salaries and hours shall be made on or before thirty (30) days from the time of which such adjustment is claimed."

Plaintiff was employed by defendants during the period from the week ending March 24, 1949, to November 18, 1950. On the latter date plaintiff was discharged because of shortages which had occurred in his cash drawer. On March 8, 1951, plaintiff instituted the present action to recover wages for alleged overtime and for vacation and sick leave occurring during 1950, for which he claimed he had not been paid.

It was stipulated that the trial court should determine preliminarily whether or not plaintiff had complied with the clause of the collective bargaining agreement set forth above.

The trial court found that no claim was ever asserted by plaintiff prior to November 20, 1950, which finding is supported by the evidence, and limited the proof as to any salary for overtime, sick leave or vacation to the 30 day period immediately preceding November 20, 1950. Plaintiff then waived his claim for said period. He also waived any claim for sick leave and testified that he had been paid for his vacation, thus limiting his claim for overtime to the period from March 24, 1949 to October 20, 1950.

The trial court thereupon gave judgment in favor of defendants, holding that since a claim had not been presented to defendants by plaintiff within 30 days after the alleged overtime wages had accrued, he was barred from recovering for them.

Questions: First: *Was the clause in the collective bargaining contract limiting the period within which plaintiff might make a claim for wages void as against public policy and in violation of the Labor Code?*

No. Section 222 of the Labor Code reads as follows: "It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either wilfully or unlawfully or with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon." Section 223 reads: "Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract", and Section 219 reads in part, "no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied."

[1, 2] A fair construction of the Labor Code is that where a wage scale has been reached through a collective bargaining agreement, a private agreement to the contrary cannot set aside the wage scale. The clause here in question was not part of a private agreement between plaintiff and defendants but was part of the collective bargaining agreement itself. Therefore there is nothing in the quoted provisions of the Labor Code which invalidates the clause in the collective bargaining agreement fixing the period in which claims for adjustment of wages shall be made.

[3] Likewise there is no merit in the contention that such clause is against public policy. There is nothing in the clause which is reprehensible or tainted with improper motives. It does not provide the payment of wages lower than that provided in the collective bargaining agreement or in contravention of the wage scale therein established. It merely provides that in the event of a controversy concerning salaries or hours, a timely claim for adjustment shall be made. No dictate of public policy is violated by an agreement requiring either the employee or the employer to make a timely statement of his claim. The manifest intention of the clause is self-evident in that in the event of a controversy, the claim of either the employer or employee shall be promptly brought to the attention of the other party to insure prompt settlement and to prevent a situation such as in the case at bar—a long and secret accumulation of claims without bringing them to the attention of the other party.

Judge Kincaid, the trial judge, very aptly stated the situation as follows:

> "Now, that was very clearly made for the benefit of both the employer and the employee, because it might

very well occur that some misunderstanding, deliberate or otherwise, might ensue on the part of either employer or employee with reference to the subject of hours and salaries; and certainly it was the duty, under the terms of this agreement, Exhibit 2, subdivision E, that if any such controversy developed, the other side of the contract should be given notice of that claim, be given an opportunity to remedy it.

"I am compelled to agree that this provision E is quite different from an agreement between an employer and employee to vary the terms of a contract as covered by these cases that have been cited, and which have been held to be against public policy; but in the absence of any showing of fraud or any attempt to vary the terms of the contract of employment that would be in the nature of a violation of public policy, I find nothing that would violate public policy by requiring either the employer or the employee to state what their controversy is with the other, within a reasonable time of its development. I find this not to be unreasonable at all in its provisions; and certainly if an employee is entitled to $80 a week pay, and his employer gives him $70 for the week's work, he cannot go on accepting $70 over a period of several years' time without demand for the differential which he claims to be due him, and then for the first time, claim it under the provisions of this subdivision E of the contract; and by the same token, if the employer had for any reason been overpaying his employees, over the contract, and he was not doing so voluntarily, he would be required to state his controversy to the employee within the limit of time prescribed by the agreement between the parties."

Mr. Presiding Justice Barnard, in Division of Labor Law Enforcement v. Dennis, 81 Cal.App.2d 306, at page 311, 183 P.2d 932, 935, succinctly stated the proposition thus: "Considering the nature of labor contracts, and the circumstances surrounding them, good reasons could well be advanced for providing a rather short period of limitation applicable to actions thereon, and for not permitting actions, based upon matters which were not within the contemplation of the parties during the time the work was in progress, to be filed long after the transactions have been completed."

[4] Cases relied on by plaintiff are not here applicable for in such cases there was a private agreement contrary to the collective bargaining agreement or law establishing the wage scale, which agreement was therefore against public policy and void. Hence, since plaintiff did not assert his claim within the time provided in the agreement, he waived any rights thereto.

Second: *Was the quoted clause ambiguous and did the trial court commit prejudicial error in refusing to receive testimony relative to parole discussions about its meaning?*

[5] *No.* The clause in question was clear and unambiguous. It provided in certain language that if either the employer or employee had any controversy or claim as to either salary or hours he should be compelled to make it before the lapse of 30 days from the time for which the adjustment was claimed.

Therefore since the clause was unambiguous the trial court properly excluded extrinsic evidence relative to the provisions in the contract.

Affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

LEO v. DUNHAM. *

Civ. 19026.

District Court of Appeal, Second District, Division 3, California.

Oct. 21, 1952.

Rehearing Denied Nov. 6, 1952.

Hearing Granted Dec. 18, 1952.

Action by pedestrian against truck owner for injuries sustained when pedestrian walked across highway into path of approaching truck. The Superior Court, Los Angeles County, Clarke E. Stephens, J., entered judgment on verdict for defendant, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that since the truck driver had seen the pedestrian crossing the highway while looking in the opposite direction when the pedestrian was 300 feet away, the doctrine of imminent peril was not available to the truck owner, and giving instruction on such doctrine was prejudicial error.

Reversed.

1. Automobiles ⟹159

Where truck driver saw pedestrian crossing highway 300 feet in front of truck, which was traveling 30 miles per hour, and observed that pedestrian was looking in opposite direction from the approaching truck, truck driver in action by pedestrian for injuries sustained when truck ran into pedestrian was not entitled to benefit of imminent peril doctrine.

2. Negligence ⟹12

The imminent peril doctrine is not available to one who has brought about the emergency by his own negligence.

3. Automobiles ⟹225

Where pedestrian walked into pathway of truck while looking in opposite direction from the truck, pedestrian's immediate danger was a danger which, but for his own negligence, he would have discovered in time to avoid it, and therefore pedestrian could not escape responsibility for the ensuing accident through reliance upon the imminent peril doctrine.

4. Negligence ⟹12

The imminent peril doctrine relates to situations which require prompt action and yet afford some opportunity for effort to escape injury.

5. Appeal and Error ⟹1064(1)

Fact that jury requested further instruction as to effect if both parties in automobile case were found to have been negligent did not necessarily show that denial of recovery was based upon finding of contributory negligence and did not rule out the possibility that some of the jurors might have joined in the verdict on the ground that defendant had not been negligent, and therefore error in giving imminent peril doctrine instruction could not be held harmless.

6. Automobiles ⟹245(72)

Whether pedestrian, who was injured when he walked across highway in pathway of truck which he saw when it was 300 feet away, was negligent in misjudging the speed of the truck was a question for the jury.

◆

A. J. O'Connor, Los Angeles, for appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff appeals from a judgment after verdict in favor of defendant in an action for damages for personal injuries sustained when plaintiff was struck by defendant's truck while crossing a highway.

There was no conflict in the evidence as to the material facts. Plaintiff, 73 years of age, a resident of Montana, was riding in a car driven by his wife in a northerly direction on U. S. Highway 99 in the County of Los Angeles. It is a three-lane highway 30 feet wide with a six-foot shoulder along each side. Plaintiff's car was stopped along the east edge of the highway. Plaintiff alighted and directed his wife to drive west across the highway, which she proceeded to do. Defendant was driving a Ford tank truck south at about 30 miles per hour. When he was about 600 feet away he observed plaintiff's car crossing the highway. When he was about 300 feet away he saw plaintiff start across the highway. At the same time plaintiff saw the truck approaching at a distance of about 300 feet. He testified that he thought he had time to cross ahead of it but that it suddenly loomed up in front of him. Defendant testified that he observed plaintiff as he proceeded across the highway and saw that he was looking in the opposite direction. He coasted along without applying brakes until he was within 60 or 80 feet of plaintiff, when he applied brakes, hollered and swerved to the right. The point of the collision was about six feet west of the paved portion of the highway. Defendant denied negligence and pleaded contributory negligence.

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* Subsequent opinion 264 P.2d 1.

The court gave the jury 52 instructions. Among them was one requested by defendant reading as follows: "A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in the calmer and more deliberate moments. His duty is to exercise only the care that an ordinarily prudent person would exercise in the same situation. If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by an ordinarily prudent person under the same conditions, he does all the law requires of him, although in the light of after-events it should appear that a different course would have been better and safer."

Plaintiff's sole point on the appeal is that it was error to give this instruction. He contends, (1) the instruction was inapplicable for the reason that upon the uncontradicted evidence defendant was not suddenly or unexpectedly confronted with a condition threatening imminent danger, and (2) defendant was clearly negligent in creating the danger and hence was not entitled to the instruction. Defendant replies, (1) he was confronted with imminent peril, (2) plaintiff was not injured by the instruction inasmuch as it operated as well to his advantage as to defendant's advantage, and (3) it appears from a question asked by the foreman, when the jury returned with a request for further instructions, that the jury found both parties to have been negligent, and for that reason returned a verdict for the defendant.

[1-4] It was error to give the instruction. When he was 300 feet away, traveling at 30 miles an hour, defendant observed plaintiff in the process of walking across the highway while looking in the opposite direction from that of the approaching truck. Defendant realized that plaintiff was unaware of his danger and yet he proceeded on his course, waiting for plaintiff to look in his direction and stop, until it was too late to stop the truck. If plaintiff had been looking in the direction of the truck it could reasonably have been argued that defendant expected plaintiff to stop before he left the east half of the highway. But when plaintiff was looking in the opposite direction and yet proceeding into the path of the truck, the danger of the situation was continuing as long as plaintiff was looking away. There was nothing sudden about plaintiff's actions. Defendant simply took the chance that plaintiff would look around, see the truck and keep out of its way. The only thing sudden about it was that defendant suddenly discovered his mistake; but it appears from his own testimony that the danger was one which should have been apparent to him while he was traveling 300 feet. Under these facts defendant could not properly claim the benefit of the imminent peril doctrine. It is not available to one who has brought about the emergency by his own negligence. Yates v. Morotti, 120 Cal.App. 710, 716, 8 P.2d 519; Dodds v. Gifford, 127 Cal.App. 629, 632, 16 P.2d 279; 65 C.J.S., Negligence, § 17, p. 412. Defendant does not contend on the appeal that he was free from negligence. Nor was plaintiff in any better position. He saw the truck when it was 300 feet away; he did not testify that he watched it after that, and he did not deny that he was looking in the other direction until the truck was practically upon him. In fact, there was evidence indicating that he walked

into the side of the truck, back of the cab. There is no merit in defendant's contention that the instruction was harmless for the reason that plaintiff also suddenly found himself in a perilous position and the instruction therefore was to his advantage. Certainly, when plaintiff was walking into the truck he was in immediate danger, but it was a danger which, but for his negligence, he would have discovered in time to avoid it, and he could not any more than could defendant escape responsibility through reliance upon the imminent peril doctrine. Wright v. Sniffin, 80 Cal. App.2d 358, 364, 365, 181 P.2d 675. We do not believe the jury would have attempted to apply the instruction to plaintiff's conduct. The rule as to the sudden appearance of danger relates to situations which require prompt action and yet afford some opportunity for effort to escape injury. Gamalia v. Badillo, 53 Cal.App.2d 375, 378, 128 P.2d 184; 65 C.J.S., Negligence, §§ 122, 123, pp. 732, 735. Plaintiff's discovering the truck when it suddenly "loomed up" and his colliding with it appear to have been simultaneous. The probabilities are that the jury would have applied the rule to the conduct of defendant and not to that of plaintiff.

[5] Defendant argues that even if the instruction should not have been given there was no harm in it for the reason that the jury determined that both parties were guilty of negligence and that plaintiff's negligence was the proximate cause of the accident. The record shows that when the jury returned into court for further instructions the foreman asked what the verdict should be if both parties were found to have been negligent, in reply to which the court read instructions on negligence and contributory negligence. The court then asked: "Do those two instructions, as reread to you, answer your question?" to which the foreman replied "they do as far as I am concerned." These proceedings, it is true, cause one to suspect that some of the jurors, or perhaps all of them, believed plaintiff to have been guilty of contributory negligence. Upon the other hand, a number of the jurors may have been of the opinion that defendant was not negligent, and they may have joined in the verdict for that reason. There was nothing in the proceedings to disprove that the several jurors had different reasons for joining in the verdict. The instruction should not have been given and we have no way of knowing that the jurors were not misled, or that the verdict would have been the same if the instruction had not been given. See Wright v. Sniffin, supra, 80 Cal.App.2d 358, 365, 181 P.2d 675.

[6] Plaintiff testified that he looked once and saw the truck. We cannot say, as a matter of law, that he was negligent in misjudging its speed. That was a question for the jury. Flach v. Fikes, 204 Cal. 329, 332, 267 P. 1079.

The judgment is reversed.

WOOD and VALLÉE, JJ., concur.

113 Cal.App.2d 666

ODENTHAL v. LEE.

Civ. 19072.

District Court of Appeal, Second District,
Division 2, California.
Oct. 16, 1952.

Action on an account stated. The Superior Court, Los Angeles County, Allen W. Ashburn, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Moore, P. J., held that the evidence supported the finding that there was an account stated between the parties.

Affirmed.

1. Account Stated 🔑19(3)

Evidence supported finding that there was an account stated between the parties.

2. Appeal and Error 🔑1010(1)

Where reviewing court has determined that there is substantial evidence in the record in support of findings of trial court, a reversal cannot be had on the ground of insufficiency of the proof.

3. Appeal and Error 🔑1170(10)

Where evidence sustained trial court's finding that certain sum was unpaid on open book account, judgment that such amount was owed on account stated did not result in miscarriage of justice such as would require reversal. Const. art. 6, § 4½.

4. Evidence 🔑594

Witnesses 🔑311, 315, 316, 363(1)

In action on account stated, trial court was free to reject testimony of defendant and those who came to corroborate defendant, even though such witnesses may not have been impeached, in view of fact that court was entitled to consider their interest in result of the case, their motive, the manner in which they testified, and the contradictions appearing in the evidence.

◆

Myron W. Silverton and Robert M. Bushnell, Los Angeles, for appellant.

Roy B. Woolsey, Los Angeles, for respondent.

MOORE, Presiding Justice.

Judgment for $3,342.09 against defendant was entered on the court's finding that he was indebted to plaintiff on an account stated. A reversal is sought on the ground that the evidence is insufficient to support the findings that there was an account stated between the parties for the sum of $9,388.85 either on May 24, 1948, or on June 30, 1948. No attack is made on the finding of an unpaid open book account. The findings disposed of the latter account by the declaration that the sum of $3,342.09 would be due, owing and unpaid by defendant on the book account "except for the account stated herein referred to on which said sum is owed." Appellant says "because of said exception defendant limits this appeal to said account stated."

[1] Not only is the judgment supported by the finding of the unpaid open account, but the evidence in substantial amount supports the finding that the account was twice stated. Invoices and statements showing the materials delivered and services rendered during 1946 and 1947 were sent to appellant. During the same period the invoiced items were posted in respondent's ledger account to Mr. Lee.

On May 24, 1948, appellant met in conference with Leonard Odenthal, respondent's nephew and former employee, when the two discussed a statement of appellant's account with respondent. A copy of the identical paper appears in the margin below.[1] Leonard testified appellant agreed

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[1] (Exhibit 4)
Alert Electric Company
306 East Washington Boulevard
Los Angeles 15, California
PRospect 0745

May 21, 1948

Lee Construction Co.
8713 South Van Ness Ave.,
Inglewood, California

Date		Debit	Credit	Balance
8/12/46	Inv #8940 Wall St. Job	536.78		536.78
11/16/46	Inv #9168 Degnan Motor	4,408.81		4,945.78
11/30/46	Inv #9208 Amato Job	923.59		5,869.18
12/11/46	Inv #9251 Degnan	1,335.02		7,204.20
12/11/46	Credit (Degnan)		23.21	7,180.99
12/11/46	Credit (Degnan)		69.02	7,111.97
12/26/46	Inv #9296 (Moench-Davis)	622.06		7,734.03
1/14/47	Credit Pepperdine check		622.06	7,111.97
1/20/47	Inv #126 (Degnan)	1,150.33		8,262.30
2/ 3/47	Credit Cancel Inv #126		1,150.33	7,111.97
2/ 3/47	Inv #154 (Degnan)	2,070.15		9,182.12
3/26/47	Inv #230 (Amato)	127.78		9,309.90
8/19/47	Inv #390 (Buick Job)	61.17		9,371.07
9/29/47	Inv #434 Water pipe	17.78		9,388.85

with him that the balance of $9,388.85, as shown on exhibit 4 was the correct, unpaid balance of appellant's account with respondent and that it included the "Degnan extras of $1,355."

Some confusion arose out of the events that occurred at the second meeting of the same day when respondent and Leonard met appellant and his attorney, Mr. Bushnell. Having no knowledge of the agreement already made by appellant and Leonard, Mr. Bushnell prepared a "Receipt and Release" to be executed by respondent. That writing recited that in consideration of the payment by Lee of $4,000, respondent should release appellant from all claims existing in favor of respondent arising from the latter's furnishing labor and materials for the construction of the "Greenwald" improvements. When the discussion arose that such document might be interpreted to mean a full settlement for $4,000 and for that reason respondent should not sign it, appellant stated to Leonard that the writing referred to the Degnan account only, appellant signed a writing below Mr. Odenthal's release as follows:

> "The above agreement does not affect, change or alter the separate agreement between the said parties covering extra electrical work on the Degnan job and other agreed upon credits and debits between H. Lee, dba Lee Construction Co. and William Odenthal and/or Alert Electric Company."

The $4,000 having been paid to respondent, he conferred with appellant with reference to a statement of appellant's account showing the payments of (1) the $4,000; (2) $1,046.76 profit due Lee on a building constructed for respondent and (3) $1,000 paid for the latter to Woodcock, aggregating $6,046.76, leaving the balance due respondent, to wit, $3,342.09, including the Degnan extras of $1,355.02. No objection to the balance was made then by appellant, nor was denial made at any of the four subsequent telephonic conversations between the two men that such sum was due. Moreover, respondent gave testimony as to the materials furnished appellant and the prices at which they were sold, and filed in evidence his ledger account against Mr. Lee.

[2, 3] Appellant has argued at length the vices of respondent's evidence and the virtues of his own. But no one could profit by a discussion of the comparative strength and weakness of the proof adduced by each party. It is still the rule that when the reviewing court has determined there is substantial evidence in the record in support of the findings of the trial court a reversal cannot be had on the ground of the insufficiency of the proof. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. The court having found the existence of an open book account in the same amount as that of the account stated, no reversal could be had even though the correctness of the unpaid balance had never been agreed to. The trial court's finding that the sum of $3,342.09 is unpaid on the open book account is tantamount to a finding by this court that after our examination of the entire record including the evidence we are of the opinion that the judgment did not result in a miscarriage of justice. See Art. VI, sec. 4½ of the Constitution.

[4] As to the testimony of appellant and those who came to corroborate him, the court was free to reject such proof even though the witnesses may have been unimpeached, for the court was entitled to consider "their interest in the result of the case, their motives, the manner in which they testify, and the contradictions appearing in the evidence." Giannini v. Bank of America, etc., 101 Cal.App.2d 805, 806, 226 P.2d 712, 713.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

113 Cal.App.2d 634

CENTRAL MANUFACTURERS MUT. INS. CO. et al. v. TORREYSON et al.

Civ. 19064.

District Court of Appeal, Second District,
Division 1, California.
Oct. 14, 1952.

Action for damages caused by fire alleged to be due to defendant's negligence. The Superior Court of Ventura County, Charles F. Blackstock, J., entered a judgment dismissing the action and plaintiffs appealed. The District Court of Appeal, Doran, J., held that record did not justify dismissal of action for failure of plaintiffs to prosecute action with reasonable diligence.

Judgment reversed.

1. Dismissal and Nonsuit ⚷60(3)

Code provision authorizing court to dismiss action for want of prosecution on defendant's motion whenever plaintiff has failed for two years after action is filed to bring such action to trial, and providing that where defendant has been absent from state or concealed therein and his whereabouts unknown to plaintiff and not discoverable to plaintiff, upon due diligence, such period of absence or concealment shall not be part of such two-year period, was not meant to require a plaintiff to do the impossible. Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⚷60(6)

Code provision authorizing court to dismiss an action for want of prosecution on defendant's motion whenever plaintiff has failed for two years after action is filed to bring such action to trial, and providing that where defendant has been absent from state or concealed therein and his whereabouts unknown to plaintiff and not discoverable to plaintiff, upon due diligence, such period of absence or concealment shall not be part of such two-year period, was not intended to place a premium upon activities of a defendant who seeks to avoid service of summons until more than a two-year period has elapsed. Code Civ.Proc. § 583.

3. Dismissal and Nonsuit ⚷60(1)

Code provision authorizing court in its discretion to dismiss an action for want of prosecution on defendant's motion whenever plaintiff has failed for two years after action is filed to bring such action to trial, and providing that where defendant has been absent from state or concealed therein and his whereabouts unknown to plaintiff and not discoverable by plaintiff, upon due diligence, such period of absence of concealment shall not be part of such two-year period, was intended to afford relief where, with no good reason and with no display of reasonable diligence, a plaintiff has permitted action to drag along for what amounts to unconscionable delay. Code Civ.Proc. § 583.

4. Dismissal and Nonsuit ⚷57

In action for damages caused by fire alleged to be due to defendant's negligence, brought against a defendant who was not served with summons until three years, four months and twenty-six days from filing of action, but who was outside of state for one-year, three months and nine days of such period, and who lived in state during such period for two months and eleven days in county other than county in which action was filed and in which defendant had resided before defendant left state, record did not establish lack of diligence on part of plaintiffs in obtaining service of summons which would entitle defendant to dismissal of action for failure to prosecute action with reasonable diligence. Code Civ.Proc. § 583.

◆

Elbert E. Hensley, Los Angeles, Allan M. Carson, Los Angeles, of counsel, for appellants.

M. Arthur Waite, Ventura, for respondents.

DORAN, Justice.

The action herein, one to recover damages caused by fire alleged to be due to defendants' negligence, was dismissed by the trial court on the ground that appellants had failed to prosecute the same with reasonable diligence. Plaintiffs have appealed from the judgment of dismissal.

Plaintiffs and appellants, as subrogees under policies of fire insurance, filed the action in question on July 6, 1948. The summons was delivered to the sheriff of Ventura County for service on July 8, 1948, and on July 10, 1948, the civil deputy sheriff, having learned that the respondent Torreyson had left Ventura County, returned the summons to appellants' attorney. An examination of the Grand Register in the County Clerk's Office and the Post Office records together with other investigation, failed to disclose the defendant's whereabouts.

Respondent's motion to dismiss on the ground of failure to prosecute the action with reasonable diligence, was filed December 12, 1951, argued on January 14, 1952, and the action ordered dismissed on January 15, 1952. An affidavit in opposition to the motion was filed by appellants' attorney, and avers that the attorney conducted an investigation to discover respondent's whereabouts through the Department of Motor Vehicles and other sources, but was unable to locate respondent until 1951. The summons was again placed in a deputy sheriff's hands for service on July 10, 1951 but the officer was unable to serve same until December 2, 1951. As before noted, the motion in question was thereafter filed.

The affidavit of appellants' attorney recites that affiant was "informed that the defendant was outside the continental limits of the United States and Arabia with the Becktel International Corporation for a year and a half from April, 1948 until October, 1949, when he returned to Ventura. That since that time the defendant has been outside the territorial limits * *, working in the Channel Islands approximately 25 miles off the coast of California for a considerable portion of the time from December, 1949 to December, 1951."

Officer Cummings who finally served the summons on respondent, made affidavit that between July 10 and December 2, 1951, "affiant called at the residence of said defendant many times, at all hours and days of the week, and at some periods as many as three and four times a week"; that affiant was informed by respondent's wife that Don Torreyson "was working in the Channel Islands * * * and that he came home to Ventura on occasional days off work; that affiant left many messages for the defendant to call him when he was in Ventura, but that the defendant failed and refused to do so, although affiant would later learn that the defendant had been in town. That on several occasions when affiant knocked on the door * * * he would hear voices inside the house, but they refused to answer the door, and affiant believes that said defendant was within the house and concealing himself to avoid service of summons".

Much of the matter contained in the above affidavits is confirmed by the respondent's affidavit made in support of the motion to dismiss. Torreyson therein admits that in April, 1948, affiant "accepted a position as ditch machine operator * * * in Arabia, and your affiant resided in Arabia from the latter part of April, 1948 until he returned to California October 15, 1949. That your affiant resided with his mother from October 15, 1949, in Lakeside Park, near Canoga Park, County of Los Angeles * * * until December 26, 1949", then "resided in the building to the rear of 60 South Santa Rosa Street, Ventura, California, until the month of June, 1950", and since then resided at 590 So. Arcade Dr., Ventura. Respondent's affidavit says nothing about working in the Channel Islands, but affirms that affiant "has continuously resided in the County of Ventura * * * since December 26, 1949 except when his work required him to be away from *hom* for a few days at a time", and denies that affiant had "at any time concealed his whereabouts or evaded service of summons".

"The question upon this appeal", states appellants' brief, "is whether, under the circumstances presented, the trial court abused its discretion in dismissing the action". In this connection is cited Section 583 of the Code of Civil Procedure, reading as follows: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant * * *, whenever plaintiff has failed for two years after action is filed to bring such action to trial, *except where it be shown that defendant has been absent from the State or concealed therein and his where-*

abouts unknown to plaintiff and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be a part of said two-year period". (Appellants' italics.)

The time situation is thus summed up in appellants' brief:

Total time from filing action to service:	3 yrs.	4 mos.	26 days
Respondent's absence from state:	1 yr.	3 mos.	9 days
Remaining period:	2 yrs.	1 mo.	17 days
Time respondent was at mother's home in Los Angeles County after return from Arabia:		2 mos.	11 days
Remaining period:	1 yr.	10 mos.	6 days
Time expended by sheriff to locate respondent:		4 mos.	22 days
Remaining period:	1 yr.	5 mos.	14 days

Since by the express language of the code provision, respondent's absence in Arabia must be deducted from the total time, the remaining period is only 1 month and 17 days in excess of the two-year period. As appellants point out, in regard to this deduction of time the trial court possesses no discretion, for Section 583 is explicit that the discretion mentioned in the early part of the section applies "*except* where it be shown that defendant has been absent from the State or concealed therein". (Italics added.)

It is also to be noted that the remaining time in excess of the two-year period is hardly enough to indicate in itself any lack of diligence on appellants' part. Moreover, there is nothing to indicate that appellants had any knowledge of the exact date of respondent's return. Furthermore, upon such return, Torreyson resided not in Ventura County but "with his mother from October 15, 1949 in Lakeside Park, near Canoga Park, County of Los Angeles * * * until December 26, 1949", a fact which appellants would be unlikely to know. The four months and 22 days which the sheriff consumed in locating the respondent must be considered an exercise of diligence rather than a shortcoming chargeable to appellants.

[1–4] It is obvious that Section 583 of the Code of Civil Procedure was not meant to require a plaintiff to do the impossible. Nor was it intended to place a premium upon the activities of a defendant who seeks to avoid service of summons until more than a two-year period has elapsed. Rather, the provision was intended to afford relief in those cases where, with no good reason and with no display of reasonable diligence, a plaintiff has permitted an action to drag along for what in the particular case amounts to unconscionable delay. The record herein does not indicate such a situation.

During most of the period involved herein the respondent, intentionally or unintentionally, had remained out of circulation, so to speak, in so far as the service of summons is concerned. It is not enough to assert that by employing unusual means, the appellant might have located the respondent during his comparatively brief stay in Ventura County. Appellant was only required to use reasonable diligence and the record would seem to show that such diligence was used in the instant case.

According to appellants' break-down of the period involved, and after deducting respondent's absence in Arabia, there remains only one month and 17 days over the two-year period on which respondents rely. Torreyson's residence in Los Angeles County after returning from Arabia, presumably without appellants' knowledge, and the time expended by the sheriff's office in locating and serving respondent, bring the time well below the two-year period. The fact that respondent was thereafter working in the Channel Islands, returning home periodically, added further difficulties to the situation. All of these difficulties were created, not by appellants but by the respondent, and the fact that the sheriff's office required more than four months to reach the respondent indicates that the job was not an easy one.

Considering the entire record and the situation with which appellants were confronted, it cannot be said that there was such a lack of diligence as should entitle respondent to a dismissal. The trial court's action, therefore, was not justified, either under discretionary power or otherwise.

The judgment is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

113 Cal.App.2d 647

ALVAREZ v. VAN CAMP SEA FOOD CO., Inc. et al.

Civ. 4294.

District Court of Appeal, Fourth District, California.

Oct. 15, 1952.

Rehearing Denied Nov. 10, 1952.

Hearing Denied Dec. 11, 1952.

Action by seaman against vessel's owners, the master, and fellow seaman for injuries received when seaman was struck in eye by hook and line being used by fellow seaman. The Superior Court of San Diego County, Arthur L. Mundo, J., entered judgment on verdict for defendants, and the seaman appealed. The District Court of Appeal, Barnard, P. J., held that failure to add further instructions to effect that assumption of risk was no defense if defendants had negligently failed to provide a safe place to work was not error in view of other instructions given.

Judgment affirmed.

1. Seamen 🔑29(1)

Vessel's owners, the master, and fellow seamen are not liable to seaman who is injured as result of normal hazards of his business and without fault of any one else if ship is seaworthy and equipment perfect. Jones Act, 46 U.S.C.A. § 688.

2. Trial 🔑260(8)

In action by seaman against vessel's owners, the master, and fellow seamen, for injuries received when struck in eye by hook and line being used by fellow seaman, refusal to give additional instruction that assumption of risk was no defense if defendants had negligently failed to provide a safe place to work was not error in view of other instructions given. Jones Act, 46 U.S.C.A. § 688.

3. Seamen 🔑29(5.17)

In action by seaman against vessel's owners, the master, and fellow seaman for injuries received when struck in eye by hook and line being used by fellow seaman, where trial court instructed jury that seaman has cause of action for injuries proximately caused by negligence of owners, the master, or fellow seamen, failure to add "or by reason of any defect, due to the owners' neligence, in the ship's equipment" was not error. Jones Act, 46 U.S.C.A. § 688.

4. Trial 🔑260(8)

In action by seaman against vessel's owners, the master, and fellow seamen for injuries received when struck in eye by hook and line being used by fellow seaman, refusal to instruct jury that a higher degree of care is required of employers of seamen than is required of employers of seamen who work ashore was not error in view of other instructions given. Jones Act, 46 U.S.C.A. § 688.

5. Trial 🔑296(9)

In action by seaman against vessel's owners, the master, and fellow seamen for injuries received when seaman was struck in eye by hook and line being used by fellow seaman, use of phrase "the ship being seaworthy and equipment perfect" in charge to jury did not take issue whether ship was seaworthy and equipment perfect from jury in view of other instructions given. Jones Act, 46 U.S.C.A. § 688.

6. Appeal and Error ⚷1048(6)
Seamen ⚷29(5.13)

In action by seaman against vessel owners, the master and fellow seamen for injuries received by seaman struck in eye by hook and line being used by fellow seaman, sustaining objection to cross-examination question whether it would be possible to attach a detachable canopy to protect area in which seaman was when injured on ground that question called for conjecture was neither error nor prejudicial in view of fact that seaman's counsel then merely asked whether such had ever been done and, upon negative reply, did not pursue matter further. Jones Act, 46 U.S.C.A. § 688.

◆

Harold P. Lasher, Charles E. Burch, Jr., San Diego, for appellant.

J. A. Donnelley, Richard P. MacNulty, San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for damages brought under the Merchant Marine Act, commonly known as the Jones Act, 46 U.S.C.A. § 688.

The plaintiff was one of the crew on a tuna boat owned by the defendants. The boat left San Diego in October, 1947, on a fishing trip. One of its owners, Jose Alves, was in charge of the vessel as master. He had hired the crew, one of whom was his son Eduenno Alves, who was an apprentice seaman making his first trip on a tuna boat. The plaintiff was injured on January 4, 1948, while the boat was in the vicinity of the Gallapagos Islands in the Pacific Ocean, and while certain members of the crew were engaged in fishing.

This tuna boat was nearly new and modern. It had a live bait box consisting of three tanks near the center of its deck. A wooden canopy held up by stanchions covered the rear two tanks but not the front tank. The evidence is undisputed that the canopy on such boats is never extended over the front tank because it would interfere with other operations which are necessary. Briefly stated, the method of fishing was as follows. There were a number of racks along the side of the boat outside the bulwark, where the fishermen stand several feet apart. The fishermen were using short poles some 8 or 9 feet long with about a 5-foot line to which was attached a "squid", which is a heavy barbless hook. When a fish was hooked the fisherman would try to bring it around nearly in front of him and then throw the fish over his right shoulder so it would land on the deck. Frequently the hook would tear loose while the fish was fighting. When this happened the fisherman would fall back against the bulwark and the hook on the end of the line would fly back over his head. Usually, the hook would hit the top of the canopy or the side of the bait box. On the occasion in question, Eduenno Alves was fishing on a rack about the middle of the side of the boat, and he had hooked a 25 or 30-pound fish. As he was trying to work the fish around in front of him, with the fish fighting, the fish broke loose. He fell back and the hook and line went over his head, the hook striking the plaintiff and causing the loss of an eye. The line and hook wound itself around a stanchion at the front end of the canopy.

Before the accident the plaintiff was on duty on the bait tank, helping the chummers, where he had been passing bait from the forward tank to the middle tank. He testified that he was under the canopy and beside the middle tank at the time he was injured. There was other evidence that when he was first seen by other people after the accident he was standing outside of the protected canopy near the forward tank. There was no evidence, and it is not contended, that the portion of the boat under the canopy was other than a safe place to work. There is evidence that these portions of the boat were similar to those used on all tuna boats.

The complaint was based upon the theory that the plaintiff's injuries were caused by the negligence of the defendants. The plaintiff alleged in his first cause of action that he was standing on top of the bait tank acting as a chummer while other members of the crew were engaged in fishing, and that the master of the vessel did "negligently and carelessly conduct and carry on the fishing going on at the same time and place; that by reason thereof plaintiff was caused to be struck across the right eye and nose by one of the fishing lines." In a second cause of action it was alleged that Eduenno Alves and one other, acting within the scope of their duties, "did so negligently and carelessly handle fishing pole and line that the fishing pole and line snapped back with such force as to cause the end of said line to strike and come in contact with the plaintiff across his right eye and nose, thereby causing the plaintiff the injuries and damages complained of." Nowhere in the pleadings was it alleged that the defendants had failed to provide the plaintiff with a safe place to work, or that the vessel was unseaworthy or any of its equipment dangerous or defective. No evidence was introduced on any issue of unseaworthiness or defective equipment, but an attempt was made to show that the defendants had not provided the plaintiff with a safe place to work and this issue was submitted to the jury.

The jury found in favor of the defendants and the plaintiff has appealed from the judgment. While it is not claimed that the evidence is insufficient to support the judgment, it is contended that there was ample evidence of negligence on the part of the defendants. It is argued in this connection that the evidence shows that Eduenno Alves was an inexperienced fisherman since this was his first trip on such a boat; that he had not been given sufficient instructions; that since the line wound itself around the front stanchion it must have been going back in a sort of sweeping way; and that the area where plaintiff was working was unsafe, since the front tank was unprotected by any canopy. The evidence was conflicting as to these issues, and there was ample evidence that Eduenno Alves had done considerable fishing; that he had been adequately instructed; that he was acting in the customary manner at the time in question; that he had done what any other fisherman would have done; and that it was neither customary nor reasonably possible to furnish any other protection for men in the position where the plaintiff was working.

The cause was submitted to the jury on the question of negligence on the part of the defendants, whether in providing a safe place to work or otherwise. The jury was given the usual instructions on negligence and proximate cause. The jury was then told, among other things, that under the Jones Act a seaman who suffers a personal injury in the course of his employment is given a cause of action if the proximate cause of his injury is the negligence of the owners of the vessel, the master of the vessel, or any fellow seaman on the vessel; that Jose Alves had operated the boat as the agent of the owners and his conduct "shall be deemed by you to have been the conduct of these owners"; that Eduenno Alves was likewise acting within the scope of his authority and "hence his conduct shall be deemed by you to have been the conduct of these owners"; that Eduenno Alves was required to use reasonable care, a care commensurate with the danger existing at the time, the test being whether his conduct under the circumstances had been that of a reasonable and prudent man; that any contributory negligence on the part of the plaintiff would not bar a recovery, but should be taken into account through a reduction of any damages allowed to an extent proportionate to the extent of plaintiff's fault; that the employers of the plaintiff were bound to exercise reasonable care to provide a reasonably safe place to work, and to exercise ordinary care to guard against injuries to their employees; that while certain hazards are inherent in the nature of a fisherman's duties on the high seas, the amount of caution required of the defendants, in the exercise of ordinary care, increases in accordance with the danger that is known or that reasonably should be apprehended in the existing situation; that "If a seaman is injured in the normal hazards of his business without fault on the part of anyone else, the ship being seaworthy and the equipment perfect, he assumes the loss himself and cannot recover for his injuries;" and that the plaintiff "was not obligated or required to bear the risk of injury through the fault or negligence of a fellow servant", or other employee.

The appellant contends that the court erred in failing to properly instruct the jury in accordance with the provisions of the Jones Act, under which this action was brought. It is first contended that while the court told the jury that the defendants were bound to exercise reasonable care to provide a reasonably safe place in which to work, it erred in refusing to give an instruction that "Assumption of risk is not a defense to a suit brought by a seaman under the * * * Jones Act, where the employers negligently fail to provide safe appliances or a safe place in which to work." It is argued that by refusing this instruction and by telling the jury that "if a seaman is injured in the normal hazard of his business without fault on the part of anyone else, the ship being seaworthy and the equipment perfect, he assumes the loss himself and cannot recover for his injuries" the court, in effect, told the jury that as a matter of law the plaintiff assumed the risk of such injury whether or not the appliances or the place where he was working was safe; that the jury was thus misled into assuming that if the plaintiff was injured while he was outside of the canopy he assumed the risk of being injured; and that if the court had given the refused instruction on assumption of risk the jury would have known that the plaintiff had not assumed such a risk.

[1, 2] The doctrine of assumption of risk had not been pleaded and in that form was not involved in the case. It was still true, however, that the defendants were not liable if the plaintiff was injured as a result of a normal hazard of his business and without fault on the part of anyone else, and if the ship was seaworthy and the equipment perfect. These issues were left to the jury as questions of fact, and the jury was told that the defendants were liable for any negligence on their part; that they were bound to use reasonable care in providing a safe place to work; that the amount of care required of them increased in accordance with the danger to be foreseen; that the defendants were bound by the acts of their agents; and that the plaintiff was not required to bear the risk of injury through the negligence of other employees. It was unnecessary to add a further instruction to the effect that assumption of risk was no defense if the defendants had negligently failed to provide a safe place to work. The instructions as given did not have the effect of telling the jury that the plaintiff assumed the risk, as a matter of law, regardless of whether or not the appliances or the working conditions were safe. In Roberts v. United Fisheries Vessels Co., 1 Cir., 141 F.2d 288, 293, in commenting on the fact that the defense of assumption of risk can no longer be made in such an action, the court said:

> "But where the injury or death is not the result, in whole or in part of the negligence of the employer, or his agents, the provision has no effect to change the rights or remedies of the parties, and, in the case of a seaman, he takes the same risks of his calling as he did before under admiralty law. By the Jones Act he is given a right of action for the negligence of his employer which he did not have before, but the usual risks of the calling are not shifted on to the employer if the employer is guiltless of any fault. * * * The presence or absence of negligence governs the verdict. If there is no negligence the plaintiff cannot recover."

[3] It is next contended that in giving the instruction that under the Jones Act a seaman is given a cause of action for injuries proximately caused by the negligence of the owners, the master, or any fellow seaman on the vessel, the court failed to add "or by reason of any defect, due to the owners' negligence, in the ship's equipment." Neither in the pleadings nor in the evidence was it urged that any of the boat's equipment was defective or that the plaintiff was injured by reason of any such defect. It was, at least inferentially, contended that some further precautions could have been taken in connection with the question as to whether a reasonably safe place to work had been provided. The

duty of the owners to provide a safe place to work was covered in the instructions and the issue was submitted to the jury as a question of fact. The matter of any negligence on the part of the defendant was submitted to the jury, regardless of whether it arose from negligence in furnishing a safe place to work or from some other act or omission.

[4] It is next contended that the court erred in refusing an offered instruction which would have told the jury that "a higher degree of care is required of the employers of seamen than is required of employers of seamen who work ashore." This was sufficiently covered by the instruction calling attention to the hazards which are inherent in the nature of a fisherman's duties on the highseas, which further told the jury that the amount of caution required from the defendants would increase in proportion to the danger which was known to be involved, or which was reasonably to be apprehended.

[5] It is further contended that the court presumed that this ship was seaworthy and the equipment perfect by including in its instruction with reference to an injury resulting from a normal hazard, without fault on the part of anyone else, the words "the ship being seaworthy and the equipment perfect", and thus took this issue of fact away from the jury. This contention is without merit. The factual questions raised by the evidence were all left to the jury. The court left it to the jury to say whether the defendants were negligent in any respect, including the matter of providing a safe place to work, and the instructions adequately covered the entire matter of negligence including those called for under the provisions of the Jones Act. Beadle v. Spencer, 298 U.S. 124, 56 S.Ct. 712, 80 L.Ed. 1082.

[6] The only other point raised is that the court erred in ruling on one question of evidence. During the cross-examination of an expert witness, with many years' experience in this kind of work, appellant's counsel asked: "Captain, would it be possible to attach to the end of the canopy what might be a detachable canopy that could be rolled back or rolled over during fishing operation?" An objection that the question called for conjecture was sustained, the court saying that whether or not it was possible was not the test. Appellant's counsel then asked the witness "Has that ever been done?" and the witness replied "I never heard of it, sir." The matter was not pursued further and neither error nor prejudice appears.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, J., dissenting.

113 Cal.App.2d 720

PEOPLE v. GUTHRIE et al.

Cr. 4858.

District Court of Appeal, Second District,
Division 3, California.
Oct. 17, 1952.

Defendant was convicted in Superior Court, Los Angeles County, Charles W. Fricke, J., of violating Pen.Code, § 288a, and he appealed. The District Court of Appeal, Parker Wood, J., held that instruction that where person commits act without being conscious thereof, however that condition may have been created, he does not thereby commit a crime, and that if there be a reasonable doubt as to whether such person was conscious of such act he is entitled to acquittal, was applicable under the evidence and sufficient under defense theory that defendant was intoxicated and not a knowing participant in act.

Affirmed.

1. Criminal Law ⚿774

In prosecution for sex perversion, instruction that where person commits act without being conscious thereof, however that condition may have been created, he does not thereby commit a crime, was applicable under evidence and sufficient under defense theory that accused was intoxicated and not a knowing participant in act. Pen. Code, § 288a.

2. Criminal Law ⚷814(17)

Where officers who observed accused in act of sex perversion testified that accused sat up in bed immediately after they turned the light on, that accused walked and talked normally, and that in their opinion he was not intoxicated, evidence that accused knowingly participated in act was direct, and instruction as to circumstantial evidence was not required. Pen.Code, § 288a.

◆

William M. Brandon and Francis X. Marnell, Huntington Park, for appellant.

Edmund G. Brown, Atty. Gen., and Frank Richards, Asst. Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendants were charged with violation of section 288a of the Penal Code. Defendant Guthrie pleaded guilty. Defendant Shickner was found guilty in a trial by a jury. Proceedings were suspended and probation was granted. Defendant appeals from the order denying his motion for a new trial.

Appellant contends that the court erred in refusing to give certain instructions requested by him.

The theory of the defense was that appellant was intoxicated and did not knowingly participate in the act. Two police officers arrested defendants about 3:20 a. m. on January 24, 1952, in a room in a Turkish bathhouse. According to the testimony of the officers, there was no light in the room when they entered; they directed the beams of their flashlights on the bed, and for approximately 10 seconds they observed an act, which was in violation of section 288a, being committed by Guthrie on the person of appellant, who was lying on the bed; the only clothing on appellant was a shirt; one of the officers turned the ceiling light on, and then the appellant sat up in bed. One of the officers testified that during the 10 seconds he did not see appellant's face, did not know whether appellant was asleep or awake, and that appellant made no movement until the light went on; he (officer) asked appellant why he did not push the other fellow away, and appellant replied, "Well, I just didn't"; appellant walked from the room to the office and got his clothes, and then he returned to the room and dressed. The officers testified further that appellant's walk and speech seemed normal; his eyes were bloodshot; the officers were of the opinion that appellant had been drinking but he was not under the influence of intoxicating liquor.

Appellant testified that he had been drinking at a nearby cafe on the night of January 23rd; he was drunk and he did not remember leaving the cafe or going to the bathhouse; he remembered someone telling him to get off the street; the next thing he remembered was the bright light of a flashlight in his face; he got up and the officers said that they (appellant and Guthrie) were under arrest; he did not recall any of the conversation with the officer (at the bathhouse); he remembered going down some steps and riding in a police car; Guthrie was sitting next to him in the police car, and that was the first time he had ever seen Guthrie.

Appellant contends that the court erred in refusing to give instructions requested by him to the effect that the defendant should be acquitted if the jury found that defendant was intoxicated to such a degree that he was not aware of the act being perpetrated upon him; or that he was asleep or unconscious at the time of the act; or that he did not knowingly participate in it.

The court gave the following instruction: "Our law provides that 'no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition'. This means that drunkenness, if the evidence shows that the defendant was in such a condition when allegedly he committed the crime charged, is not of itself a defense in this case. It may throw light on the occurrence and aid you in determining what took place, but when a person in a state of intoxication, voluntarily produced by himself, commits a crime such as that charged against the defendant in this case, the law does not permit him to use his own vice as a shelter against the normal, legal consequences of his conduct. *Where, however, a person commits an act without being conscious thereof, however that condition may have* *been caused, he does not thereby commit a crime even though such an act would constitute a crime if committed by a person while conscious and if there be a reasonable doubt as to whether such person was conscious of such act he is entitled to an acquittal."* (Italics added.)

[1] Appellant asserts that said instruction would lead the jury to believe that the defendant must be "completely" unconscious in order for an unconscious condition to be a defense. He argues that it would be a defense if the defendant was without knowledge of the act being committed even though he was not completely unconscious. He states that there should have been an instruction that defendant must be acquitted if he was so intoxicated that his mind was in such a state, either from sleep, stupor, or unconsciousness, that he could not knowingly participate in the act. The instruction above quoted, which was given, stated that where a person commits an act without being conscious "thereof," however that condition may have been caused, he does not thereby commit a crime, and that if there be a reasonable doubt as to whether such a person was "conscious of such act" he is entitled to acquittal. That instruction was applicable under the evidence, and it was a sufficient instruction under the theory of the defense.

[2] Appellant contends also that the court erred in not instructing the jury regarding circumstantial evidence; and that the court erred in not giving an instruction to the effect that, with respect to circumstantial evidence, the jury must be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that of guilt. He argues that such an instruction should have been given because the evidence as to whether he knowingly participated in the act was entirely circumstantial. In refusing to give such an instruction, the judge stated that the case was not based entirely or chiefly on circumstantial evidence but it was based on direct evidence. Whether it is prejudicially erroneous to fail to give such an instruction depends upon the evidence in the particular case. In the present case, as above stated, the officers testified that the defendant sat up in bed immediately after they turned the light on; that defendant walked and talked normally; and that in their opinion he was not intoxicated. Defendant testified that he got up when the light was turned on; and that the officers said that he was under arrest. In view of the strong direct evidence herein, it was not necessary that such an instruction be given.

Appellant cites the case of People v. Rayol, 65 Cal.App.2d 462, 150 P.2d 812, wherein a conviction under section 288a was reversed on the ground that the evidence as to whether the defendant was a conscious participant was circumstantial and that such an instruction on circumstantial evidence should have been given. That case is factually distinguishable from the present case.

The order denying the motion for a new trial is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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113 Cal.App.2d 759

FRERICKS et al. v. SORENSEN et al.

Civ. 19118.

District Court of Appeal, Second District,
Division 3, California.
Oct. 21, 1952.

The Superior Court, Los Angeles County, Alfred E. Paonessa, J., entered judgment for plaintiffs in boundary dispute, and defendants appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that plaintiffs had acquired good prescriptive title to the land in question.

Affirmed.

1. Boundaries 🔑48(6)

Where landowner sold part of her lot and pointed out to the purchasers, and later to their purchasers, the boundary line between the part sold and the part retained, and acquiesced in the purchasers' possession of the land so pointed out and the making of improvements, landowner and her successors were equitably estopped from disputing such location of the boundary line.

2. Boundaries ⚷**37(5)**

In boundary line dispute, evidence supported trial court's finding that plaintiffs' predecessors had entered into a valid boundary line agreement with defendants' predecessors locating the boundary line in the place contended for by plaintiffs.

3. Boundaries ⚷**46(1)**

In order to have a valid agreement fixing a boundary, it was not necessary that an actual controversy or dispute have existed.

4. Adverse Possession ⚷**90**

Where tax assessment roll did not correctly describe lands which were actually assessed to adjoining landowners, payment of taxes was payment of taxes upon land in possession of the parties, though held adversely.

5. Adverse Possession ⚷**100(4)**

Where landowners and their predecessors for over 10 years occupied in good faith to a point beyond the true boundary line, and the adjoining landowners and their predecessors, thinking that the landowners were occupying to the true boundary line, acquiesced in such possession, landowners acquired good prescriptive title.

◆

George L. Hampton, Van Nuys, for appellant Alma Sorensen.

Richard C. Fildew, Los Angeles, for respondents.

SHINN, Presiding Justice.

The property in controversy in this action is a parcel of land 50.5 feet by 66 feet, being a part of lot 111, tract 1000 in the county of Los Angeles. Plaintiffs claimed title by reason of facts to be hereinafter related and also asserted a prescriptive title. They prevailed and defendants appeal.

Lot 111 is bounded on the north by Albers Street, on the west by Sunnyslope Avenue, and on the south by Chandler Boulevard, although the south 50.5 feet are included in the Boulevard. Inclusive of this 50.5 feet, lot 111 is 645.83 feet in length.

The court found the following facts: (1) On February 29, 1940, Lillian B. Thatcher was the owner of the west 66 feet of lot 111; (2) on that date she executed a deed conveying to Harry W. Ferguson and wife the south 292 feet of the west 66 feet of lot 111; the Fergusons entered into possession of 292 feet measured from the north line of Chandler Boulevard and continued in possession until they sold the property to Grey and wife, March 26, 1942; (3) at the time the Greys purchased there was a shed 54 feet by 16 feet, located within and at the north end of the 292 feet; immediately north of the shed was a stake and a fence which extended across the lot north of the shed. The stake and fence were 342.5 feet north of the south line of lot 111; (4) the Greys later sold to Kasparian and wife in 1946, and in 1948 the Kasparians sold to plaintiffs. The several deeds described the parcel as the south 292 feet of lot 111. In February, 1944, Lillian B. Thatcher conveyed to defendants Sorensen the west 66 feet of lot 111, excepting the south 292 feet thereof.

Plaintiffs and their predecessors, as well as Thatcher and wife and Sorensen and wife, overlooked the fact that the south 50.5 feet of the lot had been taken for street purposes. Everyone supposed that the south 292 feet of the lot extended to a point just north of the shed. It was not until the spring of 1950, after examining tax bills, that the Sorensens laid claim to the disputed 50.5 feet.

When the Greys purchased from Ferguson, March 26, 1942, Mr. Thatcher, acting as agent for his wife, represented to Grey that the Ferguson's land extended just north of the shed to a fence and to the stake which he pointed out to Ferguson and Grey. The Greys acted upon this representation in making their purchase. The court also found that Ferguson and Grey were uncertain as to the north boundary of the property to be conveyed, that a controversy arose concerning the same and that Mrs. Thatcher, acting through her husband as her agent, agreed with Ferguson and Grey that the north boundary was a line just north of the shed. The Greys entered into possession of the land and the shed. The court found that Grey "did make considerable and expensive improvements upon the shed and other portions of the 50.5 strip." He spent $200 or $300 in improvements of the shed, put up chicken batteries and rabbit hutches, repaired a lath house and pruned trees on the 50.5 foot strip, all without objection on the part of the Thatchers or the Sorensens. Upon a second occasion in March, 1942, when Mr. Thatcher pointed out the boundary to Ferguson and Grey, Mrs. Thatcher agreed with the latter that the north boundary of the land was the line of the fence just north of the shed. It was also found that the Sorensens witnessed the occupancy of the strip by the Kasparians and acquiesced in their fencing the strip and making extensive improvements, and they also observed the occupancy by plaintiffs and permitted them to make improvements thereon, all without any objection until the spring of 1950.

[1] When Grey purchased he had a right to rely upon the representations of the Thatchers, who presumably had superior knowledge as to the boundaries of the land they had sold. He was not required to have a survey made, and even if he had measured 292 feet from the shed to the north line of Chandler Boulevard, he would not have known that lot 111 extended into the street, and his measurement would not have been in conflict with Thatcher's representation. The Thatchers undoubtedly acted in good faith. They believed Ferguson had purchased 292 feet, measured from the Boulevard as, indeed, he had, although the land was incorrectly described in his deed. The Thatchers were concluded from questioning the title of Grey to the 50.5 foot strip. The original understanding with Ferguson, the representation made to Grey and acquiescence in possession of the strip and the making of improvements by Ferguson and Grey combined to make out a complete case of equitable estoppel. Grants Pass Land Etc. Co. v. Brown, 168 Cal. 456, 462, 143 P. 754. The Sorensens, as successors of the Thatchers, were likewise estopped. Stanley v. Green, 12 Cal. 148, 163.

[2, 3] The court found that a valid boundary line agreement had been entered into between the Thatchers on the one side, and Ferguson and Grey on the other. The evidence supports this finding. There was uncertainty on the part of Ferguson and Grey as to the location of the north boundary, otherwise, Thatcher would not have been called upon to locate the line. The boundary thus agreed upon was accepted and acquiesced in by the several subsequent holders of the adjoining parcel and the portion now in dispute thereby attached itself to the land of Grey as a definition of the land that had been sold to Ferguson and which Grey was purchasing. In order to have a valid agreement fixing this boundary, it was not necessary that an actual controversy or dispute should have existed. Upon these propositions the decision in Price v. De Reyes, 161 Cal. 484, 119 P. 893, is controlling.

The court also found that since March, 1942, the south 342.05 feet of the west 66 feet of lot 111 has been in continuous possession of plaintiffs and their predecessors in interest, has been protected by a substantial enclosure, cultivated and improved, and that said occupation has been continuous, open and hostile to the defendants; also that plaintiffs and their predecessors in interest have paid all taxes on said south 342.05 feet. The Fergusons and the Greys paid taxes for the years 1940 to 1946, inclusive, under assessments upon the west 66 feet of lot 111, with a depth of 241.5 feet bounded on the south by Chandler Boulevard; since then the Kasparians and plaintiffs have paid upon land described on the assessment roll as the west 66 feet of the south 241.5 feet of the north 595.33 feet of lot 111. Prior to 1944 the shed and other improvements were assessed to the whole of the west 66 feet; thereafter, they were assessed to the parcel of land which was assessed to plaintiffs and their predecessors. Although these descriptions on the tax roll conformed to the deeds of the parties, they did not describe the parcels which the parties occupied. The land which was assessed to plaintiffs and their predecessors by a visual observation on the ground was 342.05 feet in depth. This was necessarily so inasmuch as the improvements were assessed to their land. Plaintiffs and their predecessors not only paid taxes upon the land which they occupied, but they were the equitable owners of it.

[4, 5] While the assessment roll described defendants' land according to their deed, they were not actually assessed for the 50.5 feet upon which the shed and other improvements were located. The assessment roll did not correctly describe the land which was actually assessed to either the plaintiffs or the defendants and their predecessors. Payment of taxes under these circumstances was payment of taxes upon land in the possession of the parties. The court correctly determined that plaintiffs and their predecessors had paid all taxes on the land in dispute and that plaintiffs have a good prescriptive title. Price v. De Reyes, supra, 161 Cal. 484, 119 P. 893; Sorensen v. Costa, 32 Cal.2d 453, 196 P.2d 900.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

JONES v. WELLINS' ESTATE et al.*

Civ. 19124.

District Court of Appeal, Second District,
Division 2, California.
Oct. 16, 1952.

Rehearing Denied Nov. 6, 1952.
Hearing Granted Dec. 11, 1952.

Action by attorney to recover fee. Superior Court, Los Angeles County, A. W. Ashburn, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, McComb, J., held that plaintiff, who was retained under contingent fee contract which assigned to him, pro tanto, anything received or collected on client's claim, could not maintain action for fee against estate of attorney who succeeded him upon his discharge by client, and who effectuated settlement of claim, where no claim for such fee had been filed against attorney's estate.

Judgment affirmed.

1. Executors and Administrators 🔑224

Attorney who was retained under contingent fee contract which assigned to him, pro tanto, anything received or collected on client's claim, could not maintain action for fee against estate of attorney who succeeded him upon his discharge by client and who effectuated a settlement of claim, where no claim for such fee had been filed against attorney's estate. Probate Code, §§ 702, 707.

2. Attorney and Client 🔑186

Attorney, who was retained under contingent fee contract which assigned to him, pro tanto, anything received or collected on claim, and who was discharged by client before settlement of claim, waived any lien he might have had to sums collected on settlement of claim, by executing affidavits for purpose of attaching such funds, in which he stated that his claim was not secured by any lien.

Arthur A. Jones, in pro per.

David Sokol, Macbeth & Ford, Vincent J. Blumberg and Patrick H. Ford, Los Angeles, for respondents.

McCOMB, Justice.

Plaintiff appeals from a judgment in favor of defendants after trial before the court without a jury in an action to recover an attorney's fee.

Facts: September 25, 1950, plaintiff, who is a lawyer, sued a former client, Mrs. Martin, for $12,000 attorney's fees under a written contract dated April 2, 1948. This contract entitled plaintiff to a fee of $65 plus 50% of "any money or property paid, received, or collected, by action, compromise or otherwise upon or in satisfaction of any claim, or recovery made, incident to, or as a result of the said services" rendered by plaintiff in collecting a claim which Mrs. Martin had for alleged assault and battery against defendant union. The contract further provided, "This retainer shall operate as an assignment *pro tanto* to said attorney, of any claim or right of recovery * * * and of anything received or collected thereon or of judgments obtained thereon."

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* Subsequent opinion 256 P.2d 905.

After employing plaintiff Mrs. Martin discharged him and substituted as her counsel defendant Wellins who effected a settlement of Mrs. Martin's claim for $20,000, of which he retained $8,000 for attorney's fees, giving $8,000 to Mrs. Martin who left California. Upon learning that Attorney Wellins had agreed to settle Mrs. Martin's claim with the union, plaintiff notified the union that he had a lien upon the funds in their hands which they were going to pay to Mrs. Martin. The union's attorney made an oral agreement that he would notify plaintiff in the event any settlement should be effected with Mrs. Martin so plaintiff might levy an attachment on the money.

On April 16, 1951, the $20,000 compromise was arranged and the attorney for the union issued his check to attorney Wellins, Mrs. Martin and an insurance company which claimed a $4,000 lien for workmen's compensation paid to Mrs. Martin. The payees endorsed this check and deposited it in Wellins' account in the California Bank.

On April 17, 1951, attorney Wellins paid $4,000 to the insurance company and with the consent and at the instruction of his client paid $8,000 to himself for his legal services and paid the balance to Mrs. Martin.

April 16, 1951, the attorney for the union tried to notify plaintiff of the compromise by telephone, and on April 17, 1951, such notice was given, at which time plaintiff made no protest to the payment made by the union to Attorney Wellins, nor did plaintiff make any claim that any of his rights had been violated, nor assert any lien on the fund before payment was made.

During the course of the present proceedings plaintiff twice made and executed affidavits for attachment in which he claimed that defendants were indebted to him upon a contract for the direct payment of money and that the payment was not secured by any mortgage, deed of trust or lien upon real or personal property.

Questions: First: *Did plaintiff have any claim against the estate of Marvin Wellins, deceased?*

[1] *No.* Section 707 of the Probate Code provides that no action may be maintained against an estate or an administratrix upon a contract without first presenting a claim against the estate as provided by the provisions of section 702 of the Probate Code.

In the instant case there was no evidence that such claim had ever been presented to the estate of Marvin Wellins, deceased, and the trial court properly found that no claim had ever been presented and plaintiff was barred from recovery.

Second: *Was plaintiff's claim for a lien against the other defendants barred because of the fact that he had waived such lien?*

[2] *Yes.* The trial court found, supported by substantial evidence, that plaintiff had waived any lien he might have to funds in the hands of the other defendants by executing the two affidavits for the purpose of obtaining an attachment, in which he stated that his claim was not secured by any lien upon real or personal property. This constituted a waiver of any claim of a lien he might have had. (Wingard v. Banning, 39 Cal. 543, 548.)

In view of our conclusions it is unnecessary to discuss any other questions presented by counsel.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

113 Cal.App.2d 823

CARRARA v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 15565.

District Court of Appeal, First District, Division 2, California.

Oct. 24, 1952.

Petition against a Superior Court for peremptory writ of prohibition. The District Court of Appeal, Dooling, J., held that under the Constitution such Superior Court did not have jurisdiction in habeas corpus over person of a minor present and residing in another county of state.

Peremptory writ ordered to issue.

1. Habeas Corpus 🔑48

Under Constitution Superior Courts only have jurisdiction to issue habeas corpus on a petition by or on behalf of any person in actual custody, in their respective counties. Const. art. 6, § 5.

2. Habeas Corpus 🔑48

Under Constitution, a Superior Court in and for one county did not have jurisdiction in habeas corpus over person of a minor present and residing in another county of state. Const. art. 6, § 5.

Benjamin F. Marlowe, Oakland, for petitioner.

Bert W. Hirschberg, Jr., San Francisco, for respondent.

DOOLING, Justice.

[1, 2] This proceeding presents the question whether the Superior Court in and for the City and County of San Francisco has jurisdiction in habeas corpus over the person of a minor actually present and residing in Alameda County. Under Art. VI, sec. 5 of our Constitution Superior Courts only have jurisdiction to issue "habeas corpus on petition by or on behalf of any person in actual custody, *in their respective counties.*" (Emphasis ours.) Bartlett v. Superior Court, 108 Cal.App. 755, 292 P. 545; Zeigler v. Superior Court, 134 Cal. App. 88, 24 P.2d 899; People v. Dunlop, 102 Cal.App.2d 314, 227 P.2d 281; People v. Ponce, 103 Cal.App.2d 271, 229 P.2d 77.

The peremptory writ of prohibition is ordered to issue as prayed.

GOODELL, Acting P. J., and JONES, J. pro tem., concur.

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113 Cal.App.2d 692

FULTON et al. v. HUGUET (two cases).

Civ. 18894.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1952.

Hearing Denied Dec. 15, 1952.

Action for injuries sustained by a pedestrian when struck by defendant's automobile while pedestrian was crossing street. The Superior Court of Los Angeles County, Walter R. Evans, J., entered an order granting a new trial after verdict for defendant and defendant appealed, and from the judgment entered on the verdict, plaintiffs cross-appealed. The District Court of Appeal, McComb, J., held that the evidence was sufficient to sustain the verdict for defendant.

Order granting a new trial reversed and judgment for defendant affirmed.

1. Automobiles 🔑246(22)

In action for injuries sustained by pedestrian when struck by defendant's automobile, where defendant denied negligence, giving instruction on doctrine of unavoidable accident was not error.

2. Appeal and Error 🔑1015(1)

Where minute order granting plaintiffs' motion for new trial after verdict for defendant did not state that new trial was granted on ground of insufficiency of the evidence, order granting a new trial could not be sustained on such ground. Code Civ. Proc. § 657.

3. New Trial 🔑68

In action for injuries sustained by pedestrian when struck by defendant's automobile, order granting plaintiffs' motion for new trial after verdict for defendant could not be sustained on ground that defendant was negligent as a matter of law, in view of evidence that pedestrian was not in a marked or unmarked crosswalk at time of accident.

4. Appeal and Error ⚿1060(1)

Counsel for defendant was not guilty of prejudicial misconduct in asking that a witness for defendant be examined out of order before completion of plaintiffs' case in order that witness should not have to close down his business another day, where trial court before adjournment ordered all witnesses to return the following day.

5. Trial ⚿339(3)

Where result of jury poll was eight to four in favor of verdict for defendant, but statement volunteered by one juror who had given a negative answer in poll and further inquiry by court disclosed that such juror misunderstood the inquiry when polled and intended to vote for verdict, receiving the verdict as originally read and refusing to send jury out for further deliberation was not error. Code Civ.Proc. § 619.

6. Automobiles ⚿244(6, 40)

In action for injuries sustained by pedestrian when struck by defendant's automobile as pedestrian attempted to cross street at a T-intersection, evidence was sufficient to sustain verdict for defendant on theory either that accident was unavoidable or that defendant was not negligent.

7. Appeal and Error ⚿1001(1)

Appellate court is bound by findings of the trier of fact, if there is any substantial evidence to sustain such findings.

Pollock & Pollock, Edward I. Pollock and David Pollock, Los Angeles, for respondents and cross-appellants.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for Bernard Huguet.

McCOMB, Justice.

From an order granting a new trial after the jury had returned a verdict in favor of defendant, defendant appeals. There is also a cross-appeal by plaintiff from the judgment entered on the verdict of the jury.

Facts: This action was instituted for the recovery of damages resulting from injuries sustained in an accident. Nadeau Street is 37 feet wide and runs east and west, while Morton Avenue is 40 feet wide and runs north and south and into Nadeau from the south but does not continue north of Nadeau. Thus the streets form a T intersection at the scene of the accident.

Plaintiff minor shortly before the accident had dropped a letter in a mailbox at the northwest corner of Nadeau and Bell Avenue, which is one block west of the intersection of Nadeau and Morton. Plaintiff then proceeded in an easterly direction on the northerly side of Nadeau until she reached a point about five feet east of the easterly curb line of Morton, at which point she intended to cross Nadeau from the northeast portion of the intersection to the southeast corner in an unmarked crosswalk which measures 10 feet in width. Before she started to cross the street she looked to the east and to the west on Nadeau. When she looked to the west she saw some eastbound traffic on Nadeau about a block away. Plaintiff proceeded to cross the street ahead of a westbound car in a straight southerly direction at a fast walk, and, according to her testimony, in an unmarked crosswalk. She stopped and again looked to the west on Nadeau for eastbound traffic. When she was at the center of Nadeau she then saw defendant's automobile about 100 feet from her traveling about 35 miles per hour in an easterly direction. She observed that when defendant's automobile got about one-half a car length west of Morton, it started to veer to the south and gave the appearance that it was going to turn south on Morton. Plaintiff then looked south in front of her and took two or three fast steps ahead. Looking west again on Nadeau she saw defendant's automobile which was about a foot or two away from her. She tried to leap out of the way, but it struck her, hurling her to the pavement causing her serious personal injuries.

Defendant testified: he saw plaintiff when she was approaching but not when she had reached the center of Nadeau; she was moving at a hurried pace; when he approached the west curbline of Morton he slowed down to between 20 and 25 miles per hour, applied his brakes and swerved to the south in an endeavor to avoid hitting her.

The jury returned a verdict in favor of defendant. The trial court granted plaintiffs' motion for a new trial on the ground it had erred in giving an instruction on unavoidable accident.

A. Defendant's Appeal

First: *Did the trial court err in granting plaintiffs' motion for a new trial?*

[1] *Yes.* The law is settled where as in the instant case defendant denies negligence it is not error to give the jury an instruction on the doctrine of unavoidable accident. (Covely v. C. A. B. Construction Co., 110 Cal.App.2d 30, 242 P.2d 87. Cf. Parker v. Womack, 37 Cal.2d 116, 122 [9], 230 P.2d 823.)

Second: *May the trial court's order granting the motion for a new trial be sustained on the ground that (a) the evidence was insufficient to support the verdict of the jury, or (b) defendant was guilty of negligence as a matter of law?*

No. The minute order read as follows: "The motion for a new trial in this matter is granted upon the ground that the Court at the defendant's request erroneously gave instruction No. 24, Book of Approved Jury Instructions, on unavoidable accident when there was no evidence produced to justify such instruction."

Section 657 of the Code of Civil Procedure reads in part: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground."

[2, 3] In the present case, since the minute order did not state that it was granted on the ground of the insufficiency of the evidence, and there was evidence that plaintiff was not in a marked or unmarked crosswalk at the time of the accident, there is no merit in plaintiffs' contention that defendant was negligent as a matter of law.

[4] Third: *Was defendant's counsel guilty of prejudicial misconduct in asking that a witness be examined out of order?*

No. While plaintiff was still presenting his case the trial judge stated he would not continue the court session beyond 4:15 p. m. that day. It was then seven minutes to 4:00 p. m. In the presence of the court and jury counsel for defendant stated the witness Rogers had a business he had to close down and it would be quite an imposition for him to come back the next morning, and requested he be placed on the stand out of order. Counsel for plaintiffs objected to this procedure and stated the cross-examination would take not less than fifteen or twenty minutes and he did not want to be foreclosed by shortness of time. The trial judge granted counsel for defendant's request and allowed defendant's witness to testify out of order. Counsel for plaintiffs cross-examined the witness and at the time court adjourned, counsel for defendant said: "May I inquire if counsel will require Mr. Rogers to be back, if he has a sufficiently lengthy cross-examination to require him to give up his real work again."

Plaintiff's counsel then stated to the court that he was placed in a very embarrassing position in that it was made to appear he was keeping the witness from going to work. The court thereupon ordered all witnesses to return the following day.

Clearly plaintiff has failed to show wherein he suffered any prejudice by the trial court permitting the witness to be examined out of order.

Fourth: *Did the trial court commit prejudicial error in receiving the verdict of the jury?*

No. After deliberating the jury returned to the courtroom and the following occurred:

> "The Court: Ladies and gentlemen, I take it you have reached a verdict in this matter. Will your foreman please hand the verdict to the bailiff?

"Mr. Clerk, will you read the verdict, please? (Verdict read.)

"Mr. Pollock: May the jury be polled, your Honor?

"The Court: Very well. You may poll the jury.

(The following is inserted upon the order of the Court by reason of the fact that the reporter's notes are silent):

"The Clerk: When I call your name I will ask you, 'Is this your verdict?' and you will answer 'Yes' or 'No.'

"Is this your verdict?

"Juror Vivian C. Nelson: Yes.

"Juror Kathryn A. Elledge: No.

"Juror Sam Jurow: No.

"Juror Jean Jensen: Yes.

"Juror Mary Kellerman: Yes.

"Juror Goldie Schieber: No.

"Juror Cora B. Jones: Yes.

"Juror Zella Meeker: Yes.

"Juror Grace Berg: Yes.

"Juror George C. Gibbs, Jr.: Yes.

"Juror George Meyer: Yes.

"Juror Kathryn S. Marshall: No.

(Upon the completion of the polling of the twelfth juror, the clerk again read the verdict, whereupon the following proceedings occurred):

"Juror Mrs. Schieber: I didn't vote for the defendant. I voted for them both.

"Mr. Gilbert: I think, your Honor, Mrs. Schieber has stated her misunderstanding. She stated she voted for—that they were both negligent, which would result in a verdict for the defendant. * * *

"The Court: Mrs. Schieber, I possibly didn't understand your answer there. The verdict—I am not giving you the formal verdict, but the verdict in effect was against the plaintiff, and that is that neither of them could collect from the defendant. Now the question was: did you vote for that verdict as a verdict or against the verdict?

"Juror Mrs. Schieber: I voted that the plaintiff couldn't collect for—that they were negligent, and also that the defendant was negligent.

"The Court: Then it was your verdict against the plaintiff and in favor of the defendant.

"Juror Mrs. Schieber: No. I voted they were both negligent.

"Mr. Gilbert: Your Honor, that is a matter of law.

"The Court: Yes, I can put it this way—I think I get it. I am not trying to force you in the matter into making a statement, but I think you voted—in other words, you voted against the plaintiff,—both of them?

"Juror Mrs. Schieber: Yes, sir.

"The Court: Then there is only one way you could vote which we have in mind: that was the verdict against the plaintiff.

"Juror Mrs. Schieber: Yes, sir.

"Jury Forewoman: We have a record of the way they voted.

"The Court: Yes. I believe under the statement by the juror, counsel, it has to go over into the 'yes' column. In other words, we are not polling now as to how they reached the verdict.

"Mr. Pollock: I am going to object to the verdict, your Honor, on the basis that I think that the orderly procedure would be for the jury to deliberate further in view of the fact that while at the time of the poll the vote stood at 8 to 4,—that is true, that one of the jurors indicated, namely, Mrs. Schieber, that there was a question in her mind—that is to say, that she had voted, or, rather, was of the opinion that both parties were negligent, but since there is a further issue as to whether or not the negligence of the minor was a proximate cause of the accident, I feel that that is an unsatisfactory way to leave the thing, that the verdict should—I mean, that it is not simply a question of law where the responses to the jury poll indicates 8 to 4, and how the jurors arrived at their 'Yes' or 'No' answers—

I don't think that that is a matter for the Court to inquire into, and I think that it is matter for the jury. * * *

"Mr. Pollock: I am going to object to the dismissal of the jury under the circumstances, your Honor, and assign it as error under the circumstances to inquire any further than simply the question of whether or not the juror did or did not vote for a particular verdict.

"The Court: Mrs. Schieber, in the jury room—

"Juror Mrs. Schieber: In the jury room we were 9 to 3. I voted—that is how the vote was. It wasn't 8 to 4. It was 9 to 3.

"Mr. Pollock: I submit, your Honor, what went on in the jury room is certainly not a matter to discuss as far as the Court is concerned.

"The Court: Of course, I don't want to appear arbitrary in the matter if there is any possibility of causing any further hardship or expense on anyone, I would be glad to have the jury retire again to the jury room and reconsider the matter. However, at least to me it is plain that the lady's vote was for the defendant. What are your feelings, Mr. Gilbert?

"Mr. Gilbert: Your Honor, in view of what has been said, I think it is perfectly apparent Mrs. Schieber just thought she was being asked whether she voted that the defendant was not negligent, and she made it plain that she didn't mean that, that she meant they were all negligent, and it thus becomes a matter of law, their verdict having once been rendered, it is perfectly obvious, as your Honor says, that that is what she meant, that neither side could recover.

"Juror Mrs. Schieber: That is how I voted.

"Mr. Gilbert: And I therefore move your Honor to accept the verdict and instruct the clerk to enter it in due course.

"The Court: I have inquired so far, and I am going to ask one more question now: Mrs. Schieber, you stated that when you left the jury room the vote was 9 to 3. May I ask now, were you one of the nine voting on the verdict that was arrived at?

"Juror Mrs. Schieber: I was, yes. * * *

"Mr. Pollock: If the court please, before the objection is ruled on, will it be shown for the record that we object to the recordation of the verdict in view of the poll showing the jury was eight for the defendant and four 'Noes,' and that we object to the jury being discharged under the circumstances.

"The Court: All right. The objection will be overruled and the clerk will be ordered to enter the verdict."

[5] Clearly no prejudicial error resulted from the procedure which the court followed. Section 619 of the Code of Civil Procedure reads, "When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out."

It is evident that Mrs. Schieber voted in the jury room in favor of defendant and the procedure followed by the trial judge was not prejudicial to plaintiff. Hence there was no error in the trial court's not sending the jury out for further deliberation.

In view of the fact there was no sound basis for the order granting plaintiffs' motion for a new trial it must be reversed.

B. Plaintiffs' Appeal

First: *Was there substantial evidence to sustain the judgment in favor of defendant?*

[6, 7] *Yes.* By the evidence, which supported the facts stated above, the trial jury had been presented the issue of fact as to whether or not defendant was negligent. From such evidence the trial jury may have found that the accident was an unavoidable one or that defendant was not negligent. In either event the verdict in favor of defendant would be supported by the evidence and this court under the familiar rule is

bound by the findings of the trier of fact where there is any substantial evidence to sustain its finding.

The order granting the motion for a new trial is reversed; the judgment in favor of defendant is affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

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113 Cal.App.2d 741

SMITH v. SHEFFEY et al.

Civ. 15180.

District Court of Appeal, First District, Division 1, California.

Oct. 21, 1952.

Hearing Denied Dec. 18, 1952.

Action was brought to have trustee's sale of realty under trust deed declared void, to have the trust deed reinstated, and for an accounting. The Superior Court of the County of Santa Cruz, Anthony Brazil, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained finding that action was barred by laches.

Judgment affirmed.

1. Mortgages ⇨342

Pledgee of note and trust deed could exercise power granted by statute to appoint a new trustee, particularly where instrument of pledge expressly declared that pledgee should have right at any time note should be in default to give notice of default and should have right to pursue all rights and remedies for collection of note that assignee had. Civ.Code, § 2934a.

2. Mortgages ⇨369(5)

In action to have trustee's sale of the land under trust deed declared void, to have trust deed and indebtedness secured by it reinstated, and for an accounting, evidence sustained finding that plaintiff's alleged right of action was barred by laches.

3. Equity ⇨87(1)

Statutes of limitation do not control equity in applying the principle of laches.

4. Appeal and Error ⇨949, 1009(2)

Question of existence of laches is to be determined primarily and very largely by trial court, and an appellate court will not interfere with trial court's exercise of its discretion unless manifest injustice has been done, or unless its conclusion cannot reasonably be held to find support in the evidence.

Robert Hayes Smith, Burlingame, for appellant.

Alden Ames, Simeon E. Sheffey, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff appeals from a judgment that he take nothing, in an action brought by him to declare void the trustee's sale of certain land under a deed of trust, to reinstate the deed of trust and the indebtedness secured by it, and for an accounting.

The deed of trust was executed August 22, 1938, by H. J. Grenville and Kathleen Moore to secure their promissory note (hereinafter called the Grenville note) in the principal sum of $5,785.90. June 27, 1940, Monterey Bay Properties Corporation (hereinafter called the Monterey company) became the owner of the Grenville note. By a writing dated June 27, 1940, acknowledged October 18, 1940, and recorded July 16, 1941, the Monterey company designated California Pacific Title and Trust Company as trustee in lieu of the trustees originally appointed. October 18, 1940, the Monterey company assigned to defendant Simeon E. Sheffey its interest in the Grenville note and deed of trust as collateral security for its note in the sum of $1,100 to Sheffey as payee. It was agreed that if Sheffey collected the money due on the Grenville note, the surplus over the amount due on the $1,100 note would be paid by him to the Monterey company or its assigns.

March 27, 1941, Monterey company executed an agreement with the plaintiff to assign to him its rights in the Grenville note and deed of trust subject to the prior assignment thereof to defendant Sheffey. By an instrument dated March 27, 1944, acknowledged November 14, 1947, and recorded November 19, 1948, the Monterey company assigned to plaintiff all its right, title and interest in the Grenville note and deed of trust subject to the prior assignment to defendant Sheffey.

In March, 1941, Sheffey filed notice of default in payment of the Grenville note. By an instrument dated October 30, 1941, and recorded November 27, 1941, defendant Sheffey designated Eric Falconer as trustee under the Grenville deed of trust. December 30, 1941, Falconer, as trustee, sold the property to Sheffey for $1,075, the balance due Sheffey on the Monterey company note. The trustee's deed dated December 30, 1941, was recorded February 2, 1942. November 19, 1948, plaintiff filed the present action predicated principally upon the claim that the deed to Sheffey as purchaser at the trustee's sale was void because assertedly Falconer had not been legally appointed trustee under the deed of trust.[1]

The court found against the plaintiff upon all the issues and concluded that the rights of plaintiff were foreclosed by the foreclosure sale held by Falconer, as trustee; that plaintiff's cause of action was barred by section 338(4) of the Code of Civil Procedure; that his cause of action was barred by the laches of plaintiff in the prosecution of his action; and that defendant Sheffey is owner in fee of the lands involved except those portions which he deeded to defendant Cevasco who is the owner in fee of those portions, and that the defendants have acquired title to the lands by adverse possession and paying all taxes and asssessments levied against the lands for the period required by law to gain title by adverse possession.

[1] Plaintiff's main attack upon the validity of Sheffey's appointment of Falconer as trustee is based upon the theory that Sheffey was a mere pledgee of the beneficiary's rights under the deed of trust, hence could not exercise the power given the "beneficiary" by section 2934a of the Civil Code to appoint a new trustee. This point is not well taken, particularly in view of the fact that the instrument of pledge expressly declared that Sheffey, the pledgee, "shall have the right at any time said note assigned as collateral security hereby is in default to give notice of default in the manner prescribed by law in the name of and on behalf of the parties hereto and shall have the right to pursue all of the rights and remedies for the collection of said assigned note that the undersigned assignor herein has."

[2–4] The finding that plaintiff's action is barred by his laches is amply supported by the evidence of the acts of dominion which defendant exercised over the land, commencing with his initial occupancy (January 1 or 2, 1942) and continuing to and after the filing of this action (November 19, 1948), interrupted only by the period of plaintiff's military service (August 19, 1942, to November 24, 1945). This period somewhat in excess of three and one half years (exclusive of the period of military service) fell short of the four-year period prescribed by section 343 of the Code of Civil Procedure. See Moss v. Moss, 20 Cal.2d 640, 644–645, 128 P.2d 526, 141 A.L.R. 1422, concerning the applicable statute of limitations. However, the statute of limitations does not control equity in applying the principle of laches, Livermore v. Beal, 18 Cal.App.2d 535, 548, 64 P.2d 987. "Laches does not rest entirely upon lapse of time. Unlike the statute of limitations it does not require any specified period of delay. [Citation.] Courts of equity will refuse relief even where the statutory time of limitation has not run, if in addition to mere passive neglect there is a showing of facts amounting to acquiescence in the acts complained of, or other circumstances which, coupled with the delay, render the granting of relief inequitable." Neet v. Holmes, 25 Cal.2d 447, 460, 154 P.2d 854, 861. Laches is a question of fact and as such is a question "to be determined primarily and very largely by the trial court, and an appellate court will not interfere with its discretion in this respect unless manifest injustice has been done, or unless its conclusion cannot reasonably be held to find support in the evidence." Wolpert v. Gripton, 213 Cal. 474, 483, 2 P.2d 767, 770; and see Gutknecht v. Paul, 83 Cal.App.2d 356, 188 P.2d 764.

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[1] During the trial plaintiff also contended that defendant Sheffey acquired title at the trustee's sale but acquired it subject to a trust in favor of plaintiff, predicated upon an asserted attorney-client relationship. The trial court found there was no such relationship and plaintiff does not challenge that finding upon this appeal.

A brief summary of Sheffey's dealings with the land and plaintiff's knowledge thereof and acquiescence therein will demonstrate the sufficiency of the evidence to support the finding of laches. Sheffey went on the land and took possession January 1 or 2, 1942. He rented it to one McKernan for the year 1942 for $15 which McKernan paid for the privilege of running his horses on the land and making sure that the gates would be kept closed. In 1943 Sheffey let one Cordy run cattle on the property for $25, an arrangement which was repeated in subsequent years until the fall of 1947, Cordy ditching the roads on the property during each rainy season in lieu of paying a cash rental. In 1943 Sheffey cleared the roads on the property and cleaned out two springs, constructing dams to hold some of the spring water. Sheffey's son also worked on clearing the roads and on the springs. In 1945 or 1946, Sheffey and his son commenced the building of a cabin on the property which was finished in 1947. From 1942 to the time of the trial Sheffey spent weekends on the property camping out there until the cabin was completed.

In July, 1941, Sheffey told R. H. Smith, the father of the plaintiff,[2] that he was substituting one Eric Falconer as trustee under the Grenville deed of trust. He also informed R. H. Smith that there was nothing to do but foreclose as Grenville had said he would make no further payments. R. H. Smith said he would pay the balance due Sheffey and take an assignment of Sheffey's claim but he never paid Sheffey anything. In November, 1941, Sheffey told R. H. Smith he had waited as long as he was going to wait and was going to foreclose. Again, Smith said he would get the money to Sheffey but he paid nothing, and made no offer or tender of payment. A few days after the sale, Sheffey told R. H. Smith that the trustee sale had been held, that it wiped out all liens including Smith's and that Smith no longer had any interest in the property. In May, 1942, R. H. Smith as attorney in fact for plaintiff and knowing that Sheffey claimed to be the owner, entered into a written agreement with Sheffey whereby Sheffey agreed to sell and plaintiff to buy this property for $3,000 with a right in the buyer to remove timber and cordwood, paying certain rates therefor, such payments to be credited on the purchase price. In 1942, a Mr. Brooks was on the property, improving it under a contract with Smith. In January, 1943, Sheffey terminated his agreement with Smith for failure of Smith to make any payments.

Sheffey paid all taxes levied on the property from 1941, including delinquent taxes from 1938, claiming the property as his own. In 1944 and 1945, Sheffey conveyed three 40-acre parcels of this property to defendant Cevasco in consideration of her paying delinquent taxes on the land.

In view of our conclusion that plaintiff's action is barred by his laches, it is unnecessary to consider other reasons advanced by the defendants in support of the judgment.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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[2] Sheffey never met the plaintiff, Nicol Smith. All of his dealings in relation to plaintiff were with the latter's father, R. H. Smith, who acted as plaintiff's attorney in fact. R. H. Smith is an attorney at law and in that capacity represents the plaintiff upon this appeal.

113 Cal.App.2d 724

BURKE v. IKUTA.

Civ. 18763.

District Court of Appeal, Second District, Division 1, California.

Oct. 20, 1952.

Action to recover attorney fees alleged to be owing by defendant to plaintiff's assignors for conducting divorce litigation of defendant's wife. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., rendered a judgment adverse to the plaintiff, and the plaintiff appealed. The District Court of Appeal, Doran, J., held that evidence justified finding that there was no account stated and that defendant never agreed to pay his wife's attorney fee.

Judgment affirmed.

1. Account Stated ⚿7

An account stated does not in itself create an original liability and there must be some debtor and creditor relation theretofore existing between parties, the amount of which debt is determined by assent, either express or implied, to some statement of account.

2. Account Stated ⚿12

An account stated may be avoided by proof of fraud or mistake.

3. Account Stated ⚿19(3)

In action to recover attorney fees alleged to be owing by defendant to plaintiff's assignors for conducting divorce litigation of defendant's wife, evidence justified finding that there was no account stated and that defendant never agreed to pay his wife's attorney fee.

◆

Robert E. Sease and Cletus J. Hanifin, Los Angeles, for appellant.

Respondent in pro. per.

DORAN, Justice.

The present appeal is from a judgment in defendant's favor denying recovery of attorney fees alleged to be owing by the defendant husband to plaintiff's assignors for conducting the wife's divorce litigation. The complaint in three causes of action based on an open book account, an account stated, and for reasonable value of professional services "at defendant's instance and request," sought recovery in the amount of $7,500.

Cletus J. Hanifin and Robert E. Sease, attorneys at law, plaintiff's assignors, had been retained by Mrs. Chiyoko Ikuta, defendant's wife, in August, 1948, in reference to a divorce action. Community property worth some $300,000, located in California and Honolulu, was owned by Dr. and Mrs. Ikuta. As a result of certain detective work, a complaint for divorce alleging cruelty and adultery, was filed for Mrs. Ikuta, seeking custody of three minor children, support for wife and children, award of all community property, and attorney fees of $10,000. An order to show cause in re alimony, custody, restraining order, attorney fees, etc., was likewise prepared, and copies thereof personally served on Dr. Ikuta on September 10, 1948.

Immediately thereafter there began a series of conferences relating to proposed reconciliation, Dr. Ikuta being represented by an Attorney Samuels. The last of these conferences took place on October 3, 1948, at which time a reconciliation agreement was arrived at under which Mrs. Ikuta was given three-fourths of the community property. The order to show cause, set for October 6th, was allowed to go off calendar, and a dismissal with prejudice was executed on October 12, 1948, and duly filed.

On November 8, 1948, Mrs. Ikuta's attorneys Hanifin and Sease sent a statement to Dr. and Mrs. Ikuta, then reconciled and living together, covering the claimed $7,500 attorney fees. Certain conferences concerning this matter then ensued at which, plaintiff alleges, Dr. Ikuta agreed to pay said sum which was to be reduced to $6,100 if paid immediately. Dr. Ikuta denies any such agreement. Shortly thereafter Mrs. Ikuta informed Attorney Hanifin that Dr. Ikuta had breached the reconciliation agreement in so far as it pertained to a co-respondent and instructed the attorney to file another action for divorce, which action was filed on December 7, 1948.

The present action, seeking judgment against Dr. Ikuta for Mrs. Ikuta's attorney fees, was filed December 17, 1948, to which the defendant filed answer denying any liability. Thereafter the answer was amended to include the defense of the statute of frauds. The complaint was likewise amended to include a cause of action for fraud, and alleging estoppel. The action first came to trial before Judge Otto J. Emme under a stipulation that the matter of liability should first be decided before taking testimony as to extent of liability. The trial court, however, rendered judgment as prayed for by plaintiff, and a mistrial was declared on the grounds that the court had gone beyond the terms of the stipulation. At a second trial before Judge Wilbur C. Curtis, judgment was rendered for the defendant from which plaintiff now appeals.

The trial court found that the defendant, Dr. Ikuta, was not indebted to plaintiff in any sum; that there was no account stated; that the attorneys had performed no professional services "at defendant's instance or request, or otherwise," and that Dr. Ikuta had at no time agreed to pay anything to Mrs. Ikuta's attorneys. It was further found that if Dr. Ikuta did agree to pay attorney fees for representing Mrs. Ikuta, "the said agreement was not supported by adequate consideration, and was not in writing, and is invalid and unenforceable under the Statute of Frauds."

The appellant contends that the various findings of the trial court are "not sustained by any substantial evidence," and submits that "The Appellate Court should fix the amount of plaintiff's attorney fees and order judgment accordingly." In the respondent's brief are set out various items of evidence in support of the trial court's findings.

Among other matters, respondent calls attention to the fact that in the reconciliation settlement, Dr. Ikuta transferred to Mrs. Ikuta property valued at some $200,000, and according to Attorney Hanifin's testimony, "there was some talk about the attorney's fees and there was some mention made about the fact that if Mrs. Ikuta was getting certain properties that she should pay attorney's fees * * *." There is also testimony to the effect that Dr. Ikuta stated in respect to the attorney fees that Mrs. Ikuta would have to be consulted, and that "My wife will be in to see you within the week"; further, that Mr. and Mrs. Ikuta had considered selling the "St. Louis Heights property" in Honolulu in order to pay attorney fees.

Appellant's brief claims that Dr. Ikuta promised to pay the wife's attorney fees "even though no fixed amount was agreed upon." There is evidence that the Doctor and Attorney Samuels objected to $7,500 as too large an amount for the wife's attorney inasmuch as the case never went to trial. Respondent suggests that "with the lack of this essential element (amount of the fee)," it is unlikely that Dr. Ikuta would have made a promise to pay the wife's attorneys.

In support of plaintiff's claim that there was an account stated, special reference is made to Dr. Ikuta's deposition taken as a part of the second divorce case which followed the reconciliation. Dr. Ikuta was asked to make a financial statement, and under a "Debts outstanding" column listed "My attorney fee for this time," followed by a blank, and "Mr. Hanifin wife's fee for this time"; in the column "due amount" setting out the words "7500 or 6100 cash." Dr. Ikuta explained that "This was only made because you (Hanifin) said to put in the liabilities," and that "It is not my financial statement. It is the family's financial statement." The trial court found that there was no account stated and that Dr. Ikuta at no time agreed to pay Mrs. Ikuta's attorney fee.

[1–3] In reference to an account stated, it is to be noted that such a document does not in itself create an original liability. There must be some debtor and creditor relation theretofore existing between the parties, the amount of which debt is determined by assent, either express or implied, to some statement of the account. And even where an account is stated, it may be avoided by proof of fraud, mistake, etc.

See Coffee v. Williams, 103 Cal. 550, 553, 37 P. 504. As respondent's brief suggests, then, the basic question before the trial court was whether any debtor-creditor relation existed and whether Dr. Ikuta ever agreed to pay the attorneys who represented Mrs. Ikuta. Although there is conflict on that question, the record discloses substantial evidence in support of the finding.

Appellant likewise assails the trial court's finding that Mrs. Ikuta by property settlement, "acquired approximately three-fourths of the community real property * * * valued at more than $200,000.00, in consideration of the reconciliation and subsequent dismissal 'with prejudice' of the said divorce action," as not sustained by substantial evidence, "if said finding is meant by the trial court as a finding that the only consideration was the transfer of said real property."

In this connection, appellant maintains that there were other considerations, one of which was "that Dr. Ikuta would pay plaintiffs their attorney fees." Respondent answers this by saying that "While reconciliation is sufficient consideration for the property settlement given to Mrs. Ikuta, it cannot provide a good consideration for an agreement between husband and wife for payment of wife's attorney fee for which husband is not liable."

Along this same line, appellant objects to the finding that neither the attorneys nor Mrs. Ikuta, "relied upon any promise of the defendant Shunji K. Ikuta to pay their attorneys' fees." A survey of the record, however, indicates that all of these matters were the subject of more or less conflict at the trial, and that while it may be possible to point out certain items of evidence which seem to favor appellant's contentions, nevertheless the record also discloses substantial evidence and legitimate inferences therefrom, in support of all of the findings made by the trial court. And such being the case, the well established rule prevents any further appellate review of the evidence.

The trial court further found that if Dr. Ikuta did agree to pay Mrs. Ikuta's attorney fees the agreement not being in writing was unenforceable under the Statute of Frauds. Appellant, however, contends that the alleged promise, although oral in form, was not one to answer for the debt, default or miscarriage of another; that if a written memorandum was required, Dr. Ikuta's property statement hereinbefore referred to, was sufficient; that in any event Dr. Ikuta is estopped from setting up such defense.

Appellant's brief insists that, although the order to show cause in re attorney fees, etc., had gone off calendar along with dismissal of the divorce case, there was some sort of "obligation imposed upon Dr. Ikuta to pay the attorney fees," and that "the record reveals a case in which the court would have without any doubt awarded attorney fees, under Section 137 et seq. of the Civil Code." However, as respondent's brief points out, no such order had been made and the making of such order was, under the statute, within the court's discretion. No such obligation existed until some order was made, fixing the amount and terms of payment.

Reference has heretofore been made to the financial statement made by Dr. Ikuta, and claimed by appellant to be such a memorandum as would take the matter out of the statute of frauds. As explained by Dr. Ikuta, this was "the family's financial statement" made as a part of the defendant's deposition in the second divorce case. The trial court could well believe as a reasonable inference from the evidence, that this statement was never intended to serve as an account stated. It was, in fact, no memorandum of any contract, and set forth no essential provisions of an agreement.

Appellant's argument that Dr. Ikuta is estopped to set up the statute of frauds is not persuasive. The case of Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, dealing with such estoppel, bears no factual resemblance to the present situation. Appellant's observation that "Reconciliation agreements are highly favored," etc., and that because the wife's attorneys assisted in a reconciliation, the husband should be forced to pay, adds nothing to the argument.

As previously indicated, there is evidence from which the trial court could well conclude that Dr. Ikuta never agreed to pay the wife's attorneys, and that there was some discussion to the effect that since Mrs. Ikuta received settlement properties of some $200,000 "she should pay attorney fees." The findings and judgment find adequate support in the record, and are not contrary to law.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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113 Cal.App.2d 682

PEOPLE v. DODD.

Cr. 4720.

District Court of Appeal, Second District, Division 3, California.

Oct. 16, 1952.

Defendant was convicted in the Superior Court of Santa Barbara County, Walter J. Fourt, J., of burglary, and he appealed from the judgment and from order denying motion for new trial. The District Court of Appeal, Shinn, P. J., held that that evidence was sufficient to sustain the conviction.

Judgment affirmed.

1. Criminal Law 🔑511(2)

Evidence corroborating an accomplice's testimony is sufficient to sustain conviction if it tends to connect the defendant with the commission of the crime.

2. Criminal Law 🔑511(3)

In determining whether there are circumstances corroborating testimony of accomplice, relationship of individuals and all of their acts and conduct may be considered.

3. Criminal Law 🔑511(1)

Evidence was sufficient to corroborate testimony of accomplice and to sustain conviction for burglary.

Edwin D. Jones, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a nonjury trial appellant Dodd was convicted of second degree burglary. He was charged with and admitted a prior conviction of a felony for which he served a term in prison. He appeals from the judgment and from an order denying his motion for a new trial.

Upon the request of appellant for appointment of counsel this court appointed Edwin D. Jones, Jr., a member of the voluntary committee of the Los Angeles Bar Association on Criminal Appeals, with a request that he make a full report to the court after a study of the record and file a brief on behalf of the appellant if he should entertain a doubt that appellant was given a fair trial or whether any arguable ground exists for reversal of the judgment. Such report has been received, with counsel's statement that in his opinion no such ground of appeal exists. The report is considered as a substitute for a brief and does not call for a reply. From our examination of the record we are in full agreement with the conclusion stated in the report of counsel.

We have examined the record and find that during the trial the court made no rulings upon the admission or exclusion of evidence which were adverse to the defendant. There remains for consideration only the question whether there was substantial evidence that the crime charged was committed by the defendant. One Gonderman was jointly accused of the burglary and his case has been handled in the juvenile court. He was a witness for the People and implicated Dodd in the burglary. The question of the sufficiency of the evidence relates to that which tended to corroborate the testimony of the accomplice.

Gonderman testified that he had known defendant Dodd for 12 years; In May, 1951, he and defendant, looking for work on tunnel construction, drove in defendant's car from Los Angeles to Santa Barbara and thence to San Marcos Pass in the same area; they slept for two nights by the side of the road in the San Marcos Pass; they stopped at the Cold Springs Tavern and were directed to Paradise Camp where cabins were available; they discussed going to Paradise Camp to get blankets and whatever else could be found from an empty cabin in order to improve their roadside sleeping conditions; they found a relatively isolated cabin and defendant taped a window and broke it with his fist; defendant stood on a small stand below the window and after picking out the remaining pieces of glass, broke the inside screen and took it out; Gonderman then boosted the defendant through the opening and followed him; it was about 10 o'clock p. m. and there were no lights in the cabin; defendant and Gonderman used small wooden matches to see their way around; in the bedroom which they entered they picked up a stack of blankets, went to the kitchen and got silverware, a hot plate, pots and pans, and, from the living room, two large cushions. Defendant climbed back out the window and Gonderman handed the various articles to him; when the deputy sheriff arrested defendant on the morning of May 17th Gonderman was seated in defendant's car; at the time there were no keys in the car.

William Parker, a retired building contractor residing in Santa Barbara, testified that he owned a cabin in Los Prietos (in Santa Barbara County) which he and his family used for occasional weekend visits; the cabin was kept furnished and stocked with all the necessary utensils, bedding and appliances for purposes of use on short notice; at no time had Mr. Parker given defendant Dodd or his companion Gonderman permission to enter the cabin; on Saturday, May 26, 1952, Parker drove to the cabin, went in the front door and saw small burnt matches all over the floor and the bedroom window broken; missing were blankets, large couch pads, silverware, pots and pans and an electric hot plate; the window had been taped with masking tape, then broken and the broken part placed on the ground; the window was about 6 feet above the surface of the ground; later, in the Santa Barbara County Court House, Parker identified a group of articles which had been taken from defendant's car by the officer; in support of his identification he testified that he had previously repaired one element of the hot plate and thus was able to identify it. He also testified that he had personally made the couch pads.

Clayton Cornish testified that he was a deputy sheriff; that in company with Deputy Sheriff Harry Looney he arrested defendant on the morning of May 17th at the mouth of the Tecolote Tunnel. Cornish took defendant to the latter's 1937 car which was parked close by and found Gonderman seated in the car; there were no keys inside the car. In the back seat of the car there were blankets, quilts, sheets, cushions and also a roll of white masking tape similar to that which had been used to break open the cabin window. Cornish took Gonderman in his car and Looney went with the defendant; they drove to defendant's camp by the roadside about a mile and a half away and there found some cooking utensils and an electric hot plate. Cornish in his car then followed the defendant to Santa Barbara. When Cornish questioned defendant on May 27th defendant said he had brought a hot plate and silverware from Los Angeles.

Harry Looney testified that he was one of the arresting officers and rode with defendant in defendant's car to Santa Barbara; when defendant came out of the tunnel and was taken to his car he took the keys to the car out of his pocket; during the drive to Santa Barbara a conversation took place in which defendant said all the articles in the car had been brought from Los Angeles; only one hot plate was found. The foregoing constituted the direct evidence of the People.

Defendant testified that he and Gonderman arrived at the Cold Springs Tavern about 8:30 p. m. on May 16, 1951, and talked about getting a job; they got in defendant's car and drove down to the lower part of the Cachuma Dam; at that point Dodd left the car and went to a little building and asked a man about work; he was referred up to the tunnel; when he got back to where the car had been parked the car and

Gonderman were gone; Dodd walked 3 miles up to the tunnel entrance arriving about 11 o'clock p. m.; he there talked about work to Robert Ellison who was in charge of the shift; after talking to Ellison, Dodd noticed his car nearby and Gonderman sitting in it; he asked Gonderman where he had been and then saw that there were quilts and other supplies in the back seat of the car; he told Gonderman to take them back where he had got them, which Gonderman said he would do; Dodd sat down and read a paper for a few minutes, then went outside, saw his car and Gonderman again and was told by Gonderman that he had returned the stolen articles. Defendant testified that he knew Eugene Edwards, later called as a witness, having met him previously in Los Angeles.

Robert Ellison testified for defendant that he was a shift chief on the Tecolote Tunnel job on May 16, 1951; Dodd had previously worked for him in 1947 on a Feather River Canyon job; Dodd came to him shortly after 11 o'clock p. m. on May 16th and asked him for work; he did not know Gonderman at all; he had no knowledge of Dodd's whereabouts prior to 11 o'clock p. m. that evening.

Eugene Edwards was called by the defendant. He testified that he first met Dodd in the Santa Barbara County Jail and did not remember having met him previously in Los Angeles; that he did not know Carl Gonderman. He testified that he had told defendant's attorney that he had previously met Dodd in Los Angeles and that he had seen Gonderman before but that these statements were untrue; that in the jail Dodd had asked him to make these statements to his (Dodd's) attorney and also to tell him that he had seen Gonderman in Dodd's car in Santa Barbara on the night of the 16th of May. He insisted that the statements made to defendant's attorney were untrue and that he was testifying to the truth. He also testified that his conversations at the jail with Dodd were in the presence of two other persons, one named Pascual and the other called Wimpy.

Frederick A. Van Order was called by the defendant. He testified that he had been in the same cell with Dodd for two days and that Edwards had been in the same tank but not the same cell and that he had heard no conversation between Dodd and Edwards concerning Dodd's case.

Richard H. Byrd, called by the defendant, testified to the same general effect as Edwards. He was questioned whether Dodd had talked to him about his case and stated he would not care to make any comment about that as it could implicate Dodd.

Pascual Bustos was called by defendant and testified that he knew nothing of any conversation between Dodd and Edwards.

After Edwards and the other witnesses had testified, Dodd did not take the stand or deny that he had coached Edwards to tell his (Dodd's) attorney that he had known Gonderman and had seen him alone in Dodd's car.

[1-3] There was abundant evidence to corroborate the testimony of Gonderman that he and Dodd together had committed the burglary. It is well settled that corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime and that the relationship of the defendant and the accomplice and all their acts and conduct may be considered in determining whether there are corroborating circumstances. People v. Henderson, 34 Cal.2d 340, 209 P.2d 785. The defendant's statements and admissions, made in connection with his testimony, may afford corroboratory proof sufficient to sustain a verdict. False or conflicting statements as to material facts may constitute corroborative evidence. People v. Sullivan, 144 Cal. 471, 77 P. 1000. The following evidence tended strongly to corroborate testimony of Gonderman; defendant and Gonderman had a common need for bedding and cooking utensils with which to equip their roadside camp; a part of the stolen articles were found in defendant's car and the remainder at the camp; defendant and Gonderman were together both before and after the burglary and defendant knew that the articles which were in his car had been stolen; the fact that he had the keys to the car was in direct contradiction of his testimony that

Gonderman had used the car without his consent; his statements, testified to by the officers, that he had brought the stolen articles from Los Angeles were contrary to his testimony at the trial. The testimony of the witness Edwards, if believed by the court, proved that defendant had a consciousness of guilt and was endeavoring to fabricate a defense by the use of false testimony. It cannot reasonably be contended that the testimony was legally insufficient to establish defendant's guilt.

The judgment and order denying motion for a new trial are affirmed.

WOOD and VALLÉE, JJ., concur.

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113 Cal.App.2d 661

SIEGEL et ux. v. BAYLESS et al.

Civ. 18984.

District Court of Appeal, Second District, Division 2, California.

Oct. 16, 1952.

Hearing Denied Dec. 11, 1952.

Claim and delivery proceeding to recover possession of automobile which plaintiff-owners had authorized their agent to deliver to a used automobile dealer and had allowed to remain on the dealer's display lot, and which had been sold to defendants with plaintiff's approval. Defendants filed cross-complaint to quiet title to the automobile. The Superior Court of Los Angeles County, Roy L. Herndon, J., entered judgment quieting title in defendants, and plaintiffs appealed. The District Court of Appeal, Fox, J., held that as to defendants who had no notice of plaintiffs' claim, the used automobile dealer was a factor with authority to deal with the automobile as his own, and that, as between plaintiffs and defendant, plaintiffs would suffer the loss caused by the dealer.

Judgment affirmed.

1. Factors 🔑1, 53

Where automobile owners' agent, upon authority of owners, delivered automobile to used automobile dealer with directions that he display it for sale, as to purchasers of the automobile who had no notice of owners' claim, the dealer was a factor with authority to deal with the automobile as his own. Civ.Code, §§ 2026, 2369.

2. Factors 🔑66

In action of claim and delivery by owners of automobile against persons who purchased it from a factor who had absconded with proceeds of sale, whether purchasers had sufficient notice to put them on inquiry as to ownership, and were negligent in not pursuing it, were questions for the trier of facts.

3. Automobiles 🔑19

Where motor vehicle had never been registered in California, lack of compliance with provisions of Vehicle Code relating to the transfer of a vehicle registered in California did not prevent a factor employed by owners of the automobile from passing title to purchasers. Vehicle Code. §§ 175(a), 186(a).

4. Estoppel 🔑72

Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer. Civ.Code, § 3543.

5. Estoppel 🔑75

As between purchaser of automobile from used automobile dealer who absconded with proceeds of sale, and owners who authorized their agent to deliver automobile to the dealer and allowed it to remain on his display lot and approved a sale by him, the owners, whose activity justified an inference of negligence, would have to suffer the loss caused by dealer. Civ. Code, § 3543.

Frye & Yudelson, North Hollywood, for appellants.

Irwin & Melby, Glendale, for respondents.

FOX, Justice.

Plaintiffs sought to recover possession of a certain Cadillac automobile through a claim and delivery proceeding. Defendants denied their right of possession and filed a cross-complaint to quiet title to the car. From a judgment quieting title in defendants, plaintiffs appeal.

In August, 1950, plaintiffs, residents of Detroit, Michigan, turned over their 1949 Cadillac to one Couls to drive to California for the purpose of selling it. Couls was also given the registration certificate which bore the genuine signature of Mr. Siegel on its face, but was never endorsed on the back. The Michigan certificate of title was not delivered to Couls but has remained in the possession of plaintiffs. Prior to leaving Detroit, Couls wired Clifford Cole, a used car dealer in Los Angeles, regarding the state of the local market on second hand Cadillacs. He showed Cole's reply to Mr. Siegel who was advised Cole was engaged in the used car business. Couls was authorized to sell the car for $3,600. Any sale at a lower price was required to be submitted to and approved by the owner.

Upon his arrival in California Couls tried without success for a number of weeks to sell the vehicle. He then contacted used car dealer Cole advising him that he had the Siegel Cadillac for sale. Cole thereupon took possession of the car, about the first of November, for the purpose of displaying it for sale to his clients. Couls advised plaintiffs he had given possession of the automobile to Cole who thought he had a buyer for it and that it had been placed on Cole's lot. The latter displayed it there for sale to prospective purchasers in the ordinary course of business for a period of approximately two weeks. During the latter period defendant Clifford Bayless observed it displayed for sale upon the used car lot, and had two conversations with Cole relating to buying it. Thereafter Cole informed Couls he had a buyer for the automobile for $3,100. This offer was communicated by Couls to plaintiffs who advised him the offer was satisfactory and to allow Cole to sell the car. Couls conveyed this information to Cole.

On November 14, 1950, Cole sold the automobile to defendants for $2,785. They gave Cole their check in that amount as payment. He, however, absconded with the proceeds. Cole delivered to defendants the automobile, the Michigan registration certificate, a power of attorney, a bill of sale to Cole from plaintiffs, and a California Department of Motor Vehicle form which normally accompanies the transfer of automobiles which bear an out of state registration. Each of these documents was in blank except that each bore the purported signature of plaintiff Bernard R. Siegel which, however, was a forgery on all the documents except upon the certificate of registration issued by the State of Michigan. This, of course, was not known to defendants. Cole also executed and delivered to defendants two additional documents, viz., a bill of sale to the car from himself to defendants, and an In Lieu of Ownership Certificate. At the time of this transaction the automobile carried Michigan license plates. It has never been registered in California.

The court found defendants were not negligent in the purchase of the automobile from Cole and that at the time of the purchase and delivery thereof they had no notice of any claim of ownership by plaintiffs.

The basic question is whether Cole was a factor in this transaction. It clearly appears from the evidence and findings that he was.

[1] Section 2026, Civil Code, defines a factor as "an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, * * *." There can be no doubt Cole was employed as an agent by plaintiffs to sell their Cadillac. He was engaged in an independent business. Possession of the car was delivered to him. Thus he meets all the requirements of a factor. As such he had "ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership." Civil Code, sec. 2369. Here the court has determined the purchasers of the automobile "had no notice of any claim of ownership of plaintiffs." Under these circumstances Cole had authority, so far as defendants were concerned, to deal with the automobile as his own, for although the

authority of a factor is by this section declared to be "ostensible," it is, "as to persons without notice, as real 'as it is when it is declared to be actual.'" 12 Cal.Jur., Factors, sec. 7, p. 416.

These principles were applied in Kenny v. Christianson, 200 Cal. 419, 253 P. 715, 50 A.L.R. 1297, where the factual situation was almost identical with our case. There the plaintiff or her agent delivered her Cadillac to one Patterson, who placed the automobile on his used car lot and displayed it for sale along with other second hand cars he was offering for sale. Christianson purchased the automobile from Patterson while it was thus offered for sale. Possession, together with a bill of sale, was delivered to the purchaser who paid Patterson the purchase price therefor. Patterson, however, as here, absconded with the money, and the original owner sought to recover possession of the automobile from the purchaser. The court held in favor of the purchaser on the theory that Patterson was a factor.

In Carter v. Rowley, 59 Cal.App. 486, 211 P. 267, the facts are also strikingly close to those in the case at bar. There also the rights of the purchaser of a car from a defaulting used car dealer were upheld as against the former owner. Another very similar case in this respect in which the used car dealer was held to be a factor is Babson v. Salisbury, 46 Cal.App. 521, 522, 189 P. 702.

None of the cases cited by plaintiffs approaches the factual situation disclosed by the evidence and findings in this case, and in the Kenny, Carter and Babson cases which, on very similar facts, establish the principle that is here applicable, viz., that Cole was a factor.

[2] Plaintiffs argue defendants had notice sufficient to put them on inquiry and that they were negligent in not pursuing it. These are both essentially questions of fact. From the evidence in its entirety the trial court drew the inferences on these questions in favor of defendants and found accordingly. We cannot say as a matter of law that the court was not justified in so doing.

[3] Plaintiffs point to various sections of the Vehicle Code that were not complied with. Hence, they contend, title did not pass to defendants. Since, however, this automobile has never been registered in California the provisions of our Vehicle Code are not here applicable. Section 175(a) of the Vehicle Code, which provides how a transfer of a registered vehicle may be made, and section 186(a), which declares such a transfer ineffective unless made and completed by a change of registration in the manner so provided, "are limited by their own terms to vehicles registered under the Vehicle Code. They do not apply at all to a vehicle not so registered, * * *." Willard H. George, Ltd., v. Barnett, 65 Cal.App.2d Supp. 828, 830, 150 P.2d 591, 592.

[4, 5] Finally, in support of the judgment it should be pointed out that the conduct of plaintiffs in turning the car over to Cole through their agent Couls, and in permitting it to be and remain on Cole's used car lot and actually authorizing him to sell the automobile on their behalf justifies an inference of negligence on their part. The court determined the defendants were not guilty of negligence in purchasing the car from Cole. This situation makes applicable the maxim that "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Civ.Code, sec. 3543. The loss here must therefore fall upon the plaintiffs.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

ANDREWS v. BOARD OF DIRECTORS & TREASURER OF MODESTO IRR. DIST. et al.

Civ. 8209.

Sac. 6287.

District Court of Appeal, Third District, California.

Oct. 22, 1952.

Hearing Denied Dec. 18, 1952.

Taxpayer's action against directors and treasurer of irrigation district to have such officers removed from office for alleged wilful violation of express duty to advertise for bids before purchasing three large electrical transformers. The complaint failed to allege that the equipment involved came within definition of word "works" as defined in statute requiring advertisement for bids. The Superior Court, Stanislaus County, B. C. Hawkins and Stanley Murray, JJ., sustained a general demurrer without leave to amend, and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that complaint failed to state cause of action.

Judgment affirmed.

1. Waters and Water Courses 🔑228½

Complaint which alleged that Directors and Treasurer of Irrigation District had purchased and paid for three large electrical transformers without advertising for bids, but failed to allege that the equipment purchased came within definition of word "works" as defined in the statute requiring advertisement for bids, failed to state a cause of action. Water Code, §§ 20537, 20540, 21196, 22300, 22301, 22306, 25670–25679.

2. Waters and Water Courses 🔑228½

Under statute requiring that bids be called for before contracts for construction of any works should be made by irrigation districts, Legislature intended to limit requirement to works as defined in the Water Code and such statute must be read as applying only to construction of works to be paid for by proceeds from sale of bonds or of a limited assessment. Water Code, §§ 20537, 20540, 21196, 22300, 22301, 22306, 25670–25679.

3. Waters and Water Courses 🔑228½

The multitudinous purchases which irrigation districts must make from time to time in ordinary transaction of their business are excluded from statute requiring bids to be called for before contracts for construction of any works should be made by the districts. Water Code, §§ 20537, 20540, 21196, 22300, 22301, 22306, 25670–25679.

◆

Frank Andrews, for appellant.

Vernon F. Gant, Modesto, for respondents.

VAN DYKE, Justice.

Herein plaintiff, as a taxpayer, brought action against the Board of Directors and the Treasurer of Modesto Irrigation District, complaining that the defendants had purchased and paid for three large electrical transformers without advertising for bids. A general demurrer was sustained without leave to amend and from the judgment entered thereafter this appeal has been taken.

In his complaint, appellant, who is acting in pro. per., asks that the trial court "invoke on the defendants [respondents here] the penalty prescribed by Law." He refers to Section 21196 of the Water Code, which provides that for any wilful violation of express duty the officers of the district are subject to removal from office.

Appellant contends that the district through its officials were required by law to call for bids before they might purchase the equipment alleged to have been purchased by them, and that their purchasing the same without such call was a violation of law. Appellant cites in support of his contention the following sections of the Water Code dealing with irrigation districts. Section 22300 reads as follows: "As used in this article 'works' is limited to any works to be paid for with the proceeds of the sale of bonds or a limited assessment." Section 22301 reads: "Contracts for the construction of any works shall be made pursuant to the provisions of this article." The sections following those quoted direct that the board of directors of the district give notice, by publication, calling for bids for the construction of "works" or of any portion thereof; and provide for the contents of such notice and various other matters, including the awarding of contracts to the lowest bidders. Section 22306 provides that in case of emergency or urgent necessity for any works, the board by unamimous vote of those present may award contracts without advertising for bids, if the cost of the works does not exceed $500 and an additional amount equal to five cents for each acre of land in the district.

[1] We think it clear that, in the absence of allegations that the equipment alleged to have been purchased without a bid comes within the definition of the word "works" as defined in the sections referred to, the pleading fails to state a cause of action. We are assuming, without deciding, that some right of action would rest in appellant, as plaintiff, if the law concerning bidding had been violated; and we do this because the respondents have requested that our decision be based upon the proposition advanced by them, contrary to the claims of appellant, that in purchasing such equipment as was here purchased they are not required to call for bids. In the absence of affirmative allegations to the contrary, it must be taken that the equipment did not come within the definition of "works" as given in Section 22300 of the code, that is, it must be assumed that the equipment was not to be paid for out of the proceeds of the sale of bonds or of a limited assessment.

[2] We think it clear that it was the purpose of the legislature, when requiring that bids be called for before contracts for the construction of any "works" should be made, was that the requirement should be limited to "works" as that word was especially defined. There could be no other explanation of the limitation imposed by the definition. The sections must be read as though they expressly stated that they had no application except to the construction of works to be paid for by the proceeds from the sale of bonds or of a limited assessment.

[3] By other sections a limited assessment is defined as meaning, "any or all of the following: (a) Completion assessment. (b) Particular purpose assessment. (c) Emergency assessment." Sec. 20540, Water Code. These three forms of assessments are in turn specifically defined as follows: "'Completion assessment' means an assessment levied pursuant to Article 2 of Chapter 2 of Part 10." Sec. 20537. The article, chapter and part referred to deal with assessments "for the completion of a plan of works". See Sections 25670–25679, inc. An assessment for a "particular purpose" may be levied for "any of the purposes of the district", but only after an authorizing election. And an emergency assessment may be levied "in cases of emergency by which the flow of water in a canal or other supply is interrupted." Bonds may be issued for the purpose of acquiring necessary irrigation, drainage, power development and distribution works, for acquiring the necessary property for such works, and "for the purposes of the district" and for otherwise carrying out the provisions of the irrigation district law. Sec. 24950. It thus appears that when the legislature enacted the sections having to do with the lettering of contracts on bids, it precisely limited the operation of those sections. It excluded therefrom the multitudinous purchases which these districts must make from time to time in the ordinary transaction of business; an exclusion which would naturally and reasonably be made, since these districts are authorized by law to engage, and frequently do engage, in the extensive operation of works for the generation of electric power, and in the distribution and sale of such power.

We think that the trial court correctly held that the complaint did not state a cause of action. The record shows that the court permitted the complaint to be once amended, that the defects herein pointed out were specified in the trial court, and that appellant, as plaintiff below, did not request leave to further amend.

The judgment is affirmed.

PEEK, J., and SCHOTTKY, J. pro tem., concur.

113 Cal.App.2d 705

LEWIS & QUEEN v. S. EDMONDSON & SONS et al.

Civ. 19031.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1952.

Hearing Denied Dec. 16, 1952.

Action by subcontractor against principals and surety on labor and material bond. The Superior Court of Los Angeles County, Alfred L. Bartlett, J., entered judgment adverse to principals and surety and they appealed. The District Court of Appeal, McComb, J., held that in view of fact that action on bond was for enforcement of primary direct obligation on bond, without regard to prime contract, when subcontractor had furnished material and performed services for which compensation was sought, any error, in admission of parol evidence relative to contract between prime contractor and subcontractor was immaterial.

Affirmed.

1. Bonds 🔑115

An action on a labor and material bond given by a contractor on a public work is for enforcement of a primary and direct obligation on bond, and same is maintainable without regard to the original prime contract, and without reference to any contract between the contractor and the materialmen.

2. Appeal and Error 🔑1050(1)

In view of fact that action on labor and material bond given by contractor on public works is for enforcement of direct obligation on bond, maintainable without regard to original prime contract, when it was conceded that plaintiffs had furnished the material and performed the labor and services for which they sought compensation in action on bond, any error in admission of parol evidence relative to contract between prime contractor and plaintiff was immaterial, and would not affect result of the action.

3. Principal and Surety 🔑161

In action against principals and surety on labor and material bond, for compensation for material furnished and labor and services performed by subcontractor, wherein there was issue whether there had been material alteration in principal contract which exonerated surety, record was devoid of any evidence that plaintiff or prime contractor had done any work not required by original contract, or authorized by proper change orders in accordance with terms in original contract.

4. Mechanics' Liens 🔑317

Where labor and material bond provided in part that if principal, as contractor, failed to pay for any materials, or labor, surety would pay amount thereof, and that in case suit was brought on bond, reasonable attorney's fee to be fixed by court would be paid, and statute provided that upon trial of action on labor and material bond against surety, reasonable attorney's fees, to be taxed as costs, should be awarded to prevailing party, successful subcontractor in action on bond was entitled to reasonable attorney's fee. Government Code, § 4207.

5. Attorney and Client 🔑140

The trial court has power to determine what are reasonable attorney's fees without taking any testimony on the subject and without making any specific findings.

6. Mechanics' Liens 🔑317

In action by subcontractor against principal and surety on labor and material bond, record established that trial judge had not abused his discretion in fixing attorney's fee to be awarded to subcontractor in the sum of $3,500.

7. Mechanics' Liens 🔑317

Under statute providing, with reference to action on labor and material bond against surety, that court shall award prevailing party a reasonable attorney's fee, to be taxed as costs, and to be included in judgment rendered therein, it is not prerequisite to award of attorney's fees in judgment that there be either a motion to have such fees taxed as costs, or a claim therefor in the cost bill filed. Government Code, § 4207.

8. Mechanics' Liens 🔑317

Where labor and material bond provided in part that in event of action caused by failure of principal to pay for materials or labor, or suit brought on bond, reasonable attorney's fee to be fixed by court would be paid, when a reasonable attorney's fee was fixed by the trial court, the obligation of the bond had been complied with, and appellate court did not have power by virtue of such provision to award additional attorney's fee in connection with appeal.

9. Costs ⚷252

Mechanics' Liens ⚷317

Under statute providing, with reference to actions on labor and material bonds, that court shall award to the prevailing party a reasonable attorney's fee, the fixing of an attorney's fee is limited to services rendered in the trial court, and does not include services rendered on appeal. Government Code, § 4207.

10. Appeal and Error ⚷204(1)

Where certain evidence in action by subcontractor on labor and material bond was received without objection, any right to complain that such evidence was not admissible was waived, and might not be urged as error on appeal.

11. Pleading ⚷238(2)

Where defendants in action by subcontractor on labor and material bond had not noticed motion to amend answer and counterclaim at least ten days before hearing as required by statute, and first knowledge of subcontractor of motion was on day when same was made, that being the morning the case was called for trial, court did not abuse its discretion in denying defendant privilege of amending. Code Civ.Proc. § 1005.

12. Pleading ⚷248(1), 261

A party should not be permitted to so amend his pleadings as to raise a new cause of action or a new defense.

13. Appeal and Error ⚷959(3)

Pleading ⚷236(3)

Granting or denying of amendment to a pleading at time of trial rests in sound discretion of trial judge, which discretion will not be interfered with on appeal in absence of showing of its abuse.

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Everett H. Smith and Oliver C. Hardy, Los Angeles, for appellants.

Howard B. Crittenden, Jr., San Francisco, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs on a labor and material bond given by defendants S. Edmondson & Sons as principals, and defendant New York Casualty Company as surety, defendants appeal.

Facts: Plaintiffs entered into a contract with defendants Edmondson to do certain excavation work on the Los Angeles Municipal Airport in performance of a contract which defendants Edmondson had with the City of Los Angeles. Plaintiffs Lewis & Queen had executed a labor and material bond with defendants S. Edmondson & Sons as principal and the casualty company as surety. The bond provided in part as follows:

> "The condition of the above obligation is such, that whereas said principal has been awarded and is about to enter into a written contract with the City of Los Angeles for constructing the extension of Runway 'D', Taxiway 'J', and to construct Taxiway 'M', and to perform all appurtenant work in connection therewith at the Los Angeles Airport. * * *
>
> "Now, therefore, if said principal as contractor in said contract, or their subcontractor, fails to pay for any materials, provisions, provender or other supplies or teams used in, upon or for or about the performance of the work contracted to be done, or for any work or labor done thereon of any kind said surety will pay the same in an amount not exceeding the sum set forth above, and also in case suit is brought upon this bond, a reasonable attorney's fee to be fixed by the Court * * *".

Plaintiffs performed work upon the airport, of which there was an unpaid balance of $15,886.95. The trial court gave judgment for this balance with interest from its due date, plus costs and $3,500 attorney's fees.

Questions: First: *Did the trial court err in admitting oral testimony contrary to the terms of the written contract between the* *parties, particularly with respect to the terms of payment?*

[1] *No.* An action on a labor and material bond given by a contractor on a public work is a primary and direct obligation on the bond and enforcible without regard to the original prime contract and without reference to any contract between the contractor and the materialmen. (Pneucrete Corp. v. U. S. Fidelity & Guaranty Co., 7 Cal.App.2d 733, 736 [1], 46 P.2d 1000. Cf. Los Angeles Stone Co. v. National Surety Co., 178 Cal. 247, 250, 173 P. 79.)

[2] Therefore since it is conceded that plaintiffs furnished the material and performed the labor and services for which they are seeking compensation, any error of the trial court in admitting parol evidence relative to the contract between the prime contractor and plaintiff was immaterial and would not affect the result of the present litigation.

[3] Second: *Was there a material alteration in the principal contract which exonerated the surety?*

No. The record is devoid of any evidence that plaintiff or the prime contractor did any work not required by the original contract, its plans and specifications, or authorized by proper change orders in accordance with the terms in the original contract.

Third: *Were plaintiffs entitled to recover attorney's fees in this action which they instituted to recover the compensation due them?*

[4] *Yes.* The bond provided in part as follows:

> "* * * if said principal as contractor * * * fails to pay for any materials, provisions * * * or for any work or labor done thereon of any kind said surety will pay the same in an amount not exceeding the sum set forth above ($49,943.75), and also in case suit is brought on this bond, a reasonable attorney's fee to be fixed by the court."

In addition Government Code, section 4207, referring to an action on a labor and material bond against the surety reads in part as follows: "Upon the trial of the action, the court shall award to the prevailing party a reasonable attorney's fee, to be taxed as costs, and to be included in the judgment therein rendered."

[5] It is likewise settled that the trial court has power to determine what are reasonable attorney's fees without any testimony on the subject and without making any specific finding. (Rosslow v. Janssen, 136 Cal.App. 467, 470[1], 29 P.2d 287; Los Angles v. Los Angeles-Inyo Farms Co., 134 Cal.App. 268, 274[4] 25 P.2d 224.)

[6] In the present case the judge had before him the entire record of the proceedings which had taken place and there was no abuse of discretion in fixing the attorney's fee in the sum of $3,500.

Fourth: *Was it error for the trial court to award plaintiffs attorney's fees in the judgment in the absence of either a motion to have such fees taxed as costs, or a claim therefor in the cost bill which they filed?*

[7] *No.* Where, as in the present case, a statute provides that "a reasonable attorney's fee, to be taxed as costs" shall, under certain specified conditions, be awarded to plaintiffs, such language does not expressly or impliedly require that a cost bill be filed pursuant to the provisions of section 1033 of the Code of Civil Procedure, but if the attorney's fees are fixed by the court and included in the judgment, such procedure is adequate. This is a proper method of allowing plaintiffs attorney's fees. (Sunset Lumber Co. v. Smith, 95 Cal.App. 307, 319[19], 272 P. 1068.) In the present case the foregoing procedure was properly followed by the trial court.

Fifth: *Does this court have the power under the facts in this case to award plaintiffs an additional attorney's fee for services rendered in connection with this appeal?*

[8] *No.* The bond upon which suit was instituted provided in part that in case suit be brought on the bond, "*a* reasonable attorney's fee" shall be fixed by the court. "*A* reasonable attorney's fee" was fixed by the trial court. Therefore the obligation in the bond has been complied with and since it did not contain any obligation to pay

another or additional attorney's fee on appeal, this court under the provisions of the bond is without power to award plaintiffs any additional compensation on account of attorney's fees.

[9] The Government Code, section 4207 provides in part: "Upon the trial of the action, the court shall award to the prevailing party a reasonable attorney's fee * * *." In construing a similarly worded provision in section 2 of the Public Works Act (Deering's Gen.Laws, Act 6423), reading: "upon the trial of any such action, the court shall award to the prevailing party a reasonable attorney's fee, to be taxed as costs, and to be included in the judgment therein rendered", the District Court of Appeal in Burr v. Pacific Indemnity Co., 56 Cal.App.2d 352, 362[9], 133 P.2d 24, 28 (hearing denied by the Supreme Court) held that an appellate court was without authority to award an attorney's fee on appeal, and that the language of the statute limited the fixing of an attorney's fee to the services rendered in the trial court.

Mr. Justice Dooling, speaking for the court, said: "An attorney's fee was included in the judgment. Plaintiff asks for an additional attorney's fee on appeal. The language of the section, 'upon the trial,' clearly limits the attorney's fee to the trial, and we find no warrant therein for the allowance of a further fee on appeal. No California case in point has been cited or found by us but the Supreme Court of Oklahoma in National Credit Co. v. Franklin, 177 Okl. 417, 60 P.2d 744, reached a similar conclusion on a statute apparently not so clearly limiting the fee to the trial of the action as ours."

The foregoing rule is here applicable. This court is without power to grant plaintiffs' request for an award of additional attorney's fee for services upon appeal.

West Coast Lumber Co. v. Newkirk, (1889) 80 Cal. 275, 22 P. 231, and Smith v. Solomon, (1890) 84 Cal. 537, 24 P. 286, relied on by plaintiffs as authorities for the proposition that an appellate court may make an award of additional attorney's fees for services rendered on appeal, are not now authority for the reason that such decisions awarded additional attorney's fees on appeal in mechanic's lien actions, predicated upon a statute, section 1195 of the Code of Civil Procedure, which statute so far as the awarding of attorney's fees were concerned, the Supreme Court subsequently held to be unconstitutional. The effect of the two prior decisions so far as the point here under discussion was involved was nullified. (See Builders' Supply Depot v. O'Connor, (1907) 150 Cal. 265, 268 et seq., 88 P. 982, 17 L.R.A.,N.S., 909; Union Lumber Co. v. Simon (1907) 150 Cal. 751, 753, 89 P. 1077, 1081; Merced Lumber Co. v. Bruschi (1907) 152 Cal. 372, 375, 92 P. 844.)

Sixth: *Did the trial court err in receiving parol evidence regarding alleged ambiguities in the written agreement between plaintiffs and defendants?*

[10] *No.* The evidence was received without objection. It is settled that where evidence is received without objection, any right to complain that such evidence was not admissible is waived and may not be urged as error on appeal. (Ries v. Reinard, 47 Cal.App.2d 116, 121[8], 117 P.2d 386. See cases cited in 5 West's Calif.Digest, (1951) Appeal & Error, 🔑204(1), p. 259; 3 Cal.Jur.2d (1952) Appeal & Error, sec. 156, p. 634.)

Seventh: *Did the trial court abuse its discretion in denying defendants the privilege of filing an amendment to their answer and a counterclaim on the day the case was called for trial?*

[11] *No.* On the morning the case was called for trial, defendants moved to file a counterclaim, asking for affirmative relief against plaintiffs in the sum of $5,384.66, upon an alleged claim on an open book account for work, labor, services and rental alleged to have been rendered and delivered by defendants to plaintiffs.

There was a motion filed and served by mail for leave to file this counterclaim on August 3, 1951. Plaintiffs' counsel left his offices in San Francisco on the week-end August 4th and utilized August 6th and 7th preparing for trial on the 8th. His first knowledge of the notice was on the 8th when the motion was made.

[12] A motion must be noticed at least 10 days before the hearing where the attorney served has his office outside the county in which the court is held. (Sec. 1005, Code Civ.Proc.) In the instant case the foregoing rule was not complied with. In addition a party should not be permitted an amendment that raises a new cause of action or a new defense. (Le Cyr v. Dow, 30 Cal.App.2d 457, 462[2], 86 P.2d 900.)

[13] It is likewise settled that the granting or denial of an amendment to a pleading at the time of trial rests in the sound discretion of the trial judge, which discretion will not be interfered with on appeal in the absence of a showing of its abuse. (Willson v. Turner Resilient Floors, 89 Cal. App.2d 589, 601[6] 201 P.2d 406.) In the instant case defendants at the time of trial endeavored to inject new issues into the cause. Therefore there is no showing of an abuse of discretion by the trial court and its ruling is binding on this court.

Affirmed.

MOORE, P. J., concurs.

FOX, J., deeming himself disqualified, does not participate in the foregoing opinion.

Hearing denied; EDMONDS, SCHAUER, and TRAYNOR, JJ., dissenting.

113 Cal.App.2d 783

PEOPLE v. CARR.

Cr. 2352.

District Court of Appeal, Third District, California.

Oct. 22, 1952.

Defendant was convicted in the Superior Court, Stanislaus County, B. C. Hawkins, J., of rape, and he appealed. The District Court of Appeal, Van Dyke, J., held that the evidence sustained the conviction.

Affirmed.

1. Rape ⇨51(1)

Rape conviction was sustained by evidence.

2. Criminal Law ⇨553

Claim that testimony is inherently improbable and unworthy of belief involves claim that something has been done that would ordinarily have been impossible to have been done under circumstances described, or it involves conduct that no sane person would likely be guilty of.

3. Criminal Law ⇨260(11)

When trier of facts has chosen to believe one side as against other, appellate tribunal is bound, and presence of conflict, however sharp, does not, merely because it is a conflict, justify rejection of evidence so believed and a setting aside of judgment as being unsupported by evidence.

4. Criminal Law ⇨942(1)

In view of testimony supporting verdict in rape prosecution, claimed newly discovered evidence bearing on reputation of prosecutrix for truth and chastity and otherwise tending to impeach her testimony merely presented choice, within trial court's discretion, as to whether retrial should be had, and trial judge did not abuse his discretion in denying new trial, where two witnesses had testified at trial as to bad reputation of prosecuting witness.

5. Criminal Law ⇨31, 661, 700

Insofar as defendant in rape case was concerned, there was no obligation for District Attorney (1) to prosecute another party charged with same crimes; (2) to visit defendant in jail upon his request in order to learn his version of matter; or (3) to call any particular witness.

6. Criminal Law ⇨1171(1)

Record showed no such misconduct on part of District Attorney, in questioning defendant as to prior felonies, as would require reversal of rape conviction.

7. Criminal Law ⇨720(7)

Where there was evidence that defendant in rape prosecution had struck prosecutrix, choked her, and burned her arm with his cigarette, and that a companion of defendant had said at time of offense that there was no use trying to stop defendant when he was in such a mood, District Attorney was not guilty of misconduct in referring to defendant as a sex-crazed hoodlum from whose ravishing complaining witness was entitled to be free, no matter how base her character might be.

8. Criminal Law ⚿1162

Reversal of rape conviction could not be predicated upon District Attorney's failure to inform against prosecutrix for perjury until after defendant's conviction, especially in view of fact that perjury, for which she was later informed against, had been admitted by prosecutrix before jury at trial.

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Frank Loria, Modesto, for appellant.

Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

Defendant and appellant was accused by information in Stanislaus County of the crimes of rape and kidnaping. Just before the trial the kidnaping count was dismissed. Upon the charge of rape appellant was convicted, and from the judgment following and from the court's denial of his motion for a new trial he prosecutes this appeal. In support thereof he advances the following contentions: 1. The evidence relied upon by the prosecution is inherently improbable and worthy of no credence; 2. Newly discovered evidence required the granting of a new trial; 3. The district attorney was guilty of such prejudicial misconduct as to warrant a reversal; 4. Defendant by reason of the prevalent public agitation at the time of trial concerning sex offenses was denied a fair trial; and, 5. The compelling of defendant upon cross examination to admit prior felonies, though purportedly done for the purpose of impeachment, under the circumstances so degraded defendant and prejudiced the jury against him as to amount to denial of a fair trial.

At the oral argument counsel for appellant stated that as to contentions 4 and 5 above he realized that the record would not support them as a matter of law, but nevertheless desired this court to consider them as in support of the other three contentions.

The complaining witness and a girl companion went to Modesto from Riverbank with appellant and a friend of his, one Wayne Christian. During the course of the evening the party stopped at two bars where the men drank beer. The couples danced and otherwise amused themselves until closing time and then went to a small house known as the "Gooch Place" over the remonstrance of the two girls who, due to the lateness of the hour, asked that they be taken back to their home. Their requests were not heeded. Upon arriving at the cottage the companion of the complaining witness was dragged from the car by appellant's friend when appellant stated that he wanted to talk to the complaining witness alone. During that talk she refused to go into the house with appellant and he hit her back of the ear. After a short altercation between the two men the girls went into the house, and, before the men followed, endeavored to find a way of escape through the back but could not. The telephone had been disconnected and the windows and screens nailed shut. When the men came into the house appellant asked the complaining witness to go into the bedroom with him and when she refused he pulled her from the couch on which she had been sitting and dragged her through the door even though her companion tried to stop them. The complaining witness struggled, kicked him and tried to scream, but he threw her on the bed, choked her with one hand, undressed her with the other, extinguished on her arm the cigarette he had been smoking, causing a blister or burn, and compelled her to submit to intercourse.

[1, 2] The foregoing statement, in accordance with the rule on appeal, contains testimony more favorable to the prosecution than to the defense. Nevertheless, corroborated as it was as to many points

by the complaining witness' companion and even by appellant's own companion, it was amply sufficient to support the verdict of conviction. It is true that there is much other evidence which is contradictory of the forgoing, including the testimony of appellant who, while admitting intercourse, testified that it was with the consent of the complaining witness.

The evidence we have stated is not inherently improbable in any way. The claim that testimony is inherently improbable and unworthy of belief involves a claim that something has been done that would ordinarily have been impossible to have been done under the circumstances described; or it involves conduct that no sane person would likely be guilty of. People v. Haydon, 18 Cal.App. 543, 555–556, 123 P. 1102, 1114; People v. Loehr, 35 Cal.App.2d 1, 5, 94 P.2d 390; People v. Brown, 100 Cal.App.2d 207, 209, 223 P.2d 60. The evidence here fits neither category.

[3] Appellant relies a great deal upon the following matters: Several people living very close to the small house in which the alleged rape occurred testified that they heard no sound indicating any altercation, and no screaming. The prosecutrix testified that she screamed at various intervals before and during the consummation of the rape. She admitted she had falsified at a preliminary examination in respect to matters occurring after the commission of the assault. (After the close of the trial the prosecutrix was informed against for this perjury by the district attorney.) But these and like matters pointed out by the appellant do no more than raise a conflict. They do not render the testimony upon which the prosecution relied either incredible or inherently improbable. Such conflicts appear often during the trial of cases, and witnesses creating conflicts by their testimony may often so testify as to make it necessary that one or the other be disbelieved. But when the trier of fact has chosen to believe one side as against the other an appellate tribunal is bound. The presence of the conflict, however sharp, does not, merely because it is a conflict, justify a rejection of the evidence so believed, and a setting aside of the judgment as being unsupported by the evidence.

[4] Appellant moved for a new trial and through affidavit purported to show the following: 5 out of 7 witnesses which he had subpoenaed and who had told counsel for appellant that they would testify to the prosecutrix' bad reputation in the community for truth and chastity failed to do so when sworn as witnesses in the cause. Why they so conducted themselves was not explained. Two of the seven did testify to her bad reputation as to truth and chastity. Appellant presented to the court in support of his motion the affidavit of a number of witnesses to the effect that, if given an opportunity, they would testify that the reputation of the prosecutrix for truth and chastity in that community was bad. He presented also an affidavit of one La Verne Walker who had been occupying the house in which the offense was committed and who said she would testify that the appellant's companion had declared to affiant that he and the appellant had during the evening, with the willing cooperation of the two women involved, helped themselves indiscriminately to both. She offered to give further evidence that would tend to contradict the testimony of the prosecutrix as to the cigarette episode. Appellant presented further the affidavit of a 14-year old girl who had been hired as a baby sitter for the infant children of the prosecutrix and her woman companion to the effect that when the four people, after the occurrence of the crime, returned to the home of the two women there were no acts or conduct which would indicate that such a crime had occurred. In view of the testimony which supported the verdict, these matters in support of the motion for new trial presented nothing more to the trial court than a choice, within the discretion of that court, as to whether a retrial should, or should not, be had. There is nothing therein to justify this court on appeal in declaring that the trial court abused its discretion when it denied appellant's motion. The foregoing is said after considering, as requested by appellant, the

matter of prevalent public agitation as to sex offenses, the impeaching questions concerning prior felonies asked of appellant and the alleged misconduct of the district attorney.

[5–7] Appellant charges misconduct of the prosecuting attorney. His companion, Christian, was charged along with appellant and for the same crimes. Just before the trial began, however, both charges were dismissed as to Christian, whereupon appellant was, as he states it, compelled to subpoena Christian as a witness and so lost the opportunity he would have had of impeaching Christian, had he testified against appellant, by placing on the stand La Verne Walker to testify as to what Christian had told her concerning the affair. We see nothing in the conduct of the district attorney which could be classed as misconduct, let alone prejudicial misconduct. He was not obliged to prosecute Christian in so far as the case against appellant was concerned. What the record shows as to the district attorney's impeaching questions concerning prior felonies, which questions he directed to appellant while appellant was on the stand on his own behalf, is that the usual questions were asked in the usual way. Appellant says that the district attorney's manner in asking the questions was obviously calculated to degrade and prejudice the defendant. The record shows the court acted quickly to limit the examination to the bare questions concerning the commission of the felonies and the nature thereof. This record does not show misconduct.

Appellant again attacks the district attorney because he failed, as appellant designates it, to call as a witness the baby sitter. But here again the district attorney was under no obligation to do so.

Appellant returns to the attack, charging misconduct because the district attorney refused to visit him in jail upon his request and in order that he might tell the district attorney his version of the matter. The district attorney was under no legal obligation so to do.

Appellant charges that the district attorney in his argument to the jury excited their sympathy for the complaining witness by referring to tears she shed while on the stand, whereas he referred to the appellant as a sex-crazed hoodlum from whose ravishing the complaining witness was entitled to be free, no matter how base her character might be. The designation was based upon testimony that while the act charged was being perpetrated the companion of the prosecuting witness asked Christian to interfere and he replied that there was no use to try as nothing could stop appellant when in that mood. The designation was also supported by the testimony of the prosecuting witness that appellant had struck her, choked her and burned her arm with his cigarette. No misconduct is shown.

[8] Complaint is likewise made that the district attorney did not inform against the prosecuting witness for perjury until after appellant's conviction on the charge of rape. We are unable to see that the prosecutor, if he believed appellant to be guilty as charged, should begin the prosecution of appellant's victim, for perjury, any sooner than he did. It may be true, as appellant argues, that had the information for perjury preceded the trial it would have made appellant's conviction unlikely, but that does not mean that the district attorney was bound in any way to prejudice his side of the case, if it would thus have been prejudiced. Besides, the fact of perjury, for which she was later informed against, was admitted by the prosecutrix during her cross-examination at the trial. Whatever benefit would have resulted from an information could not materially have exceeded that which appellant gained by the admission of perjury before the jury during the trial.

The record shows, and no contrary claim is made, that the jury was fully and fairly instructed and were by the trial court given the required cautionary instructions.

The judgment and the order appealed from are affirmed.

SCHOTTKY, J. pro tem., and PEEK, J., concur.

113 Cal.App.2d 700

VIERA v. GORDON et al.

Civ. 18997.

District Court of Appeal, Second District,
Division 2, California.
Oct. 17, 1952.

Motorist brought action against owners of horses for injuries sustained by motorist when his automobile collided with horses on highway and motorist lost control of automobile and ran into tree. The Superior Court of Los Angeles County, George A. Dockweiler, J., entered judgment for owners of horses, and motorist appealed. The District Court of Appeal, McComb, J., held that denial of motorist's motion for mistrial was not error.

Affirmed.

1. Trial ⚷133(2)

Where defendants' counsel asked plaintiff on cross-examination whether he had been convicted of a felony, and plaintiff's counsel objected that offense was merely a misdemeanor, and trial court procured file of prosecution, and, after examining file, stated that plaintiff had been charged with a felony, but had only been convicted of a misdemeanor, and instructed jury not to consider question whether plaintiff had been convicted of a felony and not to draw any bad inference therefrom, trial court did not err in denying plaintiff's motion for mistrial.

2. Appeal and Error ⚷930(2)

It would be presumed on appeal, in absence of showing to contrary, that jury followed instruction of trial court not to consider certain matter.

3. Automobiles ⚷246(23)

In action by motorist against owners of horses to recover for injuries sustained by motorist when automobile collided with horses and automobile went out of control and hit a tree, court did not err in instructing jury that driver of any vehicle approaching any livestock is required to exercise proper control of his vehicle and should reduce his speed in order to avoid frightening them, and to safeguard the animals, and that provision of the Vehicle Code dealing with duty of motorist toward livestock on highway, would not apply if horses bolted onto highway. Vehicle Code. § 532.

4. Appeal and Error ⚷1033(5)

Where instruction, if erroneous, was favorable to plaintiff, plaintiff could not on appeal successfully urge that giving of instruction was error.

5. Appeal and Error ⚷216(2)

Where plaintiff failed to offer additional or different instructions, plaintiff could not, on appeal, urge error because of failure of trial court to amplify the law in its instructions to jury.

◆

Rinehart, Merriam, Parker & Berg, Jay D. Rinehart, Pasadena, for appellant.

James V. Brewer, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendants in a trial before a jury in an action to recover damages for injuries resulting from a collision between plaintiff's automobile and horses belonging to defendants, plaintiff appeals.

Facts: On January 13, 1950, plaintiff was driving his automobile in an easterly direction on Foothill Boulevard at about 11:15 p. m. when certain horses of defendants, which had broken out of their enclosure and were on the highway, were hit by plaintiff's automobile, causing plaintiff to lose control of the car with the result it struck an orange tree and plaintiff was injured.

During the course of plaintiff's examination, the following occurred:

> "Q. Mr. Frank R. Viera, you were during the year 1951 in this County convicted of a felony, were you not,—
>
> "Mr. Rinehart: If your Honor, please,—
>
> "Q. By Mr. Brewer: (Continuing) —of Section 273d of the Penal Code, wife beating?
>
> "Mr. Rinehart: We object to that as improper interrogation, and submit that the record will not so disclose. It was a misdemeanor.
>
> "The Court: If it was a misdemeanor, counsel,—
>
> "Mr. Brewer: No, it was a felony.
>
> "Mr. Rinehart: Oh, no, it was misdemeanor.
>
> "The Court: If the net result of the proceedings was that he was charged

with a felony and that was reduced to a misdemeanor, then the question is improper.

"Mr. Rinehart: And we charge counsel with misconduct in presenting the matter in that manner. We think it is highly prejudicial. This man was not convicted of a felony, and we challenge the record.

"The Court: Do you have the record, Mr. Brewer?

"Mr. Brewer: It is a record of this court

"The Court: Well, where is the record?

"Mr. Brewer: It is in the County Clerk's Office."

Shortly after the foregoing colloqy took place plaintiff's counsel moved for a mistrial because of the misconduct of defendants' counsel, whereupon the following occurred:

"The Court: Can't the Court call for the file and rectify the situation?

"Mr. Rinehart: I do not believe it can be rectified. My man feels it was tremendously embarrassing, and we are asking the Court to declare a mistrial. * * *

"The Court: Mr. Clerk, will you get the file? It probably would be in the Criminal Clerk's Office. You are making a motion for mistrial?

"Mr. Rinehart: Yes, sir.

"The Court: Denied. * * *

"The Court: Counsel, it is about ten minutes after three, and it is time for a recess. But before we recess I want to clear up this matter. I have called for the file in the case of People v. Frank Viera, the gentleman here on the stand. There was an information filed by the District Attorney of this County, Mr. Simpson, charging the defendant with violation—that is the defendant in that proceeding, Mr. Viera, the plaintiff in this proceeding,—charging him with violation of Section 273d of the Penal Code, which is, in effect, an assault to inflict corporal injury upon his wife, Effie N. Viera, which is a felony. That is, in other words, hitting his wife. Now, that information was filed, and as a result of that a trial was had, that is, a jury trial, as I understand it, and he was found guilty, but the effect of the sentence was to reduce the charge from a felony to a misdemeanor, the judgment of the Court being that the defendant was committed to two months in the County Jail, and in addition the defendant must pay a fine of $350 or defaulting in said payment defendant shall be punished by incarceration in the County Jail at the rate of one day for each five dollars of said fine not paid. Defendant to be allowed good conduct if earned. Although the charge was a felony the Court by imposing the sentence that it did, namely, sentencing him to two months in the County Jail plus a fine and so forth, in effect reduced the charge to a misdemeanor. In other words, it is the sentence that determines the gravity of the offense. If he had been sentenced to a State Penitentiary or sentenced and put on probation, but found guilty of a felony—say a sentence to the State Penitentiary was proscribed, but he was given probation, that would be a felony also. But in this case that is not true, so he has not been convicted of a felony. He was charged with one, but a charge is one thing, and the net result of what happened was to reduce the charge of a felony to a misdemeanor. So he was not found guilty of a felony. Now, in law one of the ways you can impeach a witness is to ask him if he has been convicted of a felony. A lawyer can ask such a question, but of course he must have some grounds for asking it, and in this case Mr. Brewer, looking at the file, thought that there were grounds. So we cannot ascribe any thought that Mr. Brewer was malicious in asking that question. You are at liberty to ask a person, 'Have you been convicted of a felony?' and if he says 'no' that ends it. But if the defense or the attorney wants to prove up the fact that that was the situation, then, of course, he is at liberty to bring in the file to prove it. But under the circumstances here, although the charge was a felony charge, the sentence imposed by the Court reduced it from a felony to a misdemeanor. And the sentence to the County Jail demonstrates that. Because you do not put felons in the County Jail but in the Penitentiary. In other words, you cannot draw any inferences from the fact that the question was asked of this gentleman. That is to say, you cannot destroy his evidence on that ground, the ground that he has been convicted of a felony, because he has not been convicted of a felony.

"Mr. Rinehart: In other words, as I understand the effect of your Honor's statement, it is to instruct the jury that the question asked shall not be considered by the jury as reflecting in any way on the reputation for honesty and integrity of my client.

"The Court: That is right. In other words, you cannot draw any bad inference from the fact that the question was propounded."

Questions: First: *Did the trial court err in denying plaintiff's motion for a mistrial?*

[1] *No.* In the first place defendants' counsel properly asked plaintiff on cross-examination if he had ever been convicted of a felony (Sec. 2051, Code Civ.Proc.),[1] and under this section it is proper to ask the witness the direct question of whether or not he has been convicted of a felony.

Secondly, it was plaintiff's counsel who stated the situation to the jury in the following language: "It was a compromise proposition, and this man was sentenced to sixty days in the County Jail, which he has served. He refused probation because he did not want to be dangled around under a probationary procedure."

[2] Lastly the trial court adequately instructed the jury to disregard the question concerning the conviction of a felony and it will be presumed, in the absence of a showing to the contrary, that the jury followed this instruction. (Tingley v. Times-Mirror Co., 151 Cal. 1, 23, 89 P. 1097; Fleming v. Flick, 140 Cal.App. 14, 35, 35 P.2d 210.)

Hence plaintiff has failed to show any prejudicial error in the question to which he now objects.

[3] Second: *Did the trial court commit prejudicial error in instructing the jury as set forth below?*

> "You are instructed that the driver of any vehicle approaching any live stock is required to exercise proper control of his vehicle and shall reduce his speed in order to avoid frightening and to safeguard any such animal. *This section of the Vehicle Code would not apply if the horses bolted onto the highway.*"

No. Section 532 of the Vehicle Code reads:

> "The driver of any vehicle approaching any horse-drawn vehicle, any ridden animal or any live stock shall exercise proper control of his vehicle and shall reduce speed or stop as may appear necessary or as may be requested by any person driving or riding any animal or by any person in charge of any such live stock in order to avoid frightening and to safeguard any such animal or live stock and to insure the safety of any person driving or riding such animal or in charge of such live stock."

[4] Plaintiff complains of the last sentence in the foregoing instruction. However, such sentence, if erroneous, was favorable to plaintiff and was not prejudicial, therefore he may not urge error in the giving of it on appeal.

[5] Since plaintiff failed to offer additional or different instructions he may not

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[1] Section 2051 of the Code of Civil Procedure reads:

"A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation".

now urge error of the court in not further amplifying the law in its instructions to the jury. (Alexander v. McDonald, 86 Cal.App. 2d 670, 671, 195 P.2d 24.)

Affirmed.

MOORE, P. J., and FOX, J., concur.

113 Cal.App.2d 808

MEYER v. PORATH et al.

Civ. 8165.

Sac. 6260.

District Court of Appeal, Third District, California.

Oct. 23, 1952.

Hearing Denied Dec. 18, 1952.

Suit to have existence of easement in actual existing roadway determined. The trial court entered judgment declaring that the easement existed, but in describing the roadway, a mistake was made in the judgment. The Superior Court, Mariposa County, Andrew R. Schottky, J., entered a nunc pro tunc order correcting such description, and the owners of the servient estate appealed. The District Court of Appeal, Van Dyke, J., held that the error was clerical, rather than judicial, and therefore was properly corrected by the nunc pro tunc order.

Affirmed.

1. Judgment 🔑304, 306, 326

Where court in judgment declaring easement to exist in actual existing roadway erroneously described such roadway, the error was "clerical", not "judicial", and was properly corrected by nunc pro tunc order. Code Civ.Proc. § 1 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Clerical Error" and "Judicial Error".

2. Judgment 🔑326

Orders may be made correcting judgments nunc pro tunc as of their original date without notice and on the court's own motion so as to make them conform to the judicial decisions actually made regardless of the lapse of time between the original order and the nunc pro tunc order.

3. Appeal and Error 🔑1024(4)

A finding, express or implied, that a clerical error exists in a judgment sought to be amended by nunc pro tunc order is, if supported by substantial evidence, a conclusive finding which binds an appellate court.

James A. Starritt, Mariposa, for appellants.

L. A. MacNicol, Merced, for respondent.

VAN DYKE, Justice.

This appeal is taken from an order made by the trial court amending nunc pro tunc its antecedent findings of fact, conclusions of law and judgment. On January 31, 1949 plaintiff and respondent brought action against defendants and appellants to have it decreed that plaintiff was the owner of a right of way for road purposes over the lands of appellants. The right of way was described as being "a roadway which is now marked out across" appellants' land, approximately 12 feet in width, and commencing on the westerly line of the servient tenement at a point "approximately" 850 feet north of an intersection of the southerly boundary of the servient tenement with the Merced Falls-Coulterville highway and continuing in a general southeasterly direction across the servient tenement to a point on the easterly boundary thereof, located "approximately" 450 feet north of a given point. Concerning this way it was alleged that for more than 40 years plaintiff and her predecessor in interest had made actual, open, notorious and adverse use of the way. The answer of appellants generally denied the allegations as to the existence of the right of way. It is apparent that from the beginning the issue was primarily whether or not the right existed and not as to the location on the ground of the way claimed. The cause was tried on May 6, 1949 and on August 19th following the court entered findings of fact, conclusions of law and judgment. By the findings the court found the existence of the right of way and its ownership by respondent. But the court did not use the description appearing in the complaint which, as noted, contained approximations. In that respect the court found that the right of way should be described as commencing at a point 2,776 feet distant from the quarter corner on the north line of a given section on a course with a given bearing and running thence from that point of commencement along a line with certain courses and distances to a point on the east line of the northeast quarter of the southwest quarter of the section. The same description of the right of way was carried into the judgment. No appeal was taken from the judgment. On May 22, 1951, approximately one year and nine months after the entry of judgment, the respondent, in whose favor the judgment had been entered, moved the court to amend its findings of fact, conclusions of law and judgment nunc pro tunc as of the date of entry upon the ground that a clerical error had occurred in the court's description of the declared easement. Movant asked that a correct description be substituted in lieu of the incorrect description appearing in the record. This motion was supported by an affidavit given by the son of respondent which was to the following effect: That after the trial of the action and before findings, conclusions and judgment were prepared or entered a licensed surveyor had been employed to make a survey and to prepare a legal description of the easement referred to in the complaint; that the surveyor prepared a description which was used by the court in its findings and judgment; that it had been discovered after the rendition of the judgment that the surveyor had made an error in certain mathematical computations which resulted in the fixing of a starting point some 500 feet distant from the true starting point. An affidavit was made by the surveyor to the same effect and this affidavit described the true starting point and the true course of the easement. At the hearing of the motion to amend the trial court declared that the court would make the requested amendments upon its own motion, and nunc pro tunc. Thereupon the corrected findings and judgment were entered, correctly describing the respondent's easement. Summarizing the foregoing it appears that: The description in the complaint referred to an actual existing roadway marked out across the servient tenement. This roadway was found to constitute an easement as alleged in the complaint. However, in describing the center line of this marked out and visible roadway a mistake was made which was carried into the findings and judgment.

[1] Appellants concede that courts may on their own motion or upon motion directed to the subject matter amend their orders and judgments so as to correct clerical mistakes that may have been made in memorializing such orders and judgments. But they contend, first, that judicial errors are not so correctable, except by motion for new trial or by appeal or by motion under pertinent sections of the Code of Civil Procedure; and that the errors here sought to be corrected were judicial and not clerical. We think it apparent here that the error herein corrected was clerical and not judicial. It is quite clear that the easement which the court intended to declare and to describe was the visible roadway marked out across the servient tenement as alleged in the complaint and that throughout the proceedings there could have been no doubt in the mind of anyone involved in the litigation that it was this marked out and visible roadway which the plaintiff was contending constituted an easement and which the defendants were contending did not constitute such easement. When, therefore, after the trial and before the findings and judgment were entered a description was furnished to the court by the prevailing party, which, through a mistake of the surveyor, did not describe the existing marked out and visible roadway, but purported to describe such a roadway lying along a different course, the mistake of the court in adopting the description so furnished was a clerical error and subject to correction by the court upon its own motion and with or without notice whenever the court became aware that the findings and judgment as entered were not in truth and in fact the findings and judgment which the court had intended to make.

[2, 3] It is well settled that orders may be made correcting judgments nunc pro

tunc as of their original date without notice and on the court's own motion so as to make them conform to the judicial decisions actually made and this regardless of the lapse of time. Lamar v. Superior Court, 87 Cal.App.2d 126, 196 P.2d 98; Benway v. Benway, 69 Cal.App.2d 574, 159 P.2d 682; Estate of Goldberg, 10 Cal.2d 709, 76 P.2d 508. It is also settled that when the occasion arises courts not only have the power to amend such orders and judgments, but are under the definite and manifest legal duty so to do. LaMar v. Superior Court, supra. This power exists independently of statute. Bastajian v. Brown, 19 Cal.2d 209, 120 P.2d 9. A finding, express or implied (in this case express) that a clerical error exists in the judgment in question is, if supported by substantial evidence, a conclusive finding which binds an appellate court on review. Bastajian v. Brown, supra. Here the trial court by its order correcting the findings and judgment declared that the failure of the findings and judgment to contain a proper description of the easement arose because of mistake and inadvertence due to a mathematical error in the survey. From what has been heretofore said there was ample evidence to support this declaration. Upon this point it was said in Kohlstedt v. Hauseur, 24 Cal.App.2d 60, 62, 63, 74 P.2d 314, 315, that:

> "It is for the judge who made the original decision to decide whether the judgment as written expresses his decision. * * * In acting upon the matter the judge is exercising one of the functions of his judicial office, and he will not direct the amendment unless he is satisfied that the original entry does not clearly express the order which was made. * * * 'It was for the trial judge to determine whether the order was complete and all that he intended it to be or whether it was deficient. If the mistake was clerical, it could be corrected. If it was judicial, it could not be. It must be presumed that he found it to be his own clerical error; otherwise he would have had no right to make the second order. The facts were completely and solely within his own knowledge. He alone knew whether a mistake had been made and how it had been made. He had a right to rely upon his own memory * * * and his determination of the fact is conclusive.' "

We are satisfied upon the whole record that the mistake here involved was clerical in nature and that the trial court acted properly and within its jurisdiction in correcting its judgment.

The order appealed from is affirmed.

PEEK, J., and BEDEAU, J. pro tem., concur.

113 Cal.App.2d 673

REVELS v. SOUTHERN CALIFORNIA EDISON CO. et al.

Civ. 18954.

District Court of Appeal, Second District, Division 3, California.

Oct. 16, 1952.

Action by widow against general contractors for alleged wrongful death of her husband, an employee of a subcontractor. The Superior Court, Los Angeles County, Henry M. Willis, J., entered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that evidence of defendants' negligence was sufficient for jury.

Reversed.

1. Appeal and Error 🔑927(3)

On appeal from judgment of nonsuit, evidence and inferences that may be reasonably drawn therefrom are considered in light most favorable to appellant.

2. Negligence 🔑55

An employee of a subcontractor doing work contracted to be done by the latter is an "invitee" of the general contractor, and the duty owed by the general contractor to such employee is the duty owed by one to invited persons.

See publication Words and Phrases, for other judicial constructions and definitions of "Invitee".

3. Negligence ⚷32(2.3), 52

The duty owed to any invitee is to exercise ordinary care to keep premises in reasonably safe condition, or to warn of danger, and duty extends to conditions which might have been found dangerous by exercise of reasonable care.

4. Negligence ⚷52

If there are hidden dangers on the premises of which invitor has knowledge, or which are discoverable by him in exercise of ordinary care, he must use ordinary care to give warning thereof to invitee.

5. Negligence ⚷55

Generally, a general contractor, who is in control of premises, is burdened with duty to use ordinary care to provide safe place for employees of subcontractor to work, including duty to warn such employees of danger, either known to general contractor or discoverable by exercise of ordinary care.

6. Negligence ⚷55, 136(16)

A general contractor is under no duty to warn employee of subcontractor of obvious danger, but the question whether the danger was obvious is one for the jury.

7. Negligence ⚷55

If general contractors had reasonable grounds to apprehend that employee of subcontractor might come in contact with electricity in pursuit of his work, reasonable care required that he be warned, or the wires guarded.

8. Negligence ⚷136(9)

When different inferences as to negligence may reasonably be drawn from evidence, it is duty of the court on motion for nonsuit to submit question to jury.

9. Electricity ⚷19(6)

In action against general contractors for wrongful death of subcontractor's employee electrocuted when steel rod, with which such employee was reinforcing contractors' construction work, contacted high voltage wire which hung over roof upon which employee was working, questions whether contractors provided employee with reasonably safe place to work, and whether they were negligent in failing to warn of danger, were for jury.

10. Death ⚷58(1)

In action against general contractors for wrongful death of subcontractor's employee, electrocuted when steel rod, with which such employee was reinforcing contractors' construction work, contacted high voltage wire which hung over roof upon which employee was working, the law presumed that employee was exercising ordinary care for his own concern, where there was no uncontradicted testimony on part of plaintiff which was wholly irreconcilable with presumption.

11. Appeal and Error ⚷837(10), 927(2)

Evidence taken when court and jury, at request of defendants in wrongful death action, viewed the scene of accident, was not a part of plaintiff's case, and could not be considered in reviewing correctness of judgment of nonsuit, nor could it be assumed that trial court considered such evidence in ruling on motion.

12. Trial ⚷45(3)

In action against general contractor for wrongful death of employee of subcontractor, offer of proof that the custom in construction industry, when work is to be done in close proximity to high-voltage wires, is to guard, deenergize, or move the wires, and that said work is customarily done at the expense of contractor or person responsible for work, was insufficient in that it did not tend to prove that such work is done at expense of general contractor in case where work is to be done by subcontractor.

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Kelley & Kelley and Frank W. Woodhead and Howard C. Velpmen, Los Angeles, for appellant.

Hunter & Liljestom and Wendell Mackay, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of nonsuit in an action for damages for the alleged wrongful death of her husband. The cause was tried on the issues made by the complaint and the answer of defendants R. V. Mead, E. S. O'Donnell, and Mead & O'Donnell, a partnership, referred to as defendants.

[1] The evidence and the inferences that may be reasonably drawn therefrom are stated in the light most favorable to plaintiff.

On June 24, 1948, defendants had a contract with the city of Beverly Hills, in which they had agreed to construct a building. The contract provided that "said Contractor agrees at its own expense to furnish all materials, labor, tools and equipment necessary to construct, install and complete" the building, and "The Contractor will have a representative on the job at all times"; and "The said Contractor agrees to assume and accept all responsibility for any personal, property or other damage that may occur to any person or persons, or to the general public on account of the work to be done hereunder by said Contractor or on its behalf while transporting any of the materials or equipment to or from the location of said proposed work, or in handling the same, or in doing said work until such time as said work has been accepted by said City * * *."

Defendants, in turn, had entered into a contract with Russell H. Roemisch by which he agreed to install the reinforcing steel in the building. The deceased Chase and one Turner were employed by Roemisch as structural steel workers. June 24, 1948, was the first day Chase and Turner worked on the job. They arrived about 7:45 a. m. When they arrived they talked to Moose, job superintendent for defendants. They asked Moose what he wanted done. Moose told them "where the reinforcing was and what was to be done, the location of the work that we were supposed to put in"; that the location was "up on the roof, on the corner * * * on the west end of the building." Moose at that time gave them a placing sheet which described where the reinforcing steel rods were to go, how many of them and the lengths to be used at a particular location. The two men did not talk to anyone other than Moose about the work to be done. The steel rods were to be placed in a cornice on the top of the wall of the building. The cornice was a concrete part of the wall between the top layer of brick and the roof. Some of the rods were 30 feet long, others 15 feet, others 4 feet. The rods were threaded into stirrups in the locations shown on the placing sheet. Stirrups are metal rods bent into a square shape with a hook on the top extending away from the wall. Chase had to insert the rods into the tops of the stirrups. To do so, he had to lift them to an angle of at least 45 degrees and start them from the top. There was a piece of wood along the peak of the roof which obstructed the insertion of some of the reinforcing rods, so they had to be put in over the wooden beam at the peak.

There was a high voltage line which overhung roof of the building. The line was suspended on crossarms, carried 66,000 volts of electricity, and was uninsulated. The lowest wire was 13 feet, 9 inches above the place where Chase was working at the time of the accident. Chase was 5 feet, 11 inches tall. He was close to the peak of the roof, handling a steel rod 15 feet in length which had to be tipped up at a sharp angle in order to insert it into the stirrup. Suddenly there was a dull roar; Turner looked up to see a flame covering Chase's body. The top of the rod which Chase was handling had contacted the high voltage wire which hung over the roof directly over the two men. The rod had grounded at the bottom end on a piece of steel which was sticking up through the roof. Chase died the next day.

Defendant Mead testified he knew prior to June 24, 1948, of the presence of the high voltage wires; he knew there was a clearance of about 12 feet between the top of the building and the nearest wire; he, his partner, and an employee had had numerous conversations with representatives of Southern California Edison Company, owner of the power line, prior to June 24, 1948, relative to moving the poles and the wires; the first conversation was about February, 1948. He testified that one reason for wanting the poles and wires moved was: "In our opinion they were too close to the building." Mead was on the job the morning of the accident. He testified he did not warn Chase or Turner of the existence of the high voltage wires, and did not advise Moose to warn Chase or Turner of the danger.

No one warned either Chase or Turner before the accident of the existence of the wire overhanging the roof or of the fact that it was uninsulated. There were no warning signs on the roof. Turner testified he did not "see any other signs around to indicate that these were high-voltage wires"; Moose did not tell him there were any such wires above him, or that the wires were uninsulated; "nobody mentioned any wires"; he did not know they were high voltage wires; Chase did not mention anything to him about the wires. He further testified there were no barriers erected on the roof to prevent contact of the steel rods with the wires, and there were no rubber or insulated sleeves over the wires.

About a month after the accident, one of the poles holding the wires was moved, and the wires raised 5 feet.

The complaint alleged that defendants, with full knowledge of the fact that the wires were uninsulated and carried electrical voltage of over 750 volts, negligently directed and permitted Chase to perform work and carry materials within 6 feet of said wires without taking the proper precautions to prevent injury to him, and without warning him of the fact that the wires were uninsulated and carried high voltage.

The nonsuit was granted on the ground there was no proof of negligence. There is no question of contributory negligence or assumption of risk involved.

Plaintiff urges that defendants, as general contractors, were under a duty to provide Chase, an employee of a subcontractor, with a reasonably safe place to work; that the evidence was sufficient to warrant the jury in concluding that they negligently failed to do so, and that, therefore, the nonsuit should not have been granted. Defendants contend the contrary.

We use the term "general contractor" to indicate one who contracts directly with the owner to do the work; and the term "subcontractor" to indicate one who contracts with the general contractor to do part of the work.

[2-4] An employee of a subcontractor doing work contracted to be done by the latter is an invitee of the general contractor, and the duty owed by the general contractor to such employee is the duty owed by one to invited persons. Fountain v. Willard-Slater Co., 172 Cal. 129, 131, 155 P. 630; Lucas v. Walker, 22 Cal.App. 296, 299-300, 134 P. 374, 379. The duty is to exercise ordinary care to keep the premises in a reasonably safe condition, or to warn of danger. The duty is not limited to conditions actually known to be dangerous, but extends also to conditions which might have been found dangerous by the exercise of reasonable care. Raber v. Tumin, 36 Cal.2d 654, 658, 226 P.2d 574. If there are hidden dangers on the premises of which the invitor has knowledge, or which are discoverable by him in the exercise of ordinary care, he must use ordinary care to give warning thereof. Dobbie v. Pacific Gas & Electric Co., 95 Cal.App. 781, 788-790, 273 P. 630.

[5] The general rule is that a general contractor on a construction job who is in control of the premises is burdened with the duty to use ordinary care to provide a safe place for employees of a subcontractor to work, including the duty to warn such employees of a danger, either known to the general contractor, or discoverable by the exercise of ordinary care, or otherwise to protect the employees from injury, and to avoid exposing them to injury on account of dangerous conditions. He is bound to take reasonable measures to protect the employees of a subcontractor from injuries likely to arise from places of danger about the building. If he neglects this duty by

failing to give adequate notice or warning of the existence of a place of danger, he may be found liable to an employee of a subcontractor for resulting injury. Dingman v. A. F. Mattock Company, 15 Cal.2d 622, 624, 104 P.2d 26; Brockman v. Aldous, 11 Cal.App.2d 650, 54 P.2d 43; Caspersen v. La Sala Bros., 253 N.Y. 491, 171 N.E. 754; Annotation 20 A.L.R.2d 868, and cases there cited.

[6, 7] As a part of supervising the work, it is the duty of the general contractor to oversee conditions in the work of each subcontractor so far as they affect the safety of the employees of the subcontractor. Although the oversight of the work of an employee of a subcontractor is properly the function of the subcontractor who employs him, if the general contractor's superintendent directs such employee in a particular matter, the superintendent may be found to have assumed control of the work of the subcontractor to that extent, and the general contractor may be held responsible for his resulting injury,—as where the superintendent of the contractor directs a carpenter to go on planks not properly supported by the superintendent's employer, Broderick v. Cauldwell-Wingate Co., 301 N.Y. 182, 93 N.E.2d 629, or sends an employee into a dangerous place and fails to warn him when danger develops, Herndon v. Halliburton Oil Well Cementing Co., Tex.Civ.App., 154 S.W.2d 163, or tells a stevedore to load a derrick sling with bags of sugar from the side of the pile rather than from the top as he had been doing. McGrath v. Pennsylvania Sugar Co., 282 Pa. 265, 127 Atl. 780, 782. While a general contractor is not under a duty to warn an employee of a subcontractor of obvious danger, the question whether the danger was obvious is a question for the jury. Dingman v. A. F. Mattock Company, 15 Cal.2d 622, 625, 104 P.2d 26; 19 Cal.Jur. 585, § 27. If defendants had reasonable grounds to apprehend that Chase might come in contact with the electricity in pursuit of his work, reasonable care required that he be warned, or the wires guarded. Young v. Bates Valve Bag Corp., 52 Cal.App.2d 86, 94, 125 P.2d 840.

We hold it was the duty of defendants, as general contractor, to exercise ordinary care to provide Chase, the employee of the subcontractor, with a reasonably safe place to work. Cf. Kiernan v. Herbert M. Baruch Corp., 20 Cal.App.2d 289, 66 P.2d 748.

Cases cited by defendants are factually dissimilar, and need not be reviewed in detail. Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 289, 91 P.2d 231 (relation of contractor and subcontractor not present); Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 195 P.2d 501 (warning would not have advised the plaintiff of anything she did not already know, and see Finnegan v. Royal Realty Co., 35 Cal.2d 409, 218 P.2d 17, in which on substantially the same evidence, a judgment for the plaintiff was upheld); Sweatman v. Los Angeles Gas & Elec. Corp., 101 Cal.App. 318, 281 P. 677 (action was against the power company, not the contractor); Bernard v. Vorlander, 87 Cal.App.2d 436, 197 P.2d 42 (the only question discussed was the liability of the power company—the liability of the contractor was not involved).

[8, 9] When different inferences as to negligence may reasonably be drawn from the evidence, it is the duty of the court on a motion for nonsuit to submit the question to the jury. Applying this rule to the evidence here, it is apparent that the questions whether defendants provided Chase with a reasonably safe place to work, and whether they were negligent, were for the jury. The jury might reasonably have concluded that: defendants were in control of the premises, and had complete supervision of all of the work; a dangerous condition existed on the roof of the building; defendants had knowledge of the dangerous condition; they knew the wires were "too close to the building"; it was necessary for Chase to perform his work on the roof in close proximity to the high voltage wires; defendants knew this fact; they knew the lowest wire was about 12 feet above the peak of the roof; as the building contractors, they knew, or in the exercise of ordinary care should have known, that Chase, a man 5 feet, 11 inches tall, in installing

the steel rods might be required to stand near the peak of the roof and tip the steel rods, 15 and 30 feet in length, to an angle of 45 degrees; defendants did not warn Chase of the presence of the wires, or that they were uninsulated, or that they carried high voltage; defendants failed to exercise ordinary care in not warning Chase of the danger, or in not erecting a barrier between the uninsulated wires carrying 66,000 volts and the roof of the building to prevent contact with the wires. The jury also might very reasonably have concluded that contact of the steel rod with the high voltage wire was the proximate consequence of defendant's failure to warn Chase of the fact that the wires carried high voltage and were uninsulated.

[10] It cannot be said, as a matter of law, that the danger was obvious. Turner had worked with Chase on the premises and on the roof about three and three-quarters hours that morning. He did not know that the wires carried high voltage, or that they were uninsulated. Chase did not mention the wires to Turner. The jury might reasonably have concluded that Chase did not know anything more about the wires than did Turner. Further, the law presumes that Chase was exercising ordinary care for his own concern, since there is no uncontradicted testimony on the part of plaintiff which is wholly irreconcilable with the presumption. Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313.

[11] After plaintiff rested, and before defendants made their motion for a judgment of nonsuit, the court and the jury, at the request of defendants, viewed the scene of the accident. The court stated that the view would not constitute a waiver of defendants' right to make the motion. Defendants, in support of the judgment of nonsuit, refer us to evidence taken at the view. Such evidence was not a part of plaintiff's case, and cannot be considered in reviewing the correctness of the judgment of nonsuit. Neither can we assume that the learned trial judge considered such evidence in ruling on the motion, as plaintiff intimates.

[12] Plaintiff asserts that the court erred in refusing to admit evidence of custom and safe practice. A qualified expert was asked by plaintiff's counsel: "Q. Now, Mr. Short, do you have any knowledge concerning any custom as to reasonably good, safe practice in the construction industry when work is to be done in close proximity to high-voltage lines?" He answered that he did. He was then asked: "What is that custom?" Defendants' objection was sustained. Plaintiff then made the following offer of proof: "I offer to prove that this witness, Frank A. Short, would testify in answer to my questions that the custom and good, safe practice in the construction industry, when work is to be done in close proximity to high-voltage wires, is for the person who is responsible for the work to do one of the following things: (1), Guard the wires by a mechanical barrier, to prevent physical contact; (2), Deenergize or ground the wires where necessary; (3), Move the poles or the wires. That said work is customarily done at the expense of the contractor or person responsible for the work." Defendants' objection to the offer was sustained. The offer was insufficient. It was that the work to be done pursuant to the custom was customarily done at the expense of the contractor, or person responsible for the work. It was not that it is done at the expense of the general contractor in a case where the work is to be done by a subcontractor. We do not decide whether evidence of custom is admissible where the work to be done pursuant to the custom is customarily done at the expense of the general contractor.

Other assigned errors are not likely to occur on a retrial, and need not be discussed.

We hold it was error to grant the motion for judgment of nonsuit.

Reversed.

SHINN, P. J., and WOOD, J., concur.

113 Cal.App.2d 768

VIERRA v. SHAFFER et al.

Civ. 8142.

Sac. 6254.

District Court of Appeal, Third District, California.

Oct. 22, 1952.

Action for declaratory relief determining rights and liabilities under a lease. The Superior Court, Merced County, Gregory F. Maushart, J., rendered judgment for defendant-lessor, and plaintiff-lessee appealed. The District Court of Appeal, Van Dyke, J., held that lessee of dairy ranch, whose daily rental was the delivery to a creamery of a determinable quantity of the statutory Grade A milk, and the payment money only if he could not make delivery, met terms of lease, after amendment of statute to designate Grade A milk as market milk with three price gradations, by delivery of milk which met previous Grade A requirements, notwithstanding that creamery might not pay lessors for top grade market milk, and could not be required to pay money so long as he continued deliveries.

Judgment reversed.

Landlord and Tenant ⚿200(1)

Lessee of dairy ranch, whose daily rental was the delivery to a creamery of a determinable quantity of the statutory Grade A milk, and the payment of money only if he could not make delivery, met terms of lease, after amendment of statute to designate Grade A milk as market milk with three price gradations, by delivery of milk which met previous Grade A requirements, notwithstanding that creamery might not pay lessors for top grade market milk, and could not be required to pay money so long as he continued deliveries.

Rodin & Nelson, Turlock, George G. Murry, Gustine, for appellant.

Landram & Silveira, Merced, for respondents.

VAN DYKE, Justice.

This is an appeal from a judgment rendered in an action brought for declaratory relief wherein the parties to a lease sought a decree of the court determining their rights and liabilities thereunder in respect of certain matters that were in dispute between them. The lease in question was for a term of five years and the subject matter was a dairy ranch belonging to respondents, lessors. The lessee was in possession of the ranch under an existing lease when the subject lease was made. A dairy was being run by him producing what was then known as Grade B milk. The parties contemplated improvements to be made by the lessors in the dairy plant and equipment so that Grade A milk could be produced. Coincident with the execution of the lease such improvements were made and during the term of the lease Grade A milk was produced. As to the rental the lease contained these provisions:

> "As and for the rental of the said premises during the said term, Lessee shall and hereby agrees to deliver, each and every day during and throughout the term hereof, to such creamery or creameries as may be selected by Lessee, in the name of Lessors, and with directions to said creamery or creameries to pay the proceeds thereof directly to Lessors, 25 pounds of Grade A butter fat. Lessee agrees to assign, and this agreement shall constitute an assignment *pro tanto* to Lessors of the dairy products produced upon the premises and the proceeds thereof to the extent of 25 pounds of Grade A butter fat per day. Should Lessee be unable to or fail to produce upon the premises 25 pounds of Grade A butter fat daily, than Lessee shall pay to Lessors an amount equal to the difference between the current market price of 25 pounds of Grade A butter fat, and the quantity thereof actually produced and delivered in the name of Lessors, it being the intent and purpose of this agreement and the understanding of the parties that Lessors shall receive as rental for the premises a daily rental equal to the current market price of 25 pounds of Grade A butter fat delivered to the creamery or creameries selected by Lessee."

The parties are in agreement that in one respect the lease as written did not properly reflect the intent of the parties. It stated that the lessees should deliver to the creamery each day in the name of the lessors "25 pounds of Grade A butter fat" and throughout the above-quoted portion of the lease it is to be noted that the reference is constantly to "25 pounds of Grade A butter fat." It is conceded by all that the reference should have been to the delivery of an amount of Grade A milk that contained 25 pounds of butter fat. At all times after the lease went into effect the lessee has delivered to the accepted creamery the required amount of milk containing the necessary amount of butter fat. The issue between the parties as to their rights and obligations under the lease did not arise until when, during the term of the lease, the Agricultural Code was changed so that the existing designations of Grade A and Grade B milk were abandoned and the term "market milk" adopted in lieu of the term "Grade A milk". What had been Grade B milk was designated as "Industrial milk". Regulations concerning pricing of market milk set up three classifications within the general designation of market milk and they were called "Class 1", "Class 2" and "Class 3". Theoretically, at least, there were gradations of price among these classes. When these statutory and regulatory provisions took effect the parties to the subject lease for some time went along as they had been doing, the price paid by the creamery to the lessors for the "market milk" delivered to the creamery for them by the lessee being arrived at by the creamery by a method which amounted to an average of the theoretical price for each of the three classifications mentioned. The same price was paid to the lessee for the milk he delivered over and above the deliveries necessary to fulfill his obligations to the lessors. But before this action was begun the lessors made a demand upon him which embraced a claim that there was on his part a duty to pay or cause to be paid to them for their 25 pounds of butter fat per day the so-called "Class 1 price". Thereupon appellant brought this action herein. The trial court found that the lessors should receive as rental for the dairy "daily a sum of money representing the top or highest price paid by any creamery to which milk from said leased premises should be delivered for a quantity of milk that would produce, or contain, 25 pounds of butterfat per day, said milk to be produced under conditions necessary to produce milk known as Grade A milk as of the time of the execution of said agreement and said milk to be delivered to said creamery by lessee in the name of lessors with instructions to pay said moneys directly to said lessors." The trial court further found, "That the value of 25 pounds of butter fat per day from September 16, 1949 [the date when the changed designations as to what had been Grade A and Grade B milk went into effect] to December 1, 1950 at the Grade 1 price paid by Avoset [the accepted creamery] during said period is the sum of $11,317.91; that during said period said Avoset Company paid to defendants for account of plaintiff the sum of $9,710.80 leaving a balance of $1,607.11 unpaid from plaintiff to defendant on account of rent payable from September 15, 1949 to December 1, 1950." The court rendered judgment in favor of the lessors, construing the lease as stated in the above-quoted findings and giving them a money judgment against the lessee in the indicated amount. From this judgment this appeal has been taken.

We think the judgment in both its aspects is without support in the evidence. Granting that in the specific reference to a delivery of butter fat per day the lease did not truly reflect the intent of the parties and the trial court upon that minor point concerning which there had been no dispute did declare the true intent of the parties, nevertheless when the court made the findings quoted above, which construed the lease as requiring a money payment of rental by the lessee, it violated the plain and unambiguous provisions of the lease so that the rental provisions became something entirely different from those stated in the instrument executed by the parties. We have heretofore quoted these rental provisions and will not repeat them here. Suffice it to say that the obligation of the lessee in respect of rental payment was clearly stated to be and must continue to be an obligation, not to pay money nor to be responsible for a price, but to deliver to the lessors, by delivery to the selected creamery, of a quantity of milk which contained 25 pounds of butter fat. When that delivery had been made the daily obligation of the tenant to pay rent was completely discharged. The only circumstances under which he could become liable for any money payments whatever were clearly stated in the lease to be dependent upon his failure to deliver a sufficient quantity of milk containing a sufficient poundage of butter fat. In that event, and in that event only, was he to pay any money to the lessors. That event, according to the undisputed testimony, never happened. We think the foregoing is made manifest by simply reading the pertinent provisions of the lease. The obligation to deliver is clearly stated and what is to be delivered is equally clear. Equally clear was the intent that this delivery should acquit the lessee of any further rental obligation. All of the terms concerning rental support this conclusion. They are, first, the specific requirement that the delivery of milk be made "as and for rental"; further, the lessee by the lease assigned *pro tanto* to the lessors a sufficient amount of the daily production to fulfill the rental requirements. When the delivery had been made in the name of the lessors, the receiving creamery was to be directed to pay the lessors directly for the same. In addition, and up until the changes in the law and regulations, the parties interpreted the lease by their acts and conduct in accordance with the foregoing. No difference of opinion arose as to the meaning of the lease or as to the extent and nature of the obligations of the tenant thereunder until the statutory and regulatory changes took place. These changes could not change the meaning of the lease as written.

Although the trial court took evidence as to the circumstances attending the execution of the lease and the negotiations leading thereto, including testimony of the conversations between the parties, yet nothing so appearing either tended to or could vary or change the clear provisions of this lease. The following quotation from 12 American Jurisprudence, page 749, is pertinent:

> "Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties—that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed."

Under the terms of this lease no occasion has yet arisen when the lessors could make any money demand whatever against the lessee nor according to all of the evidence has any situation arisen when they could have claimed that the tenant had in any way failed to perform his obligations. When he had made the required deliveries in the required manner he was acquitted of his rental obligation. If the lessors contended either before or after the changes in the law and regulations that they were not receiving from the creamery a proper payment for their butter fat their quarrel was with the creamery and not with their tenant.

The judgment appealed from is reversed.

SCHOTTKY, J. pro tem., and PEEK, J., concur.

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